

The ICANN GNSO “Business Constituency”



Comment on Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law: Process and Next Steps

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

Comment

On 22-May-2014, ICANN opened a public comment period to solicit community feedback on the Whois National Law Conflict Procedure.¹ The Business Constituency submitted comments to this proceeding on August 5, 2014.² The IAG Initial Report and Proposed Revisions to the ICANN Procedure for Whois Conflicts With Privacy Law opened on October 5, 2015.³ The report sought comment on five specific questions related to the development of alternate triggers. The Business Constituency addressed these questions in a submission on November 17, 2015.⁴

In its comments, the Business Constituency:

1. Highlighted the importance of the rule of law, submitting that ICANN contracts cannot and should not supersede the law in any jurisdiction;
2. Urged that businesses be given a direct opportunity to seek exemption; and
3. Supported the inclusion of the Contracted Party Request Trigger as an alternative to having governments alone drive the conflict resolution process.

The final report from the IAG was submitted to the GNSO Council for consideration at its May 2016 Meeting. The Revised ICANN Procedure for Handling WHOIS Conflicts With Privacy Law details how ICANN will respond to a situation where a registrar/registry provides 1) notification of a Whois proceeding, or 2) a written statement from a government agency with legal authority to enforce the national law indicating inconsistency between national law and contractual obligations of its ICANN contract regarding the collection, display, and distribution of personal data via WHOIS.

ICANN now seeks public comment on the assessment of the practicality and feasibility of the additional trigger recently added to the WHOIS Procedure, in comparison to the existing trigger to invoke the WHOIS Procedure as well as other triggers.⁵

¹ <https://www.icann.org/public-comments/whois-conflicts-procedure-2014-05-22-en>

² <http://www.bizconst.org/wp-content/uploads/2014/08/BC-comment-on-WHOIS-conflicts-with-national-law.pdf>

³ <https://www.icann.org/publicc-comments/iag-whois-conflicts-privacy-2015-10-05-en>

⁴ <http://www.bizconst.org/assets/docs/positions-statements/bc-comment-on-whois-conflict-procedure.pdf>

⁵ <https://www.icann.org/public-comments/whois-privacy-law-2017-05-03-en>

The Business Constituency addresses this inquiry under the headings below.

Notification of Whois Proceeding

The Business Constituency supports the list of supporting materials that is outlined in Step One of the Whois Proceeding. The report lists:

1. summary description of the nature and status of the action;
2. contact information for the responsible government agency or other claimant;
3. text of the applicable law involved; and
4. description of efforts undertaken to meet the requirements.

The Business Constituency believes these supporting materials can be practically and feasibly provided to ICANN staff by a registry/registrar, and that these materials will ensure a high threshold for conflict resolution and provide a strong factual basis for any exceptions moving forward.

Written Statement From Relevant Government Agency with Authority to Enforce the National Laws

The Business Constituency maintains some 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, in the absence of a Whois Proceeding. There could be an instance where a government is unable or unwilling to provide a written statement that 1.) identifies and analyzes the inconsistency the agency has found between national law and contractual obligations and 2.) certifies the agency's legal authority to enforce the national law which it has found to be inconsistent, and that it has jurisdiction over the contracted party for the purposes of such enforcement.

Moreover, even if provided, a statement of possible inconsistency between national law and contractual obligations, without more, does not itself connote a potential breach of national law that should necessitate an outright exemption to contractual obligations around Whois.

The Business Constituency 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 (e.g., properly written consent request and accompanying purpose statement for the collection of Whois data), 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.

Because of the rarity of the need for exceptions (none have been sought to date), this amendment could facilitate the reasonable evolution of the current policy. The move away from requiring governments to initiate all requests is an overall improvement.

Conclusion

The Business Constituency has highlighted its concern regarding the practicality and feasibility of the alternative trigger in its past comments. We continue to urge that exceptions be narrowly applied, and that exemptions and modifications to contracts be geographically specific.

We also urge that, as part of the ICANN Procedure for Whois Conflicts With Privacy Law, this alternative trigger process include a requirement for a registrar/registry to propose solutions to rectify perceived inconsistencies with national law rather than an outright request for exemption from contractual obligations around Whois.

Finally, as the Business Constituency has stated in previous filings, the community should serve as a check against abuse of the conflict resolution process, and should be allowed to provide comment and input in the exemption process.

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This comment was drafted by Cheryl Miller and Susan Kawaguchi.

It was approved in accord with the BC charter.