

# Staff Report of Public Comment Proceeding

## Revised ICANN Procedure for Handling Whois Conflicts with Privacy Law: Assessment and Next Steps

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### Section I: General Overview and Next Steps

In accordance with the [ICANN Procedure for Handling Whois Conflicts with Privacy Law \(Whois Procedure\)](#), this paper opened a review process to gather community input on the effectiveness of the [revised Whois Procedure](#), which was recently revised to incorporate an “Alternative Trigger,” in addition to the existing trigger to invoke the procedure.

The paper outlined the revised Whois Procedure and invited public comments on a series of questions for discussion that the ICANN community, including contracted parties, data protection agencies, law enforcement and other relevant parties may want to consider regarding the revised Whois Procedure and the process itself.

ICANN will review the body of comment and report back accordingly to the Generic Names Supporting Organization (GNSO) Council with the public input received as well as to present several solutions for the GNSO to consider, while also noting their limitations. Possible paths forward may include additional changes to the Whois Procedure, or an expedited or standard policy development process to review policy recommendations underlying this procedure.

As directed by the procedure, this assessment is intended to inform the next periodic review of the Whois Procedure, which will commence no later than 1 October 2017, as requested by the GNSO Council.

## Section II: Contributors

*At the time this report was prepared, a total of fourteen (14) community submissions had been posted to the forum. The contributors, both individuals and 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.*

### Organizations and Groups:

Name	Submitted by	Initials
New Zealand Government	Harry Chapman	NZG
Ministry of Telecom and Mass Communications of the Russian Federation	Yulia Elanskaya	RF
Council of Europe	Peter Kimpian	COE
Registries Stakeholder Group & Registrars Stakeholder Group	Stéphane Van Gelder	RySG & RrSG
Europol	Mounier, Grégory	EP
Association Française pour le Nommage Internet en Coopération	Marianne Georgelin	AFNIC
Non-Commercial Stakeholders Group	Ayden Férdeline	NCSG
Business Constituency	Steve DelBianco	BC
Non-Commercial Users Constituency	Stephanie Perrin	NCUC
At-Large Advisory Committee	ALAC Staff	ALAC
Governmental Advisory Committee	Fabien Betremieux	GAC
European Commission		EC
Intellectual Property Constituency	Gregory S. Shatan	IPC

### Individuals:

Name	Affiliation (if provided)	Initials
Roses Havethorns		RH

## Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer 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)

Based on the topics covered in the staff paper "[Revised ICANN Procedure for Handling Whois Conflicts with Privacy Law: Assessment and Next Steps](#)," several common themes could be discerned from among the comments received, and each of these themes is explained in more depth below.

- Obtaining evidence from government agencies
- Engaging government agencies
- Incorporating a third trigger
- Other modifications
- Public consultation step
- Recommendations to the ICANN Organization
- Additional comments

### **Comments related to the feasibility of obtaining evidence from government agencies**

Almost all commenters expressed concern regarding the practicality and feasibility of getting the necessary documentation from the relevant government agency as part of the “Alternative Trigger” in step one of the revised Whois Procedure, in the absence of a Whois Proceeding. While EP writes that “the Alternative Trigger provides more opportunities than the existing ones which request to be either under a judicial or administrative proceeding to benefit from the waiver,” COE states that what the “Alternative Trigger” is suggesting is “practically impossible as it would imply that Data Protection Agencies (DPAs) have to deal with each and every request they might get from contracted parties who feel ICANN contracts are in conflict with the applicable law.” In addition, COE explains that “in some jurisdictions DPAs operate with 3 staff members and others with 120 resulting in an inequality of chances in getting a waiver.” Furthermore, NCSG shares that their members have worked with DPAs, and know “from personal experience that DPAs are already overburdened.”

BC writes that “there could be an instance where a government is unable or unwilling to provide a written statement. Moreover, even if provided, without more, does not itself connote a potential breach of national law that should necessitate an outright exemption to contractual obligations around Whois.” NCUC, NCSG, RySG and RrSG express that the “Alternative Trigger” may create a dilemma for contracted parties “given that the Procedure must be completed before an exemption may be granted, a party may have concerns with bringing the conflict to the attention of the relevant DPA, which could invite enforcement action.” RySG and RrSG also explain that “it is highly unlikely that a government agency would be willing to dedicate the time and resources necessary to provide such an in depth legal analysis” and if they were to provide one, only a few would be willing to release that analysis. In addition, RySG and RrSG write that “it is more likely that public guidance or an advisory would be developed with respect to certain types of data (WHOIS, etc.) and its collection, use, and/or processing to guide enforcement.”

However, NZG and IPC state that it would be feasible for DPAs to provide a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law, while RF notes that it would be possible under certain circumstances. IPC points out that more data on such instances may become available after contracted parties have had a sufficient period of time to make use of the mechanism, which has only been in effect for a few months. Given the concerns expressed about the revised Whois Procedure, IPC notes that “it is important to take into account the impending coming into force (in May 2018) of the General Data Protection Regulation (GDPR) that will largely supplant national laws. The GDPR explicitly provides, in its Article 36(2), that the national DPAs will all henceforward have the authority and responsibility to issue written advice to data controllers and processors concerning potentially problematic processing of personal data. Thus, even if there were evidence demonstrating that a particular national data protection authority today lacks the power to issue an opinion sufficient to satisfy the alternative trigger, that would be unpersuasive in the absence of proof that the DPA will find itself similarly impotent ten months from now, when Article 36 of the GDPR comes into force.”

The GDPR was adopted by the European Union (EU) on 14 April 2016 and takes effect on 25 May 2018 uniformly across the EU countries. According to the European Commission, the aim of the GDPR is to protect all EU citizens and residents from privacy and data breaches. It applies to all companies processing and holding the personal data of subjects residing in the EU, regardless of the company’s location.

EP identifies potential risks associated with the “Alternative Trigger” such as the “necessity to provide the text of the applicable laws with references to particular actions or investigations being launched by the law enforcement authorities and the demand to provide a description of the efforts undertaken to meet the requirements of both local law and obligations to ICANN, includes the risk that sensitive

information - referred to in national law enforcement procedures - might be revealed." Another potential risk raised by EP regarding the revised Whois Procedure is that it "establishes the government agency as the mediator of the process who enforces the national law. Due to the variety of national approaches towards governmental bodies, there is a vast difference between the tasks of the government agencies at international level. In some countries, the tasks related to the enforcement of national laws are divided amongst different stakeholders. Therefore, there is a risk of possible duplication in the mandate of various stakeholders concerning the possibility to enforce national laws."

ALAC writes that the revised Whois Procedure does not create a level playing field as "Registrars (and some Registries) subject to privacy laws would have to undertake an onerous case-by-case procedure to obtain the right from ICANN to respect their domestic privacy laws. Whereas Registrars operating out of other jurisdictions would be free to ignore privacy laws which pertain elsewhere." In addition, ALAC states that "the pre-existing procedure has hardly ever been used, which means in practice, that Registrars subject to privacy laws have effectively functioned outside applicable local law and their Registrants' personal data have been potentially exposed to bulk downloads and other abuses, without their authorization and possibly without their knowledge." According to NCUC, "the process has not been invoked because the pressure has been taken off data protection law as a mechanism for registrants to protect their privacy. If the current work of the Privacy Proxy Services Accreditation Issues Working Group (PPSAI-WG) comes to fruition, there will be more requirements demanded of service providers, and it may become more difficult/expensive for registrants to keep their personal data out of the WHOIS (sic) directory. If this were to transpire, registrants may take an interest in complaining about the failure of registrars to comply with data protection law."

Regarding the type of evidence that a requesting party should provide to the data protection agencies, NZG, COE, RySG, RrSG, IPC all agree that the relevant ICANN contractual provisions and any other relevant supporting documents should be presented to DPAs. Furthermore, COE, RySG and RrSG state that documents containing the details of the data processing activity it foresees to undertake should also be submitted. RySG and RrSG list a number of items that the requesting parties should provide such as documents related to "personal data, the data flows required to comply with that contractual clause, the justification for such processing, the portions of the law/regulation the requirement violates, and the proposed remedy. In addition, the submitting party would identify their role and actions as a processor and include contact information regarding the associated controller." BC endorses the list of supporting materials outlined in step one of the Whois Procedure and believes that contracting parties can feasibly provide these materials to ICANN. NCSG states that "it is not clear which documents a registrar/registry must provide the DPA so that they could form a relevant opinion. In particular, the purpose of the WHOIS (sic) registry has not yet been defined in policy."

In terms of challenges that DPAs may face in providing a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law, IPC expresses that "DPAs may be reluctant to state a definitive legal position, as they may believe this will require them to act on it." However, IPC views any such reluctance as "an indication that the agency is not sufficiently convinced of its position, or does not wish to take action to legally prevent the contracted party from complying with their WHOIS obligations." NZG shares that when issuing an advisory opinion, their DPAs will need to take into account "the European Commission which granted New Zealand privacy law provided an adequate level of privacy protection adequacy to meet European standards. This adequacy status means that personal data information can legally be sent to New Zealand from Europe for processing without special additional measures being taken by the European companies."

Regarding countries that may not have an official data protection authority, COE expressed that judiciary bodies and governmental agencies would be considered authoritative enough to provide creditable evidence of a conflict with national law and Whois obligations. However, RySG and RrSG state that "the proposed trigger would find utility in smaller scale requests and would likely not be suitable to those entities operating under the purview of larger scale requirements." Conversely,

NCSG writes that this procedure, "would disproportionately hurt smaller registries/registrars. Particularly in developing regions of the world, where registries/registrars have considerably less resources." IPC notes that the revised procedure does not specify that the written opinion come from a data protection authority, rather it can come from any agency which certifies that it "has the legal authority to enforce the national law which it has found to be inconsistent (sic) contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement."

In light of the challenges raised by EP, EC, and COE, the GAC states that "it appears that the proposed procedure likely requires further consideration" and expresses the relevance of "a WHOIS (sic) policy that respects the requirements of data protection legislation while fulfilling ICANN's Mission related to the maintenance of and access to accurate and up-to-date information concerning domain name registrations."

#### **Comments related to improving engagement with government agencies**

With respect to improvements or changes that could be made to better engage DPAs in this process, RySG and RrSG suggest that ICANN "seek direct engagement with government agencies and/or expert privacy counsel." NZG considers consultation with the GAC on this issue as appropriate while COE states that "during ICANN58 the Council of Europe Committee of Convention 108 volunteered to provide a global platform for exchange and facilitate the dialogue between ICANN and the data protection community, including DPAs who might wish to take part in such cooperation." IPC points out that "the Whois Procedure already contemplates engagement and consultation between ICANN, the data protection or relevant government agencies, and other stakeholders" while EC expressed that "the new EU data protection framework, might foster a more in-depth discussion on issues affecting the relationship between ICANN and EU registrars and registries." EP states that it is important to set up a forum and to ensure that "deliberations on ICANN's policies, status and procedures should be carried out in close collaboration with interested stakeholders, and with the involvement of the law enforcement community and data protection experts."

In regard to forums for businesses to engage with DPAs on best practices in their jurisdiction, COE suggests the International Conference of Data Protection and Privacy Commissioners and the Council of Europe which "is to set up a platform to engage with global internet players on areas of mutual interests and concerns. Besides those there are similar initiatives at European Union's and at national level." According to RySG and RrSG, "a preferred course of action would be to engage such agencies at an industry level with representative associations seeking practical advice on wider endeavors such as industry codes of practice. In addition, industry codes of practice require DPA evaluation and acceptance by the DPAs, lending added credibility to the industry's approach, when agreed. Further, official advice and/or public guidance is issued by the Article 29 Working Party (known under GDPR as: European Data Protection Board) to clarify certain portions of laws with regard to specific types of data and to guide DPA enforcement."

#### **Comments related to incorporating a third trigger into the revised Whois Procedure**

Respondents expressed mixed feelings about incorporating a third trigger to launch the procedure, such as the Contracted Party Request or the Legal Opinion trigger, into the revised Whois Procedure to mitigate issues related to obtaining statements from a governmental agency. A Legal Opinion trigger consists of a written legal opinion from a nationally recognized law firm stating that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the RAA or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via Whois. Under the Contracted Party Request Trigger, a contracted party would request for ICANN to investigate whether the request has met the required standard for triggering the procedure by presenting ICANN with a request describing the legal conflict

as well as written support from a DPA (highly recommended), all other affected registries and/or registrars or justification for why they are the only affected party (mandatory), and a written support or non-objection to the request from the relevant GAC member or relevant government agency if the jurisdiction does not have a GAC member (mandatory).

While NCUC writes that “a letter from a competent nationally recognized law firm could work, if it were simply taken at face value,” COE states that a “Legal Opinion trigger does not seem to be an adequate solution as contracted parties should have the ability to explain themselves directly to ICANN in matters which are directly impacting them and not be required to seek a legal firm’s opinion.” In addition, COE and AFNIC agree that “there should be procedure(s) and triggers put in place for the assessment of the compliance of ICANN contractual obligations with the applicable law raised by a contracted party based on its own assessment (without governmental, DPA’s supporting documents).”

BC recommends that the “Alternative Trigger” include a requirement for a contracted party to “propose solutions to rectify perceived inconsistencies with national law rather than an outright request for exemption from contractual obligations around Whois.” Thus, BC suggests that “if a contracted party cannot obtain the appropriate documentation as outlined under Step One as part of the Alternative Trigger after reasonable good faith efforts, it be allowed to detail to ICANN in a written submission: 1. inconsistencies between national law and its contractual obligations, and why, 2. proposed solutions to rectify any inconsistency, and 3. authorize ICANN to use this written submission in any conversations, requests, or consultations with relevant government agencies and within the Consultation Step that includes a public consultation in which all interested parties can review the written statement submitted in the Notification Step and comment on all aspects of it.”

While RySG and RrSG support a Legal Opinion Trigger and state that it is consistent with the underlying policy requirements, “the onus to ensure that instructions given do not conflict with legislation lies with ICANN, and such requests and legal opinions should be the exception, not the norm.” Thus, ICANN should “consider advice and/or guidance issued by the Article 29 Working Party as sufficient to demonstrate contractual conflicts.” RySG and RrSG explain that “viewing official advice or guidance issued by a DPA as credible would increase the proposal’s utility by lowering the administrative burden of lengthy engagement with DPAs. This would especially benefit smaller registries and registrars.”

IPC believes that neither the Contracted Party Request nor the Legal Opinion triggers would be consistent with the underlying policy. IPC states that the opinion of a nationally recognized law firm, whether supplemented by input from the relevant GAC member, would “impose a looser standard” and is “not sufficient by itself as such opinions may be subjective in nature and reflect an interpretation of the law in a light most favorable to the law firm’s client that is requesting and paying for it.” IPC believes that the Contracted Party Request trigger also falls short for many of the same reasons as the Legal Opinion trigger. IPC notes “the Minority View calling for recognition of potential conflicts on a regional basis. Once again, this is incompatible with the underlying policy, not only because that policy specifically refers to national/local laws, but also because in reality, such laws are enforced on a national or local basis, and therefore to be credible a demonstration would require a clear nexus to the local/national law, and not interpretation by entities that lack enforcement authority.”

#### **Comments related to other modifications to the revised Whois Procedure**

While IPC does not believe it is necessary to revise the procedure to allow for invocation prior to contracting with ICANN as a registry or registrar, COE, RySG and RrSG all agree that the procedure should be revised to cater for this option. RySG and RrSG state that “the process should be able to be invoked for forthcoming legal conflicts that may not have yet come into effect. For example, if a new regulation is announced that would create a conflict with WHOIS requirements, contracted parties

should be able to initiate the process as soon as the regulation is published, and be eligible for a waiver prior to when the conflict would come into effect." Absent an enforceable order, RySG and RrSG state that "ICANN should consider its responsibilities when considering how to inform contracted parties as to their contractual obligations not being in compliance with national law. Identification of a conflict by ICANN as a contracting body should also be an option, whether as a means to inform parties acting under contract of the potential conflict, or to trigger the process directly."

In cases where an exemption has been granted for a particular conflict with local privacy laws, COE, RySG and RrSG state that any other entity facing the same legal conflict should be also granted an exemption, without the need for a specific application to ICANN. RySG and RrSG add that "any associated costs incurred by the original requestor of the exemption should be considered." NCSG explains that "privacy and data protection laws vary by jurisdiction, not by business. In the event it is determined that the Alternative Trigger is suitable and appropriate, should it be activated by one registry or registrar in a jurisdiction, we believe that it should apply to all registries and registrars in that jurisdiction even without them invoking it. This is because all businesses subject to an ICANN contract within the one jurisdiction are subject to the same laws. In this case, post-GDPR, the European Economic Area can, for most intents and purposes, be considered a single jurisdiction."

However, IPC states that "each request for a waiver must be decided on its own merits. Contracted parties in the same jurisdiction may or may not be similarly situated. It would certainly be appropriate for final decisions on previous waiver requests from the same jurisdiction to be referenced and considered in the process." Furthermore, BC urges that "exceptions be narrowly applied, and that exemptions and modifications to contracts be geographically specific."

### **Comments related to the Public Consultation Step**

Commenters provided a number of suggestions in terms of which relevant parties should be included in the consultation step. While IPC notes that this step "enables input from any third party, so this would provide a sufficient mechanism for broad consultation," COE lists the parties that should be consulted such as "ICANN staff, contracted parties, governmental representatives, DPAs or ICANN data protection office/officer or working group on privacy (if set up) and law enforcement agencies." Furthermore, COE states that ICANN's bylaws and policies would ensure that the opinion or input requested from the parties identified would be provided and that "ICANN staff should present a proposal subject to communities' approval/endorsement" prior to incorporating the public comments into the procedure.

BC expressed that "the community should be allowed to provide input in the exemption process," while E states that it should be mandatory for ICANN to take into consideration the observations of law enforcement rather than only "where appropriate," as well as for ICANN to consult at all times with registrars and registries rather than to consult only if "impractical under the circumstances." RySG and RrSG note that "the traditional ICANN public comment process would present challenges as government agencies would likely be unwilling to make changes to any statement based upon input from parties not affiliated with the contact in question." Thus, RySG and RrSG express that "any changes to contracts, be they bilateral or universal amendments, are noticed in public comment but negotiated and agreed between ICANN and the contracted party."

With respect to the role of comments in ICANN's decision-making process and in this review, COE states that the input received "should be taken into account to the extent possible and those not falling into ICANN mission-statement, should be left apart." Similarly, IPC states that "the opportunity for public comment remains an essential part of the process, after the Procedure has been triggered." IPC recommends that ICANN "commit to publishing an objective analysis of such comments, and a thorough explanation of the reasons why all such comments are either accepted or rejected in reaching ICANN's final decision with respect to a WHOIS conflicts proceeding." Conversely, RySG

and RrSG state that “public comments although perhaps capable of highlighting legal issues, cannot replace or supplement that of a legal consultation process. It is submitted that this process should be part of a full legal review and implementation of privacy considerations.”

NCSG, however, is not in favor of the consultation step and expressed that they would like to see guidelines and a procedure developed so that they can better understand how ICANN staff analyses the comments received. In regard to seeking the opinions of GAC representatives, NCUC explains that “data commissioners are often in the position of oversight and enforcement on their governments, so it is problematic to ask the advice of GAC members who represent those interests, as to whether the opinion or finding of an independent data protection authority is to be believed. Once again, if the views of the data commissioners are not considered to be sufficient authority, the matter must be taken to a higher Court.”

With respect to the length of the public comment period, IPC recommends at least 30 days and states that “comments should be analyzed in light of the underlying policy goals stated in the Board-approved policy, including promoting the stability and uniformity of the Whois system.” COE suggests a public comment period of three weeks to one month, while E emphasizes “a strict timeframe for such public consultation in order to avoid any unnecessary delays in the process.”

### **Recommendations to the ICANN Organization**

A number of suggested improvements and alternatives relating to the revised Whois Procedure as well as to address privacy concerns were also received. RySG and RrSG suggest that “the Procedure should include a clear, expedited timeline for review to increase predictability for contracted parties facing potential” and that “the review process should allow for ICANN to grant a temporary waiver of enforcement sooner in the process, while the full review remains ongoing, if notice of conflict is provided that includes all of the required elements.” IPC states that there is little benefit of having yet a further round of public input at this premature stage and recommends allowing “a period of time to pass during which a rational and objective assessment could be made of whether the procedure is effective or not.”

COE, NCSG, NCUC recommend that ICANN implement a practice of subjecting WHOIS registry and procedures to a Privacy Impact Assessment (PIA) with respect to processing of personal data on the rights of the data subjects. Furthermore, COE and NCUC suggest that ICANN “set up a Privacy Office or designate a Privacy Officer, or at least set up a Working Group on Privacy which can assist it in implementing the international privacy standards into ICANN policies.” ALAC, NCUC, COE and NCSG also propose that ICANN adopt a privacy policy that meets “globally accepted best practices on data protection.” NCSG adds that this can be achieved through a privacy policy “based on a combination of the GDPR, the OECD Guidelines, and the Council of Europe’s Revised Convention 108. Alternatively, ICANN could develop binding corporate rules, as provided for in the GDPR.” NCSG also suggests that ICANN “fund an independent analysis of its contracts vis-a-vis the aforementioned international law, since this is bound to affect a lot of registries and registrars in a developing region.”

NCUC recommends that ICANN “do a proper dataflow map of personal data under ICANN’s control” and urges ICANN to trust “contracted parties to figure out their own liability on this issue” as well as “data protection authorities when they write and tell ICANN that it is not in compliance with law.” As a short-term solution, ALAC supports a “block exemption” for “EU-based and other Registries and Registrars subject to local privacy laws incompatible with ICANN contracts and procedures,” while NCSG recommends that the “Alternative Trigger” be put on hold pending further developments of the GDPR task force.

While IPC reiterates its support for the 2005 policy underlying the WHOIS Procedure, which sets the baseline for triggering the WHOIS Procedure, COE, RySG and RrSG, express that, in light of previous

comments provided, the underlying policy recommendations on Whois Conflicts with privacy law should be revisited.

### **Additional Comments**

RF, COE, and AFNIC state that WHOIS contractual obligations are generally not in compliance with privacy legislation in force in many countries. According to NCUC, “two of the most relevant associations of global data protection authorities, the Article 29 Working Party on Data Protection, and the International Working Group on Data Protection in Telecommunications and Media have been expressing their concerns about WHOIS to ICANN since 1998 and ICANN has not responded.”

In regard to the Registry Services Evaluation Process (RSEP) and the Data Retention Waiver Process discussed in the staff paper, IPC believes that “neither has any relevance to this proceeding.”

According to IPC, “RSEP can be initiated by a registry operator for any reason, notably to seek to obtain a business advantage over competitors, and is briefly evaluated by ICANN solely on the narrow question of whether the proposed new service presents significant competition, security or stability issues. This contrasts markedly with the Whois Procedure, which was adopted to implement a consensus policy approved by the ICANN Board, and which focuses solely on whether the contracted party has credibly demonstrated that it is legally prevented from complying fully with the contractual obligations it has entered into with ICANN. Furthermore, the RSEP process has been frequently criticized for its opacity and obscurity and while it is true that the RSEP process has on one or two occasions led to contract modifications regarding registry Whois obligations, the ICANN Board has made clear that the modifications so obtained should not be viewed as establishing a precedent that applies to other circumstances.”

Similarly, the IPC explains that the Data Retention Waiver Process “was not adopted in order to implement any Board approved consensus policy, but solely as the result of negotiations between ICANN and registrars who were dissatisfied with the data retention provisions to which they agreed in the 2013 RAA. The shortcomings of that process’s reliance upon opinion letters from law firms hired by the contracted parties seeking to be relieved of their obligations has been amply documented. Finally, the data retention obligations of registrars are both conceptually and legally distinct from the contractual obligations regarding Whois taken on by both registrars and registries.”

## **Section IV: Analysis of Comments**

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

### **Obtaining Evidence from Government Agencies**

There was broad consensus among commenters that the revised Whois procedure requires further consideration given the concerns expressed about the practicality and feasibility of the “Alternative Trigger” in step one, in the absence of a Whois Proceeding. Specifically, 11 commenters indicated concern over requiring a written statement from a governmental agency, as these statements may not be readily provided by DPAs or easily obtained, especially by smaller registries and registrars who may not have the resources to obtain such advice. Nevertheless, when a requesting party is seeking the opinion of a DPA, several commenters suggested that contracted parties should provide DPAs with the relevant ICANN contractual provisions and any other relevant supporting documents.

### **Engaging Government Agencies**

With respect to improvements or changes that could be made to better engage DPAs in this process, commenters recommended that ICANN seek direct engagement with government agencies to ensure that ICANN policies are in line with privacy laws while others consider consultation with the GAC on this issue as appropriate. Three commenters emphasized the importance of setting up a forum for businesses to engage with DPAs at a national or industry level.

### **Incorporating a Third Trigger**

Opinions diverged on which triggers should be incorporated into the revised Whois procedure. Three commenters suggested that a written opinion from a nationally recognized law firm should be sufficient to trigger the procedure, while two respondents suggested that a legal opinion does not carry the same weight as that from a government authority, such as a DPA, which is intimately involved in privacy issues in the relevant jurisdiction. Three commenters indicated support for a Contracted Party Request trigger, especially if a registry/registrar is not able to obtain the appropriate documentation from DPAs after reasonable good faith efforts. One respondent said neither the Contracted Party Request nor the Legal Opinion triggers would be consistent with the underlying policy.

### **Other Modifications**

While one commenter expressed that it is not necessary to revise the Procedure to allow for invocation prior to contracting with ICANN as a registry or registrar, three commenters stated that the Procedure should be revised to cater for this option. Absent an enforceable order, two commenters suggested that identification of a conflict by ICANN should also be an option, whether as a means to inform contracted parties, or to trigger the process directly. In cases where an exemption has been granted for a particular conflict with local privacy laws, four commenters believe that it should automatically apply to all contracting parties that fall within the jurisdiction of the local law (e.g. all contracted parties incorporated in the European Union Member States).

### **Public Consultation Step**

Respondents expressed mixed feelings about requiring a public comment period for any proposed changes to Whois contractual requirements. While two commenters indicated support for public comments every time an exemption is considered, one respondent outright opposed this process while another expressed that a legal consultation process would be more appropriate. Commenters provided several suggestions regarding which parties should be included in the consultation step such as ICANN staff, contracted parties, governmental representatives, DPAs, ICANN data protection office/officer or working group on privacy (if established) and law enforcement agencies.

### **Recommendations to the ICANN Organization**

In terms of other efforts, three commenters recommended that ICANN implement a practice of subjecting Whois registry and procedures to a Privacy Impact Assessment (PIA) with respect to processing of personal data on the rights of the data subjects. Furthermore, two commenters suggested that ICANN establish a privacy office or designate a privacy officer, or establish a Working Group on privacy. Four commenters also proposed that ICANN adopt a privacy policy that meets "globally accepted best practices on data protection." One comment suggested that ICANN do a dataflow matrix of personal data under ICANN's control. To note, an ad hoc volunteer group was formed to help ICANN create and populate a [matrix](#) of user stories of the personal data the ICANN organization's contracted parties collect, transmit, or publish in relation to our contracts with registries and registrars. The purpose for collecting this data is to inform a legal analysis on the potential impact

of the GDPR from a contractual perspective, and to engage with DPAs in order to get a better understanding of the potential compliance implications. ICANN's work to investigate the potential compliance issue because of the GDPR does not replace the multistakeholder policy and implementation development activities underway, including those activities related to reviewing and possibly updating the Procedure. As a short-term solution, two commenters support a "block exemption" for EU-based contracted parties while another respondent recommended that the "Alternative Trigger" be put on hold pending further developments of the GDPR task force.

### **Additional Comments**

Three commenters emphasized that Whois contractual obligations are generally not in compliance with privacy legislation in force in many countries. With respect to related ICANN mechanisms to address concerns regarding contractual obligations and applicable laws that could be considered for the Whois Procedure, one commenter expressed that neither the RSEP, nor the Data Retention Waiver Process, which are discussed in the staff paper, are relevant to this proceeding.

### **Conclusion**

ICANN appreciates the time spent by community members to provide their input on the staff paper "[Revised ICANN Procedure for Handling Whois Conflicts with Privacy Law: Assessment and Next Steps](#)". A number of topics seemed to garner a strong opinion from the community, which may allow for changes to the revised Whois Procedure. Based on the significant comments generated, ICANN deems it reasonable to include these topics in upcoming discussions with the Generic Names Supporting Organization (GNSO).

Moving forward, ICANN will report back to the GNSO Council with the public input received as well as to present several solutions for the GNSO to consider, while also noting their limitations. Possible paths forward may include an expedited policy development process; however, it is likely that this would take at least one year to complete and would focus on the underlying policy recommendations, not the procedure itself. With regard to the timeframe necessary to complete such an expedited PDP, it may not provide contracted parties with immediate relief. The Council may also consider a standard PDP, noting that may extend the timeline further.

In addition, the GNSO Council may want to consider incorporating a Contracted Party Request and/or Legal Opinion triggers. However, the GNSO Council would need to first assess whether these triggers are consistent or not with the underlying policy recommendations noting that these two additional triggers previously did not obtain consensus support from the Implementation Advisory Group (IAG), which recommended adoption of the Alternative Trigger. ICANN will share these options with the GNSO Council to determine next steps.

In accordance with the [ICANN Procedure for Handling Whois Conflicts with Privacy Law \(Whois Procedure\)](#), the staff paper that was published for public comment was intended to open a review process to gather community input on the effectiveness of the [revised Whois Procedure](#), which was made effective on 18 April 2017. As mentioned, the GNSO Council will consider the feedback received and decide how to proceed.