

Questions for ICANN58 Data Commissioners Panel
developed by members of the RDS PDP WG

Introduction

The following questions have been drafted by members of gTLD Registration Directory Services (RDS) Policy Development Process (PDP) working group for consideration by the panel of Data Commissioners who will participate in the ICANN58 meeting in Copenhagen.

This working group's charter includes "analysing the purpose of collecting, maintaining and providing access to gTLD registration data (...) and safeguards to protect that data." On that basis, the working group is tasked to "determine if and why a next-generation Registration Directory Service is needed to replace WHOIS (...)" – that is, the current system which provides public access to registration data collected when a domain name is registered. In addition, this working group is tasked with "creating policies and coexistence and implementation guidance to meet those needs."

It is hoped that Data Commissioner insights into the following questions might enhance the working group's understanding of the European Union data protection framework and inform the working group's deliberations about the application of data protection laws to gTLD registration data and directory services policies.

Purpose

1. Our working group is now deliberating upon the purpose of domain name registration data and the registration directory system that provides public access to that data. Can you please help us understand what the data protection supervisors have meant over the years when they have told ICANN to specify the purpose of WHOIS? How would you assess the purpose of collecting, processing, maintaining and providing access to gTLD registration data? For example, can you help us understand what a purpose applies to when it comes to registration data or directory services? Where will purpose be applied (and not be applied) in registration data and directory services policies? What criteria should be used to determine legitimate purpose(s)? What is the difference between "primary" and "secondary" purposes and how does that affect all of the above?

2. Article 6(1)(b) Directive provides that personal data may only be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes (Article 7). Processing of personal data is allowed to a limited number of legitimate grounds, specified in Article 7 Directive. Under what circumstances might the publication of registration data elements that are personal data be allowable?

Registration Data Elements

3. Considering that gTLD registration data elements may refer to mere technical information, information that may relate to legal persons and information that may directly relate to an identified or identifiable natural person, only the last one of which has consequences from a data protection perspective, how do you think consistent policies for a Registration Directory Service could best be developed?

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For example, it is our understanding that “personal data” under the EU Data Protection Directive and the General Data Protection Regulation is specified if data relates to an identified or identifiable natural person. Currently, Registrars and Registries display the following info through a public directory service called WHOIS without any access restrictions: the domain name registrant’s full name, street address, zip code, country code, telephone number and email address. Is this “personal data” as specified by the Directive and the General Data Protection Regulation, regardless of whether the registrant is a legal person or a natural person?

4. Article 5 of the EU commerce directive requires service providers to disclose their contact information. Does this directive apply to domain name registrants? Does that mean that registrants that are service providers in the EU could be required to have their contact data displayed in a registration directory service?

5. Below is an example of “thin data” elements made publicly accessible in today’s WHOIS system for every registered gTLD domain name. Do you believe that any of the following data elements are considered personal information under the General Data Protection Directive, and why?

Domain Name: CNN.COM
Registrar: CSC CORPORATE DOMAINS, INC.
Sponsoring Registrar IANA ID: 299
Whois Server: whois.corporatedomains.com
Referral URL: <http://www.cscglobal.com/global/web/csc/digital-brand-services.html>
Name Server: NS-1086.AWSDNS-07.ORG
Name Server: NS-1630.AWSDNS-11.CO.UK
Status: clientTransferProhibited <https://icann.org/epp#clientTransferProhibited>
Status: serverDeleteProhibited <https://icann.org/epp#serverDeleteProhibited>
Status: serverTransferProhibited <https://icann.org/epp#serverTransferProhibited>
Status: serverUpdateProhibited <https://icann.org/epp#serverUpdateProhibited>
Updated Date: 15-feb-2017
Creation Date: 22-sep-1993
Expiration Date: 21-sep-2018

Access to Registration Data for Criminal and Abuse Investigations

6. It is our understanding that the suppression of criminal offences is an exemption to the application of the General Data Protection Regulation. If or when could this exemption apply to private cybersecurity firms investigating crime, civil offenses, or abuses in general by using data obtained through a registration data directory service?

7. If the application of General Data Protection Regulation provisions led to a completely private domain name registration database, where the vast majority of registrants refused to

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give access to their data, should the economic repercussions of closing the database be taken into account, to evaluate whether or not to apply the General Data Protection Regulation? For example, would economic repercussions be seen as threatening the 'monetary interests of the State' or the economic rights of private cybersecurity firms and the IP industry?

Personal Privacy/Human Rights

8. Today, a public access WHOIS directory service enables anyone who may be the victim of defamation, threats, harassment, etc., to look up the name of a domain name registrant (which may or may not correspond to the owner of a website hosted at that domain name), as a deterrent to such attacks. Do you believe this deterrent effect can constitute a public service, instead of protecting the privacy rights of the perpetrators? This effectively contributes to the fight against online violence against women, who are often the victims in such cases.

9. Under the General Data Protection Regulation, is consumer protection an objective pursued by the State which would fall into the category of protecting the rights and freedoms of others? If yes, do you consider anonymous public access to registration data an additional protection given to consumers, to help them avoid scams?

10. With regards to General Data Protection Regulation compliance by entities within the EU, would it be enough legally if ICANN consensus policies define a new Registration Directory Service which allows for controlled access to registration data, without requesting the data subject's formal consent for each use, especially uses that do not benefit him/her, but are lawful (for example, the suppression of criminal offenses)?

11. Numerous stakeholders at ICANN have suggested that asking end users or beneficial registrants to consent to further uses of their registration data would solve the debate over the privacy of registration data made accessible through WHOIS. What are your views on the use of consent in this context?

Jurisdiction

12. Can you explain to us how the data commissioners factor in the European Charter of Rights (or, for that matter, local or supra-national fundamental rights instruments in the case of countries outside Europe) in the assessment of data protection issues? Is this matter within their jurisdiction?

13. In view of the borderless nature of the internet and the fact that European Union citizens may freely acquire domain names from registries and registrars in third countries, how could potential conflicts of law based on the current and future European Union data protection framework best be avoided?

14. Can the EU enforce provisions of the General Data Protection Regulation on ICANN itself, or just the EU Registrars and EU Registries? Will there be such enforcement?

Compliance with Applicable Laws

15. Article 6 of the General Data Protection Regulation provides that processing is lawful if, among other things, the processing is “necessary to protect the vital interests of . . . another natural person or for the legitimate interests pursued by . . . a third party.” Under these principles, and given the longstanding and historical use of registration data made available through WHOIS as a de-facto public resource, do you agree this information should continue to be made readily available to those who investigate fraud, consumer deception, intellectual property violations, or other violations of law?

16. Our working group deals with policies pertaining to generic top-level domains (gTLDs). However, each country establishes its own policies pertaining to country-code top-level domains (ccTLDs). Currently, all EU states have ccTLD registries which provide publicly available registration data through WHOIS, both for private individuals and commercial entities. Can you explain how these ccTLD registry policies are able to comply with EU data protection laws?

17. The gTLD ecosystem includes the Generic Names Supporting Organization which recommends policy, ICANN which implements that policy, registries which administer the domain name space under a given gTLD, and registrars which register domain names for use by registrants. Within this ecosystem, who do you see as the data controller, in terms of the EU definitions of data controller and data processors?

Consumer Protection

18. Can you comment on your understanding of the need for owners of trademarks/brands and IP to avoid and combat infringement, and this need’s connection to consumer protection, in the context of the EU ePrivacy Directive and the General Data Protection Regulation?

19. Today, intellectual property and trademark rights holders depend on registration data obtained through the WHOIS directory service to police the misuse of their intellectual property on commercial websites, track down purveyors of counterfeit goods, and prevent fraudulent websites from engaging in illegal activity on the Internet. Is creating a repository of information for contactability to facilitate reaching those business registrants a valid purpose for this directory service and, if not, why not?