



19 May 2008

Janis Karklins
Chairman of the Governmental Advisory Committee
Ambassador of Latvia to France

Dear Janis

RE: Response to questions raised in the GAC – ICANN Board Open Session in New Delhi regarding the Implementation of the Policy for Handling WHOIS Conflicts with Privacy Law

During the last open session between the ICANN Board and the GAC in New Delhi, the UK representative raised questions about the implementation of the Policy for Handling WHOIS Conflicts with Privacy Law and in particular, how the ICANN procedure mapped to advice received from the GAC in this area. The specific areas of concern being:

- I. It appeared that ICANN proposed to implement a uniform process for considering all derogation requests, in spite of the general indication from the GAC that a uniform process was not workable; and
- II. Whether an entity could tell whether WHOIS contractual requirements required breaking the law, without acting in a way that would result in prosecution.

I.

The GAC advice from the Los Angeles meeting noted that due to the complexity of the issue related to the diversity of national policies and procedures among GAC members the GAC does not believe a uniform process is workable (<http://gac.icann.org/web/communiqués/gac29com.pdf>). The question for the implementation then, was whether the published procedure could take into account the difference in national laws that the GAC highlighted.

Accordingly, the published process seeks to provide the flexibility required by indicating that specific cases should be referred to the relevant national government for advice on the authority of the request for derogation from the ICANN gTLD WHOIS policy. There were three amendments made to the draft procedure (<http://www.icann.org/processes/revise-draft-whois-procedure-18dec07.htm>) to provide for the participation of the relevant national governments. In each case, that participation and the process for receiving will depend on that government. The referral to the government can, according to the procedure, take place in three ways: the entity seeking the derogation should work cooperatively with the government (§ 1.4), as appropriate, ICANN will consult with the governmental authority (§ 2.1.1), and ICANN will request advice on the authority for the derogation request (§ 2.1.2).

The incorporation of these amendments into the procedure provides, it is believed, the flexibility to deal with diversity of national policies and procedures by allowing the provision of advice of national governments in each case.

II.

Another concern raised was whether the rules require an entity to break the law in order to determine that WHOIS contractual requirements were in conflict with national laws. An entity cannot be told to break the law.



The procedure seeks to address this concern in its opening:

“At the earliest appropriate juncture on receiving notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance with the provisions of the [agreements]...”

[emphasis added]

The words “earliest possible juncture” and “other government ... action” were chosen so as not to require a formal law enforcement action and encourage entities to address the issue prior to the commission of a potentially illegal act whenever that is possible. Although the procedure was not in place at the time, the action taken in the Telnic request for derogation demonstrates that such a request can be accommodated prior to the commission of an act that may be determined to be illegal.

Conclusion

ICANN carefully considered the GAC advice regarding the formulation of this new policy implementation. While that plan lays out a single procedure, the amendments to that procedure are intended to provide multiple paths and flexibility in the process to accommodate differences among national governments. In addition, by involving governments, the policy implementation seeks to ensure that requests for derogation are carefully considered and granted only upon the citation and confirmation of the relevant authority. Finally, options provided in the procedure enable derogation requests even when a “dispute” between a government and an entity seeking a waiver has not yet risen to the level of a prosecution.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Paul D. Twomey", written in a cursive style.

Paul Twomey
President and CEO
Internet Corporation for Assigned Names and Numbers