# Review of the ICANN Procedure for Handling Whois Conflicts with Privacy Law

## Introduction

This paper describes a review process for the existing ICANN Procedure for Handling Whois Conflicts with Privacy Law (Whois Procedure.) ICANN is commencing a review as provided in the Whois Procedure, to consider questions regarding the scope and impact of the Whois Procedure. ICANN is opening a public comment period to collect input on options for moving forward.

## Background

In November 2005, the Generic Names Supporting Organization (GNSO) concluded a policy development process (PDP) on Whois conflicts with privacy law which recommended that "In order to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD Whois service, ICANN should:

1. Develop and publicly document a procedure for dealing with the situation in which a registrar or registry 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 Whois.
2. Create goals for the procedure which include:
    a. Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
    b. Resolving the conflict, if possible, in a manner conducive to ICANN's Mission, applicable Core Values, and the stability and uniformity of the Whois system;
    c. Providing a mechanism for the recognition, if appropriate, in circumstances where the conflict cannot be otherwise resolved, of an exception to contractual obligations to those registries/registrars to which the specific conflict applies with regard to collection, display and distribution of personally identifiable data via Whois; and
    d. Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise".[1]

The ICANN Board of Directors adopted the recommendations in May 2006 and directed staff to develop such a procedure. A draft procedure was posted for public comment, and input was specifically solicited from the Governmental Advisory Committee (GAC). The GAC recommended adding a provision, which was included as 1.4 in the final procedure, urging a registrar or registry to work with relevant national governments to ensure adherence to domestic and international law, as well as applicable international conventions. The final procedure is posted at http://www.icann.org/en/resources/registrars/WHOIS-privacy-conflicts-procedure-17jan08-en.htm.

The ICANN Procedure for Handling Whois Conflicts with Privacy Law (the Whois Procedure), in summary describes a process by which ICANN and contracted parties (both ICANN-

[1] See: http://gnso.icann.org/en/issues/whois-privacy/council-rpt-18jan06.htm

confirm that the proposed changes do not change the intent of the policy recommendations. The proposed changes may also be presented to the Board of Directors for their review, before implementation.

A public comment forum has been opened to gather community input on the existing Whois Procedure, including proposals on how the Whois Procedure may be modified while respecting the intent of the original GNSO policy recommendations, the proposed process for review, as well as the proposed questions as outlined in this paper. Comments may be submitted until 12 June.

## The Current ICANN Procedure for Handling Whois Conflicts with Privacy Law

This section describes the Whois Procedure as implemented today, and identifies issues for consideration in the upcoming review.

### *Step one: Notification of Whois proceeding*

The Whois Procedure currently requires a registry or registrar first to demonstrate evidence of potential conflict with national law. An effective procedure would emphasize consistent contractual requirements, while respecting applicable laws, and include review of valid and authoritative documentation as evidence of an issue to be addressed. The questions raised below aim to guide the discussion so as to reach a resolution that meets these objectives.

Some have expressed concern that the current Whois Procedure puts the contracted parties in the position of first signing an agreement that requires them to provide services that may contradict local laws. These stated concerns raise the question of the appropriate threshold to invoke a formal procedure.

In contrast, the data retention waiver process in the 2013 RAA first requires either a ruling of, or written guidance from, a governmental body of competent jurisdiction, or a legal opinion from a nationally recognized law firm in the jurisdiction, whose analysis indicates a conflict between the contractual requirements and local law. Considering all these issues, it would be helpful to hear from the community on the following questions:

1.1 Is it impractical for ICANN to require that a contracted party already has litigation or a government proceeding initiated against it prior to being able to invoke the Whois Procedure? How can the triggering event be meaningfully defined?
1.2 Alternatively, does that suggest the Whois Procedure has not been invoked because of an absence of enforcement action?
1.3 Are there any components of the triggering event/notification portion of the RAA's Data Retention Waiver process that should be considered as optimal for incorporation into a modified Whois Procedure?
1.4 Should parties be permitted to invoke the Whois Procedure before contracting with ICANN as a registrar or registry?
1.5 Would reaching different solutions with different registries with respect to exemption or modification of Whois requirements in light of different laws in various jurisdictions raise questions of fair and equal treatment?

### *Step two: Consultation*

Currently, the Whois Procedure calls for consultations between ICANN and the contracted party. Where appropriate, ICANN will consult with local/national enforcement authorities or other claimants together with the contracted party. In addition, it prescribes that ICANN

seek counsel from the relevant national government, pursuant to advice from the GAC. Under 2.3 of the Whois Procedure, the contracted party must notify ICANN of any changes it proposes to make as a result of legal/regulatory action affecting Whois-related contractual obligations.

With an emphasis on supporting compliance with the contractual Whois obligations to the greatest extent possible, identifying the relevant parties to the process is a crucial next step. In addition to ICANN and the contracted party, the relevant data protection authorities (DPAs) or other legal/governmental entities, as well as intellectual property and trademark owners, and the general public have an interest in how Whois requirements are implemented in each jurisdiction. Public interest considerations may also be relevant insofar as accessing domain name registration information via Whois is an important tool for transparency. In addition, as the process reflects ICANN's values of transparency and stakeholder engagement, all affected parties should be made aware of any issues and provided opportunities to contribute to the discussion.

Looking ahead, it will be important to consider how to include all the relevant parties' interests in the resolution of WHOIS requirements' conflicts with national laws.

2.1 As the current Whois Procedure incorporates consultation between the contracted party and ICANN, as well as relevant legal or other government authorities, are there other relevant parties who should be included in this step? What should their roles be in the consultation process?

### *Step three: Analysis and recommendation*

This provision assumes that the parties can reach a compromise that will meet most of both parties' objectives. According to the Whois Procedure, any solution would be presented to the ICANN Board for a decision after preparation of a public report and recommendation. Prior to the publication of that public report and recommendation, the registrar/registry may request certain items be redacted from the report, such as communications between the contracted parties, and ICANN's General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. In the ideal scenario, this step would include detailed guidelines for ensuring confidentiality, as necessary, balanced with the openness and transparency practices of ICANN. The registrar/registry is also provided a chance to comment to the Board on the public report and recommendation, which they may request to be kept confidential prior to any Board resolution. The report's recommendation should include justification for the decision, including the anticipated impact on operational stability, reliability, security, or global interoperability of the DNS.

3.1 How is an agreement reached and published? What standards for confidentiality, accountability and transparency are considered in advance of publication?
3.2 If there's an agreed outcome among the relevant parties, should the Board be involved in this procedure? Who should make the final determination to grant an exemption or modification?

### *Step four: Resolution*

Under the Whois Procedure, a determination is made by the Board, which considers the ICANN public report and recommendations, and can take one of four possible actions: approving or rejecting the recommendation with or without modifications; seeking additional information from affected parties; scheduling a public comment period on the

public report and recommendation; or referring the report to the GNSO for its comments. A clearly defined, timely decision-making process is necessary for an effective resolution process.

Because granting or denying exemptions or modifications can have broader impacts beyond the single applicant, public dialogue may be an important piece of determining a resolution. To that end:

4.1 Would it be fruitful to incorporate public comment in each of the resolution scenarios?
4.2 What other avenues for engagement may be used to reach a mutually agreeable resolution?

### *Step five: Public notice*

Publication of the Board's decision, together with the public report and recommendation, on the ICANN website is the final step. If an exemption or modification is granted, step five provides that ICANN will issue an explanation for the organization's decision to forego enforcement of compliance with the contractual provision in question or allow modification of the requirement. The Board will publish its rationale for each decision.

Looking ahead to ongoing implementation of exemptions or modifications once a resolution is reached:

5.1 What impacts would an exemption or modification have on the contract, and on others in the same jurisdiction?
5.2 Is the exemption or modification termed to the length of the agreement? Or is it indefinite as long as the contracted party is located in the jurisdiction in question, or so long as the applicable law requiring the objection is in force?
5.3 Should an exemption or modification based on the same laws and facts then be granted to other affected contracted parties in the same jurisdiction without invoking the Whois Procedure?

### *Step Six: Ongoing review*

As Step Six anticipates "substantial input from the relevant registries or registrars, together with all constituencies," ICANN encourages feedback in the areas discussed in this paper. The questions raised above are intended to open this discussion, but there will almost certainly be other questions and suggestions from within the community to consider.

## Related processes

Although the Whois Procedure has not been formally invoked, various other mechanisms have been used by ICANN and contracted parties to address concerns related to contractual obligations and applicable laws. These processes are described in this section as background information, for additional consideration in reviewing the existing Whois Procedure.

### *Comparison of available processes*

| | Whois Procedure | RSEP | RAA Data Retention Waiver |
|---|---|---|---|
| **How the procedure starts** | Notify ICANN after receiving notice of investigation, litigation, regulatory proceeding or other civil action | Registry submits request to ICANN, which completes a preliminary determination | Based on a written opinion from a nationally recognized law firm, or ruling or written guidance from a government body, registrar may apply to ICANN for a waiver. Note: If ICANN has previously waived compliance with the requirements for a registrar located in the same jurisdiction and the applying registrar is subject to the same applicable law, the registrar may request the same waiver. |
| **Consultation/negotiation process** | Consult with ICANN and relevant national government | ICANN may approve the request, refer the matter to a Competition Authority, and/or refer the request to RSTEP for a security and stability review | ICANN will discuss the matter with registrar in good faith in an effort to reach a resolution. |
| **Resolution** | Board approves or rejects staff recommendation, seeks additional information, schedules public comment or refers to the GNSO for review and comment. | The request is approved or denied by ICANN; some requests have required Board review and approval. | Registrar works with ICANN to reach a solution and ICANN may issue a waiver or modify the requirements. |

### *Registry agreements and relevant specifications, procedures*

Specification 4 of the new gTLD registry agreement outlines the requirements for Whois data retention and display. Some registries have used the Registry Services Evaluation Process (RSEP) to initiate changes to Whois requirements in their registry agreements. The

RSEP is first used to evaluate security, stability and competition issues as they relate to any proposed changes in registry services. If a new service is not found to raise any concerns in these regards, it would then be evaluated to determine if the request merits an amendment to the registry agreement. The RSEP defines registry services to include, among others, receiving data related to domain name registrations, as well as disseminating contact information for domain name registrations.[2] For example, the .CAT registry used the RSEP in 2011 to propose an opt-in system for making WHOIS data publicly available for individual registrants – referred to as "natural persons" – as opposed to "legal persons," such as corporations or individuals who are legal representatives of a registrant. An amendment to .CAT's registry agreement incorporating this proposal was approved by the ICANN Board in 2012.[3]

### *The 2013 RAA's Data Retention Specification and waiver request process*

The most recent RAA was approved in June 2013. A number of the somewhat more complex provisions, however, were not made effective until 1 January 2014, in order to allow registrars time to transition their systems and procedures. Among the delayed requirements was that registrars collect and retain certain data elements that were not previously required. These new data collection and retention requirements, set out in a "Data Retention Specification" to the RAA,[4] were amendments incorporated to address the recommendations of law enforcement and intellectual property owners (as supported by the GAC.) Many of the items of data required to be collected under the 2013 RAA are unchanged from the 2009 RAA.

Significantly, unchanged from past accreditation agreements are the requirements that registrars must notify registrants of the purposes for the collection of any personal data, the intended recipients of the data, which data are obligatory, how to access and rectify any data, and the requirement that data collection may only be conducted with the consent of the registrant. These requirements are broadly consistent with data privacy and protection expectations and legal requirements in most jurisdictions, and they have underpinned the successful operation of the Internet's shared registration system for at least the past 15 years.

During the negotiation of the 2013 RAA, some registrars expressed concerns that local or national data protection and other privacy laws might make it difficult for them to comply with the new requirements, while law enforcement and intellectual property owners advocated for retention of information in the Data Retention Specification. Accordingly, the 2013 RAA's Data Retention Specification includes a provision concerning waivers to deal with cases where compliance with the data collection and/or retention requirements might be prohibited by applicable law. Indeed, ICANN contracted parties are obligated to abide by any applicable laws.

Under the Process for Handling Registrar Data Retention Waiver Requests, registrars must present ICANN with an opinion from a law firm or a ruling or guidance from a governmental body of competent jurisdiction that states that collecting or retaining one or more data

[2] See 1.1.B, Registry Services: http://www.icann.org/en/resources/registries/rsep/policy
[3] See: http://www.icann.org/en/about/agreements/registries/cat/amendment-2-17jul12-en.htm
[4] See: http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#data-retention

elements in the manner required by the specification violates applicable law.[5] A general assertion that the data collection and Data Retention Specification requirements are unlawful is not sufficient. Rather, the waiver request must specify the applicable law, the specific allegedly offending data collection and/or retention requirement(s), and the manner in which the collection and/or retention violates the law. This specificity helps ICANN to determine the appropriate limitations on the scope and duration of data collection and retention requirements when granting the waiver. This will also help ICANN balance the interests of the registrar, governments, and the broader Internet community when considering granting such waivers.[6]

The 2013 RAA calls for ICANN and the registrar to discuss data retention waiver requests in good faith in an effort to reach a mutually acceptable resolution. The Data Retention Specification contemplates potential future modifications to the Whois Procedure in section 2: "Until such time as ICANN's Procedure for Handling Whois Conflicts with Privacy Law is modified to include conflicts relating to the requirements of this Specification and if ICANN agrees with Registrar's determination, ICANN's office of general counsel may temporarily or permanently suspend compliance and enforcement of the affected provisions of the Data Retention Specification and grant the waiver request. Prior to granting any exemption, ICANN will post its determination on its website for a period of thirty (30) calendar days." ICANN contemplates that waivers should be tailored to limit the scope and/or duration of data collection and retention as necessary to comply with local law, but will not completely eliminate all requirements for data collection and retention.

Because each country may interpret its data privacy requirements differently, ICANN is working through each of the submitted requests to change Whois data retention requirements, country-by-country. The complexity and diversity of national privacy laws has resulted in considerable investments of time and resources by ICANN and registrars alike. In countries with data privacy laws applicable to registrars, ICANN has found that restrictions generally permit the retention of registration data, but only for legitimate purposes, and for a period no longer than is necessary for the purposes for which the data were collected or for which they are further processed. What constitutes a legitimate purpose and how long data can be retained are complicated questions, and the answers may vary from one country to the next, even within the EU. All EU member states are subject to the same data privacy directive, but individual member state's legislation implementing the data privacy directive may differ in significant respects.[7]

In all, 15 requests to waive the Data Retention Specification in the 2013 RAA have been submitted by registrars, all from within the European Union.
For example, on 24 January 2014 ICANN posted the first "Notice of Preliminary Determination to Grant Registrar Data Retention Waiver Request" to Registrar OVH SAS in France.[8] The waiver, which was approved 12 March 2014, permits OVH SAS to maintain certain information specified in part of the Data Retention Specification for the duration of its sponsorship of each registration and for a period of 1 additional year thereafter, rather

[5] The ICANN Process for Handling Registrar Data Retention Waiver Requests is available here: http://www.icann.org/en/resources/registrars/updates/retention/waiver-request-process
[6] The Process for Handling Registrar Data Retention Waiver Requests was subject to the same public comment procedure as the rest of the 2013 RAA.
[7] ICANN sought public comment on the 2013 RAA Data Retention Specification Data Elements and Legitimate Purposes for Collection and Retention: http://www.icann.org/en/news/public-comment/raa-data-retention-spec-21mar14-en.htm
[8] See: http://www.icann.org/en/news/announcements/announcement-27jan14-en.htm

than 2 years thereafter. The data that ICANN requires to be retained for 180 days would continue to be retained for that 180 day period. ICANN and its outside counsel have been engaged in talks with several other registrars about their waiver requests. On 21 March 2014, ICANN posted another "Notice of Preliminary Determination to Grant Registrar Data Retention Waiver Request" for NAMEWEB BVBA, based in Belgium. The waiver would grant NAMEWEB BVBA the same exemption as OVH SAS.[9] On 7 May 2014, a "Notice of Potential Grant of Registrar Data Retention Waiver Request," was posted for registrar Blacknight Internet Solutions Ltd., which is based in Ireland.[10] In this instance, the waiver would change the 2-year retention requirement to 1 year, and the 180 days to 90 days.

The EU's Article 29 Working Party has also written to ICANN to express its concerns about the legality of the requirements of the 2013 RAA within the EU.[11] ICANN has also received correspondence from the European Data Protection Supervisor urging ICANN to waive the retention period under the 2013 RAA Data Retention Specification to all registrars operating in EU member states.[12]

## Conclusion

ICANN welcomes comments from community members on possible amendments to the Whois Procedure, recommendations for a new process to replace the WHOIS Procedure, or other suggestions regarding the proposed process for conducting the review of the WHOIS Procedure that may ensure the best possible outcome for all interested parties.

[9] See: https://new.icann.org/news/announcement-2-2014-03-21-en

[10] See: http://www.icann.org/en/news/announcements/announcement-07may14-en.htm

[11] In April 2014, the European Court of Justice ruled the EU Data Retention Directive – which requires telecommunication companies to retain citizens' communication data for up to two years – to be "invalid." It is unclear how this ruling will impact ICANN's current contractual agreements with EU-based registries and registrars. As the regulatory landscape changes, it is important that ICANN procedures and policies be adaptable, as necessary.

[12] See: http://www.internetnews.me/wp-content/uploads/2014/04/14-04-17_EDPS_letter_to_ICANN_EN.pdf