

Note to reviewers: This is a working document used to draft the policy language. Please note that the section number referenced to the policy and the language may have been changed.

Rationale Doc: Retention Requirements Analysis

Background:

EPDP Phase 1 Recommendation 15: “1. In order to inform its Phase 2 deliberations, the EPDP team recommends that ICANN Org, as a matter of urgency, undertakes a review of all of its active processes and procedures so as to identify and document the instances in which personal data is requested from a registrar beyond the period of the 'life of the registration'. Retention periods for specific data elements should then be identified, documented, and relied upon to establish the required relevant and specific minimum data retention expectations for registrars. The EPDP Team recommends community members be invited to contribute to this data gathering exercise by providing input on other legitimate purposes for which different retention periods may be applicable.

EPDP Phase 1 Recommendation 15: “2. In the interim, the EPDP team has recognized that the Transfer Dispute Resolution Policy (“TDRP”) has been identified as having the longest justified retention period of one year and has therefore recommended registrars be required to retain only those data elements deemed necessary for the purposes of the TDRP, for a period of fifteen months following the life of the registration plus three months to implement the deletion, i.e., 18 months. This retention is grounded on the stated policy stipulation within the TDRP that claims under the policy may only be raised for a period of 12 months after the alleged breach (FN: see TDRP section 2.2) of the Transfer Policy (FN: see Section 1.15 of TDRP). This retention period does not restrict the ability of registries and registrars to retain data elements provided in Recommendations 4 -7 for other purposes specified in Recommendation 1 for shorter periods.”

EPDP Phase 1 Recommendation 9: “The EPDP Team recommends that updates, if needed, are made to the contractual requirements concerning the registration data elements for registries and registrars to transfer to ICANN Org the domain name registration data that they process when required/requested for purpose 5 (Contractual Compliance). (Note: Current language within the Contracts currently provides the appropriate scope for contractual compliance requests and subsequent transfer (e.g. Art 2.11 new gTLD Base Registry Agreement) (For illustrative purposes, please see Annex D - contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users). **Registrars and Registries are required to transmit to ICANN org any RDS elements that are requested for Purpose 5.** To clarify, the data elements listed in Annex D are the aggregate of data elements that ICANN Compliance may request. As noted in the Summary of ICANN Organization’s Contractual Compliance Team Data Processing Activities “If the Contractual Compliance Team is unable to validate the issue(s) outlined in a complaint because the publicly available WHOIS data is redacted/masked, it will request the redacted/masked registration data directly from the contracted party (or its representative). In these instances, the Contractual Compliance Team will only request the redacted/masked data elements that are needed to validate the issue(s) outlined in the

complaint”. Note, this recommendation does not exclude other information required by ICANN Contractual Compliance to enforce ICANN consensus policies and contracts.”

Based on the direction provided by the EPDP team, and the implementation work to date, the following is the draft Registration Data Policy language to implement Recommendation 15.2:

“12. Registrars MUST retain all data collected or generated pursuant to Section [6] of this Registration Data Policy for a period of no less than fifteen (15) months following the life of the registration.”

Main Inputs from IRT

There are currently diverging interpretations within the IRT as to the purpose of retention of registration data for the time period after the life of the registration; specifically, whether the data elements required to be retained under the TDRP may be processed for additional purposes.

Some members of the IRT believe that Section 12 of the draft Registration Data Policy may not be compliant with Article 5(1)b of the General Data Protection Regulation (GDPR), which provides that personal data shall be “collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.” For instance, if data elements retained for purposes of responding to a TDRP dispute are processed for other purposes (e.g., responding to a Compliance complaint), this may not be compatible with the original purpose. Furthermore, such processing activities may not be disclosed prior to processing, as required.

Given that EPDP Recommendation 15.2 specifies that “registrars be required to retain only those data elements deemed necessary for the purposes of the TDRP,” some IRT members have suggested that similarly specific language (“for the purposes of the TDRP”) should also be included in Section 12 of the draft Registration Data Policy regarding retention.

Rationale for the Current Baseline policy language:

The TDRP is mentioned in the policy recommendation as a reference case for setting the recommended retention period, as it was identified based on an initial look as having the longest justified retention period of fifteen months following the life of the registration plus three months to implement the deletion, however, the policy recommendation recognized that a deeper dive was needed into ICANN org’s active processes and procedures. The recommendation does not state that this data should be retained in the case of a TDRP proceeding only.

Further, the recommendation does not exclude other purposes for which such data must be retained and does not limit ICANN org from requesting registration data for other purposes compliant with data protection laws (as will be specified in the Data Protection Terms).

In addition, per EPDP Recommendation 15.1, ICANN org reviewed its active processes and procedures to identify and document the instances in which it would request registration data elements that were subject of the EPDP from a registrar beyond the period of the life of the registration with the understanding that existing data retention requirements that were not the

subject of the EPDP remain in place. These include section 3.4 of the Registrar Accreditation Agreement (RAA) and section 1.2 of the Data Retention Specification which covers retention of certain forms of data for a period of 180 days following the relevant transaction. The results of ICANN org's review were provided to the EPDP Phase 2 team in November 2019. For more details on the results of ICANN org's review, see the Data Retention: Review of ICANN Org Processes

https://mm.icann.org/pipermail/gnso-epdp-team/attachments/20191102/e8cd309e/15.1DataRetention_ReviewofICANNOrgProcesses-1nov19-0001.pdf

Furthermore, Article 5(1)(b) of the GDPR requires that personal data must only be processed for a specified, explicit and legitimate purpose and “further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes.” The purposes identified in the Data Retention: Review of ICANN Org Processes document provided to the EPDP Team in response to Recommendation 15.1 are in line with the requirements of the GDPR and support the public interest and expectation by individual users that the Internet be a safe and secure place by ensuring safety and security. As such, the IPT's position is that the provision on retention of personal data should not limit ICANN org from requesting registration data for other purposes compliant with data protection laws.

Hello Dennis and IPT,

Thank you for laying out the context for this discussion and the IPT's view in the Rationale Document. The CPH members of the IRT have several notes.

1. Accuracy of rationale doc.

The draft recommendation language provided in the rationale doc does not match the “OneDoc”; it should refer to the registrar's sponsorship rather than the life of the domain.

2. GDPR Article 5(1)(b) is not a lawful basis for data processing.

There are several concerns with basing the requirement for retention on GDPR Article 5(1)(b); primarily, the issue is that Article 5 outlines **principles** for processing data, not **lawful bases** for processing data.

Instead, the legal basis for processing data, for both primary and secondary purposes, is found in GDPR Article 6. For processing in the public interest, the only option is 6(1)(e). That said, it is important to note that the basis for processing data in the public interest

as laid out in Art. 6(1)(e) must be laid out in Member State Law or Union Law in order to be a lawful data processing activity.

3. The “public interest” is not clearly defined and related processing is limited in the GDPR.

“Public Interest” is yet to be defined by ICANN or the ICANN community; there are certainly differing and possibly even conflicting definitions in various jurisdictions with respect to data protection law and data protection authorities.

Recital 156 of GDPR Article 5 notes several other considerations for any action related to archiving in the public interest. “Archiving purposes in the public interest” involves an assessment of the Controller's ability to conduct such processing in a way that makes the data anonymous or pseudonymous and envisions protections provided by Member State law for such processing.

4. Purposes must be defined before processing takes place.

Purposes for processing data (both primary and secondary, or “further” processing) must be defined before the data is initially processed for its primary purpose. Without defining the primary purpose for retaining the data, a secondary purpose cannot be evaluated for compatibility.

Some examples of potential purposes for processing retained data are given in this Rationale Document, such as an ICANN Compliance complaint occurring after the registrar's sponsorship of the domain, but it has not been demonstrated that the data is required in order to address the complaint; since the goal of the TempSpec and the EPDP is to update existing requirements to be GDPR-compliant, if the examples are now not compliant this demonstrates that they are no longer legally acceptable data processing activities and they should be ceased. Instead, the example issues could be addressed in other ways: a registrar can confirm data that Compliance already has on file rather than providing it to Compliance, or similarly, a registrar can confirm that the RNH was notified as required without either side having to disclose the personal data of the RNH.

The data audit provided by ICANN and referenced in the Rationale Document does not clearly indicate a purpose for processing retained data other than the TDRP; if further information were provided we would certainly examine the purposes ICANN Compliance puts each data element to and why they may be necessary.

The principle of data minimization (GDPR Art 5(1)(c)) must be respected at all times: only data specifically required for TDRP is to be retained under this data processing purpose unless and until another retention processing purpose is identified and documented.

Unless and until a specific purpose other than TDRP is identified, the Policy can only require the processing of retained data for this one purpose (responding to TDRP disputes), and so the retention requirement in the Policy must be limited accordingly.

The CPH specifically requests the following:

1. ICANN Staff provide to the IRT a list of what data elements are specifically required for the TDRP.
2. The Data Retention section of the OneDoc be updated such that it clearly indicates the retained data are only to be processed in the course of addressing a TDRP issue. This can be achieved by adding the phrase “for the purpose of the TDRP” to the end of the sentence (following “sponsorship of the registration.”)

Thank you,

The CPH IRT Team.