

Report of Public Comments

Title:	Whois Requirements and National Law Conflicts	
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Prepared By:	ICANN staff	
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Section I: General Overview and Next Steps		
<p>As part of the ICANN Procedure for Handling Whois Conflicts with Privacy Law, this paper kicked off a review as provided in the Whois and National Law Conflicts Procedure (“Procedure”). The paper outlined the Procedure’s steps and invited public comments on a series of questions.</p> <p>The body of public comment has been analyzed by ICANN staff, and the proposed next step is the formation of an Implementation Advisory Group (IAG) to consider changes to how the Procedure is enacted and used. ICANN staff found common themes among some of the suggestions in the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy.</p> <p>A call for volunteers is expected to be initiated at the ICANN 51 meeting in Los Angeles in October 2014. The IAG’s recommendation will then be shared with the GNSO Council to determine the next steps.</p>		
Section II: Contributors		
<p><i>At the time this report was prepared, a total of eight (8) community submissions had been posted to the Forum. The contributors, all representing organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor’s initials.</i></p>		
<u>Organizations and Groups:</u>		
Name	Submitted by	Initials
Business Constituency	Steve DelBianco	BC
Non-commercial Stakeholders Group	Rafik Dammak	NCSG
Intellectual Property Constituency	Steven Metalitz	IPC
European Commission, Directorate-General for Communications Networks, Content and	Camino Manjon-Sierra	EC

Technology		
Internet Service Providers Association of Ireland	Paul Durrant	ISPAI
Blacknight Internet Solutions Ltd	Michele Neylon	BIS
Software & Information Industry Association	Carl Schonander	SIIA

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

Support for changes to the Whois and National Law Conflicts Procedure

BIS, ISPAI and NCSG all agreed that it's impractical to wait for legal action before invoking the Whois and National Law Conflicts Procedure (the Procedure). BIS emphasized that registrars face the prospect of losing business if they don't sign the 2013 Registrar Accreditation Agreement (RAA), but are in some cases unable to sign agreements that impose requirements in conflict with applicable national laws. Waiting for legal action or a government opinion before invoking the Procedure makes little logical sense, BIS writes. Consequently, BIS writes, ICANN should revise its contracts in greater consideration of data privacy laws. EC agreed, and notes that changes to any provisions should be done in advance of contract execution.

NCSG recommended four possible triggers for invoking the Procedure: (a) Evidence from a data protection commissioner or office; (b) evidence of conflict arising from analysis conducted by ICANN's legal team or national legal experts hired by ICANN; (c) written legal opinion from a nationally recognized firm; or (d) official opinion from any relevant government agency. NCSG argued that any of these triggering events should be applicable before a contract has been signed.

Limited support for changes to the Procedure

SIIA, IPC and BC raised concerns about weakening registrars' and registries' contractual obligations to provide access to Whois data. All three groups emphasized the importance of maintaining open access to Whois and thus only allowing narrowly tailored exceptions in cases where national law is clearly in conflict. To limit the claims of exemptions, SIIA urges that a legal opinion not be sufficient to trigger the Procedure, unless it is linked to an existing conflict or potential conflict. IPC and BC echo this concern and add that loosened restrictions would also lower the bar to utilizing the exemption in other circumstances, such that a legal opinion that is not tied to an actual claim or concern is used to circumvent other contractual requirements.

IPC cautions against bringing the Procedure in line with the Data Retention Specification in the 2013 Registrar Accreditation Agreement (RAA), as the implementation of this has resulted in partial waivers under circumstances in which it's unclear if the legal circumstances warrant an exemption. By contrast, IPC recommends utilizing one trigger provision of the Data Retention Specification for using the Procedure: receipt of a "governmental ruling or guidance" that indicates the contracted party is in

violation of national laws. Several commenters supported the need for a legal opinion from a government authority as carrying more weight than an opinion from a reputable law firm. BC also said that only clear conflicts with national laws should be addressed in exemptions.

EC emphasized that a legal opinion from a party that does not have a vested interest in the outcome should not be weighted the same as that which comes from a government agency or a data protection authority, but did recommend that indicating the particular legislation in question should be sufficient. In addition, EC recommended bringing the Procedure in line with the 2013 RAA's Data Retention Specification. EC also noted the importance of maintaining access to Whois, but noted that the Procedure "places undue burden on contracted parties."

Board involvement

EC and NCSG do not support the ICANN Board of Directors' (Board) involvement at this level of decision making. EC does however encourage the Board to ensure that transparency is preserved throughout the Procedure and in any decisions surrounding changes to the Procedure. NCSG recommended that the Board be consulted before the Procedure is changed, while the BC urged that the Board approve all exemptions or modifications to contracts.

Public comment period

Respondents expressed mixed feelings about requiring a public comment period for any proposed change to Whois contractual requirements. IPC indicated support for public comments every time an exemption is considered.

EC supported a public comment period but noted that this would likely have little legal impact on the decision to grant or deny an exemption. At the least, EC noted that notice of changes to agreements in response to national law concerns should be delivered to the relevant authorities at a national level and that ICANN ought to use the Government Advisory Committee (GAC) to convey these notices of changes conforming to national laws.

NCSG said that public comment was not necessary on every waiver, but that public notification of a granted waiver should be routine.

Terms of exemption

NCSG and EC said that exemptions should be termed to the length of the agreement with ICANN and that others in the same jurisdictions ought to be notified of the change and be granted the same exemption. IPC suggested periodic reviews of exemptions to ensure that laws haven't changed.

Other suggestions

BIS recommended ICANN hire a data privacy officer to be charged with spearheading such issues for the organization. NCSG echoed this comment and suggested a more concerted effort to address data privacy concerns. NCSG also stated that contracted parties are at a disadvantage to negotiate the terms of their agreements because ICANN does not have a clear privacy policy.

EC recommends ICANN directly engage with data protection authorities to ensure that its contracts are in line with national laws, as these authorities can issue expert guidance and support. Similarly, NCSG recommended a broader approach to engaging with data protection authorities so that contracts are not changed on an ad hoc basis. As a step in that direction, NCSG is working to create a volunteer team of experts to provide input to ICANN on data protection and privacy issues.

EC recommends a six-month time frame from the invocation of the Procedure to its final resolution.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

There was broad consensus among commenters that access to the Whois database is important, but should not come at the expense of violating national laws in the countries where contracted parties operate. Several commenters suggested the Procedure has been effective because it has allayed potential conflicts with national laws prior to being invoked. As such, those commenters recommended narrowly tailoring exemptions and crafting the Procedure in such a way as to ensure that only those narrow exemptions where conflict with law is clear are granted. While no commenters outright opposed changes to the Procedure, several urged caution in making changes and two indicated that because the Procedure has not been invoked to date it may be an indicator of a process serving its purpose.

Opinions diverged on what should trigger the Procedure. Three commenters suggested that a written opinion from a nationally recognized law firm should not be sufficient to trigger the Procedure. They emphasized that ICANN should consult with relevant government authorities, including data protection agencies, where applicable. Several commenters suggested that a legal opinion from a firm should not be weighted as heavily as that from a government authority, such as a data protection agency, which is intimately involved in privacy issues in the relevant jurisdiction.

Commenters also were split on whether the Procedure should be brought in line with the 2013 RAA's Data Retention Specification. One commenter said that the Specification has resulted in murky exemptions, while others viewed it as a more streamlined and clear process.

In terms of other efforts, two commenters recommended ICANN more directly engage with data protection authorities to ensure ICANN policies and contracts are in line with national laws. Two commenters also recommended ICANN create a data protection officer position to lead efforts in this regard.

Moving forward, ICANN proposes to form an Implementation Advisory Group (IAG), to be announced in further detail during the ICANN 51 meeting in Los Angeles in October 2014. The IAG will be open to interested parties; parties representing the range of views expressed in the comments are encouraged to participate.

ICANN found common themes among some of the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy. For example, several commenters expressed a willingness to allow for invocation of the Procedure prior to contracting. Others raised questions about how public comments will be incorporated into the Procedure, and how these should be considered when granting an exemption to contractual requirements. Prior to convening the group, ICANN will provide additional materials to help the IAG address these questions. These and other issues will be considered by the IAG, which will then provide its recommendations to the GNSO Council for its review.