ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

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VIA EMAIL TO: comments-iag-whois-05oct15@icann.org

Dear Mr Hedlund,

IAG Initial Report and Proposed Revisions to the ICANN Procedure for Whois Conflicts with Privacy Laws

We write in response to the Implementation Advisory Group's proposals to improve the procedure to address conflicts between a contracted party's WHOIS obligations and local/national privacy laws or regulations (WHOIS Conflicts Procedure). Our response begins from the position that there should not be any room for doubt as to whether data protection law or ICANN's contractual obligations should take precedence: it should of course be the data protection law, in every instance.

Our concerns are well addressed by the minority view statements of Christopher Wilkinson and Stephanie Perrin, which we broadly support. In short, the very notion of a policy under which ICANN can grant "permission" to a contracted party to comply with its own applicable local law evinces an almost comical degree of hubris on ICANN's part. That such a policy can only be invoked at the point where a contracted party is actually under investigation by its local data protection authorities for contravening the law takes the policy beyond comedy into farce.

As Mr Wilkinson aptly points out, the solution is rather obvious; rather than requiring registries or registrars to comply with ICANN policies that infringe applicable local law, "ICANN should adopt, globally, international Best Practice in the matter of Privacy policy and Data Protection" that would obviate the need for any WHOIS Conflicts Procedure. We acknowledge that this is part of a broader discussion on the Next-Generation gTLD Registration Directory Services to Replace WHOIS, on which we have also provided comments.[1]

In the meantime, the WHOIS Conflicts Procedure can only be regarded as a stopgap measure to ensure that ICANN's contractual arrangements are suspended to the extent

1 https://forum.icann.org/lists/comments-rds-prelim-issue-13jul15/msg00002.html

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that these would otherwise lead a contracted party into infringing data protection law.

To determine whether the locally applicable data protection law conflicts with the contracted party's obligations is not a particularly difficult question, nor one that needs to be answered directly by the government. Rather, each contracted party should be entitled to rely on its own understanding of applicable law in balancing its compliance with contractual and legal obligations – as it does in so many other areas of its business, such as ensuring compliance with local censorship, licensing, and consumer protection laws.

This understanding may be informed by legal advice, but it ought not to be necessary for every contracted party operating from the same jurisdiction to obtain legal opinion that merely restates well-established law and practice. Rather, the onus should fall on ICANN, if it believes that a contracted party's failure to execute its contractual requirements is unconnected to its local legal obligations, to obtain a legal opinion on the matter that would justify it in taking enforcement action under its agreement with that party.

Thus the WHOIS Conflicts Procedure can be quite narrow: it should simply affirm that contracted parties may, in good faith, self-assess their own obligations under applicable local law, and forbear from executing contractual provisions that are in breach of those obligations. The document would then set out a procedure whereby ICANN could obtain a legal opinion as a precondition of taking any enforcement action against a contracted party alleged to be in non-compliance with its contractual requirements for reasons unconnected with local law.

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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