



Comments of the Intellectual Property Constituency on the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law

July 7, 2017

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the assessment of the effectiveness of the additional trigger, which was added to the ICANN Procedure for Handling WHOIS Conflicts with Privacy Law (“WHOIS Procedure”), in comparison to the existing trigger to invoke the WHOIS Procedure as well as other triggers.

Introduction

1. The IPC appreciates the Council’s review of the IAG Final Report and conclusion that the proposed modification to the procedure conforms to the intent of the original policy recommendations, and further confirmed its non-objection to the modification being implemented by Global Domains Division Staff. But the Council did not stop there, and requested that ICANN assess the practicality and feasibility of this new trigger in comparison to the existing trigger as well as the other triggers discussed in the IAG Final Report.
2. At the outset, we wish to note that the GNSO’s request for an assessment of the alternative trigger appears to be highly unusual, given that the revised WHOIS Procedure has been in place for less than two months. (In fact, the revised procedure was publicly announced on April 17, and the staff’s document seeking views on “the effectiveness” of the revised procedure was published for public comment just fifteen days later, on May 2.) It is highly questionable whether the practicability and feasibility of the revised procedure can be adequately assessed on paper alone, without the benefit of any real-world experience. The IPC does not see the benefit of yet a further round of public input at this premature stage. In any case, any public input that does not describe in detail any real-world problems encountered in invoking the revised should be disregarded, or at least heavily discounted, as shedding no real light on “the effectiveness of the additional trigger,” the only issue the ICANN staff has been tasked to assess.
3. We note that the alternative trigger, and the other triggers which did not garner consensus, as well as certain further minority views, were given a full public airing in 2015, following the extensive deliberation recommendation of the Implementation Advisory Group (IAG). ICANN’s assessment of these public comments was that they reflected the same consensus which existed in the IAG itself, in that they supported the proposed alternative trigger, but did not extend to other alternatives presented in the

IAG's report, such as the Written Legal Opinion Trigger, and the Contracted Party Request Trigger.¹

4. Given that it is clearly too soon to say whether the revised WHOIS Procedure is effective, it is somewhat puzzling that the GNSO Council has endorsed the continued scrutiny of a proposal which came out of a process that was so recently concluded. It appears that the continued appetite for debating the merits of the IAG's conclusions is borne from dissatisfaction amongst certain stakeholders regarding the revised WHOIS Procedure, and the underlying policy recommendation which the Board adopted on the recommendation of the GNSO Council and which has stood since 2005.
5. The IPC wishes to reiterate its support for the 2005 policy underlying the WHOIS Procedure, which sets the baseline for triggering the WHOIS Procedure, i.e., that a: "registrar or registry [that] can credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service" can trigger a procedure for resolving the conflict.² IPC reiterates its view that the policy which underlies the WHOIS Procedure is a sound and successful example of the bottom-up, multi-stakeholder process in action. It requires that the Procedure be narrowly limited to those circumstances where the contracted party is in an unequivocally clear position of not being able to legally comply with its contractual obligations. This is the standard endorsed by the GNSO Council and Board taking into account the strong and broad public interest in the accountability and transparency of the WHOIS framework.
6. The IPC is concerned that this is an exercise in exhuming previous arguments which did not gain consensus support in the IAG, and an effort to cast theoretical doubt on feasibility of the alternative trigger, which is now part of the WHOIS Procedure. That would be a waste of resources for both ICANN as well as stakeholders, all of whom are already stretched thin by a number of other ongoing processes.
7. All that said, the IPC remains committed to playing a constructive role in this process, and has attempted to provide as much information in response to the questions as possible, as might be helpful to moving this towards an outcome which will balance the important interests of stakeholders, while ensuring certainty.

Trigger

1. How feasible is it for data protection agencies to provide a party with a written statement indicating that a WHOIS obligation in an ICANN contract conflicts with national law?
 - We know of nothing explicitly preventing data protection agencies from expressing a view on whether a particular activity may conflict with national

¹ See page 13 of the Final IAG Report <https://gns0.icann.org/en/drafts/iag-review-whois-conflicts-procedure-23may16-en.pdf> and ICANN's report of the public comments dated 21 January 2016 [LINK]

² <http://gns0.icann.org/en/issues/whois-privacy/council-rpt-18jan06.htm> .

laws.³ Whether they choose to do so or not may be influenced by a number of factors, such as whether the incompatibility is clear, unequivocal, and incapable of being resolved through modification of the registrar's or registry's procedures, or other factors regarding whether intervention is warranted in that particular instance. It should be recalled that the underlying Board-adopted policy requires a "credible demonstration" of being legally prevented by local laws of complying with WHOIS obligations. An opinion from a data protection authority charged with enforcing such laws would likely be the "best evidence" of that.

- Furthermore, since the vast majority of concerns that have been expressed about the revised procedure and its alternative trigger are said to arise from the data protection laws of one or more member states of the European Union, any analysis of this question should take into account the impending coming into force (in May 2018) of an EU General Data Protection Regulation (GDPR) that will largely supplant such national laws. GDPR explicitly provides, in its Article 36(2), that the national data protection authorities 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 (in a concrete case) 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.
2. What type of evidence or documentation should a requesting party provide to the data protection agencies?
 - This may depend on the specific law in question, but it is likely that the requesting party would simply provide the agency details of the contractual obligations in question (which, as part of the RAA/RA would be public information), in addition to any pertinent aspects of the manner in which that obligation is being implemented by the requesting party, if relevant.
 - This should therefore not be burdensome to the requesting party.
 3. What challenges, if any, will data protection agencies face in terms of providing a party with a written statement indicating that a WHOIS obligation in an ICANN contract conflicts with national law?
 - Data protection agencies may be reluctant to state a definitive legal position, as they may believe this will require them to act on it. However, the 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.
 - We note that this question may be better answered by data protection agencies themselves.

³ A of the date hereof, the IPC notes the submissions of the Russian Federation and New Zealand both note that it would be possible for their respective data protection agencies to provide a written statement regarding a conflict between WHOIS obligations and national law.

4. What improvements or changes could be made to better engage data protection agencies in this process, i.e. Would direct contact with ICANN make the process more efficient?
 - It is unclear whether there is a need to engage data protection agencies that isn't being met. Such agencies are well aware of WHOIS, and the provisions of the RA and RAA are public information. The question about "making the process more efficient" is an odd one because the process was only in effect for two weeks at the time the question was asked. Furthermore, the WHOIS Procedure already contemplates engagement and consultation between ICANN, the data protection or relevant government agencies, and other stakeholders.
5. Is there a forum for businesses to engage with data protection agencies on best practices in your jurisdiction?
 - n/a
6. What experience, if any, have community members had with requesting similar written statements from data protection agencies?
 - Since the revised trigger has only been in effect for a few months, the IPC believes this question is premature, and should be asked again in a year or two, to provide a sufficient period for contracted parties to make use of the mechanism, including under the enhanced consultative authority accorded to national data protection authorities under the EU GDPR.
7. In cases where an exemption has been granted for a particular conflict with local privacy laws, should it 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)?
 - The IPC notes that this question is almost identical to one that was posed by ICANN in August 2014. The IPC repeats its answer here.
 - 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.
8. Regarding countries that may not have an official data protection authority, which bodies would be considered authoritative enough to provide credible evidence of a conflict with national law and WHOIS obligations?
 - The answer to this question is in the revised WHOIS Procedure itself, which 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 contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement."
9. Should a third trigger, such as the Contracted Party Request or the Legal Opinion trigger, be incorporated into the modified WHOIS Procedure to mitigate issues related to

obtaining statements from a governmental agency? Would these triggers be considered to be not consistent with the underlying policy recommendations? If so, why not?

- The IPC strenuously objects to this question as an attempt to circumvent the IAG’s deliberations, particularly given that input on these alternative triggers was already solicited following the publication of the IAG’s report. Asking the same question repeatedly would appear to serve no purpose other than to drum up support for opposition to the IAG’s consensus position, without allowing a sufficient period of time for contracted parties and/or data protection agencies to gain experience with the revised trigger.
- IPC believes that neither the Contracted Party Request (and as previously stated) nor the Legal Opinion triggers would be consistent with the underlying policy, for the following reasons:
 - i. The opinion of a nationally recognized law firm is clearly not sufficient by itself to credibly demonstrate that a party is legally prevented from complying with its WHOIS obligations. The interpretation of specific laws by a law firm, whether nationally recognized or not, does not sufficiently demonstrate that the contracted party is “legally prevented” by national laws from complying with its WHOIS obligations since 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. Because of the nature of legal advocacy, there is an inherent bias in such opinions that would skew the analysis towards construing the law in a way most likely to lead to the grant of a waiver on behalf of a client. As such, a legal opinion will by definition fall short of a credible demonstration of neutral legal analysis. Even if a law firm is instructed by a neutral third party, a firm’s advice might well be colored by the interests of its other clients. We also note that the meaning of “nationally recognized” is not clear. To the extent that this refers to a national registration or license requirement, the consequent “recognition” is highly unlikely to operate as a statement of the firm’s competence to opine on the issue in question or its objectivity. If it is instead a measure of the firm’s reputation, that is both high subjective and an inadequate measure of competence in a particular field.
 - ii. IPC notes that this lower threshold, which is contained in Section 2 of the Data Retention Specification of the 2013 RAA has resulted in inconsistent application, a lack of clarity as to the legal basis of the request, and, as a result, a lack of transparency regarding the standard for the granting of such waivers.
 - iii. Even independent legal analysis would not provide the required level of certainty to demonstrate the required legal prevention. The underlying policy adopted by the ICANN Board requires not just the possibility or plausibility of a conflict, but a credible demonstration of legal prevention. For that, IPC takes the view that more should be required in the form of a clear position on the part of an entity charged with enforcing relevant

national laws that the contracted party would be in violation of such laws as a result of complying with its WHOIS obligations.

- iv. IPC recalls and agrees with the earlier comments of the European Commission to the extent that they emphasize that “the decision of granting of an exemption to the implementation of the contractual requirements concerning the collection, display and distribution of WHOIS data should remain exclusively based on the most authoritative sources of interpretation of national legal frameworks.”⁴
- v. The underlying policy refers specifically to potential conflicts between “national/local” privacy laws and WHOIS obligations. 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.
- vi. Subjecting such an opinion to public comment would not remedy this deficiency. While additional input from the public and/or the relevant GAC member might be informative, it would simply compound one opinion with additional opinions, from entities and parties that are likely to be in even poorer positions to determine whether a bar to compliance in fact exists.
- vii. While IPC takes the view that public comment would not adequately or knowledgeably address the insufficiencies of a law firm opinion, the opportunity for public comment remains an essential part of the process, after the Procedure has been triggered. Given the interests that would be impacted by any waiver, and the goals stated in the underlying policy, it is essential to provide a full opportunity for public comment in any case in which ICANN proposes to release a registrar or registry from any aspect of its WHOIS obligations. ICANN should also 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.
- viii. For many of the same reasons above, a Contracted Party Request would fall short of the requirement to credibly demonstrate that they are legally prevent from complying with their WHOIS obligations.
- ix. The existing Procedure comes closest to meeting the “credible demonstration” standard required by the underlying policy by requiring specific action in the form of an investigation, litigation, regulatory proceeding or other government or civil action. An opinion from a law firm, whether supplemented by input from the public or relevant GAC

⁴ See <http://forum.icann.org/lists/comments-whois-conflicts-procedure-22may14-en/pdfIqblYdaYl.pdf>

member, would impose a significantly looser standard, one which does not come close to complying with the underlying policy.

10. What triggers to the WHOIS Procedure would be considered consistent with the underlying policy recommendations?
 - The IPC believes that the alternative trigger is consistent with the underlying policy (and notes that the GNSO Council has agreed with this⁵), and that the other proposed triggers would not.
11. What other trigger(s) would amount to a credible demonstration that a party is legally prevented from fully complying with applicable provisions of its ICANN contract regarding its WHOIS obligations?
 - Following a year of deliberations, the only trigger which a cross-sectoral group of stakeholders could agree on was the alternative trigger. The IPC welcomes other suggestions, but believes that there are now two sufficient bases on which the procedure could be triggered.
12. Should the procedure be revised to allow for invocation prior to contracting with ICANN as a registry of registrar? If so, how would that alter the contracting process and what parties would be most appropriate to include?
 - This question is virtually identical to one that was posed by ICANN in August 2014. We repeat the substance of IPC’s answer.
 - If the procedures or practices of the governmental agency charged with enforcing or authoritatively interpreting the privacy laws of the relevant jurisdiction are such that “credible demonstration of legal prevention” can be made even before the would-be contracted party has taken on those obligations, then this should be possible.
 - The IPC does not believe that it is necessary to revise the procedure to cater for this option.
13. Absent an enforceable order, what steps can be taken to inform a contracted party that their contractual obligations regarding WHOIS data is not in compliance with national laws?
 - The IPC questions the use of the word “order” here, since this is not what the revised WHOIS Procedure refers to. The revised trigger refers to a “written statement”, not an enforceable order.
 - This question is therefore misleading and implies that the revised WHOIS Procedure is narrower than it really is.
14. What other factors could be considered to make the WHOIS Procedure more effective?
 - A period of time should be allowed to pass during which a rational and objective assessment could be made of whether the procedure is effective or not. In order to do so, the concept of effectiveness needs to be better understood. Evidence of its ineffectiveness would include instances of a contracted party being subjected to

⁵ See <https://gnso.icann.org/en/council/resolutions#201702>

enforcement action in a manner where the triggering of the procedure would not have been possible in those circumstances, under its current terms.

Public Consultation

15. Are there other relevant parties who should be included in the Consultation Step? What should their roles be in the consultation process?
 - The Consultation Step enables input from any third party, so this would provide a sufficient mechanism for broad consultation.
16. How would ICANN ensure that parties identified in the consultation phase and/or trigger step are able to provide the opinion or input requested as part of their respective role?
 - n/a
17. How should public comments be incorporated into the procedure?
 - IPC supports the procedure as revised.
18. What role should comments have in ICANN’s decision-making process?
 - ICANN should consider comments, and incorporate them into their final determination where appropriate, as is the case with similar comment processes. ICANN remains bound to follow the consensus developed policy which underlies this process. However, ICANN should be extremely wary about circumventing or overruling multi-stakeholder consensus by adopting “minority view” comments from stakeholders involved in the policy development process.
19. What length of public comment period is appropriate to ensure that the procedure is completed in a timely fashion?
 - At least 30 days.
20. How should comments be analyzed?
 - 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”.

While no specific questions were posed about it, the staff report also describes as “related processes” two other ICANN procedures that in some way “could be considered for the Whois Procedure.” See pp. 4-5. IPC believes that neither the Registry Services Evaluation Process (RSEP), nor the Data Retention Waiver Process, has any relevance to this proceeding.

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 does not provide a good model to be followed in other contexts. Finally, 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.” See <https://www.icann.org/resources/board-material/minutes-2007-12-18-en>.

Similarly, 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. See, e.g., https://ipc.memberclicks.net/assets/ipc-position-papers/2014/IPC_comments_on_Blacknight_data_retention_waiver_request-6-6-2014.pdf. 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. See discussion on p. 2 of https://ipc.memberclicks.net/assets/ipc-position-papers/2016/2016_january_10_ipccommentsasciodataretentionwaiverforsubmission.pdf.

Respectfully submitted,

Intellectual Property Constituency