

Privacy Issues Update at ICANN

This is the first update on privacy issues that I have sent in a long while; members will no doubt be aware that there is a huge struggle going on over compliance to the European General Data Protection Regulation (GDPR), and we are having to draft comments and new documents on a regular basis. This short update may help those who are interested but lack the time to participate, to catch up on the latest developments.

ICANN continues to struggle to comply with the GDPR in a way which permits the continued access of many third parties, notably law enforcement agencies, intellectual property rights holders, and private sector cybercrime investigators and blacklists, to access the traditional list of WHOIS data that has been published to date. However, recent advice from the Article 29 Working Party and the International Working Group on Data Protection in Telecommunications and Media (IWGDPT, a group of data commissioners and technical experts who gather twice a year and work on data protection approaches to current IT issues) has not really changed. The IWGDPT released a working document focused on ICANN in March, as an update to their previous comments on WHOIS back in 2000. This document basically agrees with the legal advice that many registrars and registries have received. Some of those registries have already made announcements about their plans to close down access to WHOIS data, but the commercial community continues to press for open access.

At the ICANN 61 meeting in San Juan March 10-15, there were several panels on the GDPR compliance efforts ([https://61.schedule.icann.org/meetings?classes\[\]=Groups%3A%3AMeetings%3A%3AMeeting](https://61.schedule.icann.org/meetings?classes[]=Groups%3A%3AMeetings%3A%3AMeeting)). The organization released its latest plan for compliance on March 8, while many participants were enroute to the meeting, so comments on the latest proposal (the “Cookbook”) have been coming in slowly, but the new model was a focus for discussion at the meeting. The CEO continues to indicate that ICANN is seeking guidance from the Article 29 Working Party, and that they are not certain what to do until they get that guidance. He continued to encourage stakeholders to present their views to the Article 29 WP, and indicated they were intending to meet with them the week of March 26. Accordingly, the NCSG did send in a letter to the Article 29 Working Party with our views (see below). Updates on the progress of these discussions are available on the website here. <https://www.icann.org/resources/pages/data-protection-announcements-2017-12-08-en>

At the ICANN 61 meeting, it became clear to many of us that despite the many activities going on to sort out the WHOIS issues there was little or no progress. Key groups include the RDS PDP which has met weekly for 1.5 hours for two years, with

over 180 members; the Implementation Review Team for Privacy Proxy services, same timetable fewer members; the WHOIS Conflicts of Law policy working group, about to restart with a fresh Charter and a new call for volunteers; the RDS Review team II, which meets weekly and whose task is to review progress from the last review team's efforts, where no progress was made on data protection; the Thick WHOIS policy Implementation Review Team which is stalled because of concerns over registrant data of Europeans being shipped to the US, among other issues.

The ICANN Board has a power to impose a policy on the community, in an emergency. It appears that they are going to use it to force a solution to the GDPR situation. It appears that the commercial community is well aware of that potential solution, and has been lobbying fiercely outside of multi-stakeholder activities. Their proposed accreditation solution, developed by one of the members of the former Experts Working Group (also the founder of Mark Monitor, a value added service provider for the intellectual property and trademark community which was sold to Thompson Reuters a few years ago, and recently resold) was proposed as one of the initial solutions, and it appears to be getting support. The solution from before Christmas is here <https://www.icann.org/en/system/files/files/gdpr-cm5-focus-proposal-details-11jan18-en.pdf> , the recent proposal sent by letter to the CEO is available here [http://www.ipconstituency.org/assets/docs/WHOIS%20Access%20Accreditation%20Process%201.3\[1\].pdf](http://www.ipconstituency.org/assets/docs/WHOIS%20Access%20Accreditation%20Process%201.3[1].pdf) . We have been working on a response to statement of purpose aspect of this proposal, to be released shortly by the policy committee, and there was a call on Friday April 6, sponsored by the IPC/BC, to discuss the proposal, facilitated by ICANN staff. Several NCSG members attended.

Both the contracted parties and the civil society volunteers are very concerned about this neglect of the multi-stakeholder process, but it must be said that the contracted parties over the past 20 years of fighting over WHOIS policy have always accepted whatever solution kept their costs minimal and their liability low. There has never before been a solution to the WHOIS privacy debate which was developed through the multi-stakeholder process and it seems unlikely there will be one now. There is also a huge risk that whatever interim solution is found, it will last forever. There will be no appetite to revisit this issue, unless the business community or the Governmental Advisory Committee (GAC) fail to get what they wish.

Recent contributions to this debate that are not always easy to find on the ICANN website despite the commitment to transparency include the following:

- Main data protection page <https://www.icann.org/resources/pages/data-protection-announcements-2017-12-08-en>
- Correspondence <https://www.icann.org/resources/pages/data-protection-correspondence-2017-12-08-en>
- The latest business community/intellectual property constituency contribution

[http://www.ipconstituency.org/assets/docs/WHOIS%20Access%20Accreditation%20Process%201.3\[1\].pdf](http://www.ipconstituency.org/assets/docs/WHOIS%20Access%20Accreditation%20Process%201.3[1].pdf)

- Governmental Advisory Committee (GAC) advice to the Board (p.11 and following) <https://gac.icann.org/advice/communiques/public/gac-60-abu-dhabi-communicue.pdf>
- Noncommercial Stakeholders Group Contributions: <https://community.icann.org/display/gnsononcomstake/Home>
- Comments received on the interim models (this is where the IWGDPT working paper has been posted) <https://www.icann.org/resources/pages/gdpr-comments-2018-04-04-en>
- Stephanie Perrin comments on Interim model (these are more lengthy and detailed than our NCSG comments) <https://www.icann.org/en/system/files/files/gdpr-comments-perrin-icann-proposed-compliance-community-submitted-models-29jan18-en.pdf>

Recent Press

- <https://www.wsj.com/articles/u-s-tech-firms-warn-against-internet-monitors-privacy-tightening-1521115200>
- <http://thehill.com/policy/technology/378676-tech-companies-push-back-against-internet-domain-organization-on-privacy>
- https://si.wsj.net/public/resources/images/BN-XW175_ICANN0_SOC_20180314173029.jpg
- https://www.theregister.co.uk/2018/03/16/whois_gdpr_icann/
- <http://domainincite.com/22827-whois-policy-group-closes-down-in-face-of-gdpr>
- <http://domainincite.com/22784-icann-chief-begs-privacy-watchdogs-for-whois-advice>
- <http://domainincite.com/22822-marby-ponders-emergency-powers-to-avoid-fragmented-whois>
- <https://domainnamewire.com/2018/04/03/gdpr-whois-afiliias/>

Key issues that remain

From the perspective of the NCSG, in my view, these are the key concerns at the moment:

1. There is no multistakeholder process at the moment, and in recognition of this the RDS PDP has been temporarily suspended. The CEO and the Board will make a decision, claiming it to be based on advice from the Article 29 Working Party and on “community input”. That interim policy is good for a year, during which time the community can propose changes, through a normal policy development process. Once the year is over (and the process takes a couple of months in itself to vote through a policy) the interim policy

will become the final policy unless there is an agreed replacement. Given the recent history of the RDS PDP, it is highly unlikely that we could achieve consensus to change the interim solution in less than a year. I resigned from the RDS PDP at the ICANN 61 meeting because of this apparent abandonment of the multi-stakeholder process, but I would assure members that I am still watching these issues closely, and participating on the RDS Review team. We need to insist on a multi-stakeholder process to reach some kind of consensus on the biggest policy debate that ICANN has confronted in its history, or the entire model of multistakeholderism in my view falls into disrepute.

2. The purpose of the collection, use and disclosure of registrant data is being construed to include feeding the third party actors who have always had free access to the data (in our view, often illegally).
3. The issue of public safety and consumer protection as a reason to permit widespread access to data is unsupported by recent accurate data.
4. The risks to individuals and small organizations have never been measured.
5. The proposed tiered access model depends for its efficacy on a serious accreditation process. Because there is no time to develop one before May 25, an interim self-accreditation process is proposed. We doubt that there will be an appetite to work on proper standards that engage the DPAs in outlining requirements, and the interim solution will not simply expose individuals to marketing, domain expropriation, spam, and risk from political adversaries. Self-accreditation risks setting up an anti-competitive regime where registrant data is held by dominant players.
6. ICANN is still not clear as to whether it regards itself as a data controller, although a long serving member of the ICANN community challenged them publically on this matter at ICANN 61, and the fact that it has thus far refused to appoint a privacy officer for any registrant data related issues. What is clear to the NCSG and (apparently) to the contracted parties is that ICANN is the only contracting party who has access to all escrowed data of registrants, and that they set the terms for that escrow arrangement. They also set the terms for the contracts with registries and registrars, and enforce their compliance through the Global Domains Division (compliance branch). A registrar found not to be in compliance with the terms of the 2013 Registrar Accreditation Agreement very quickly loses his right to sponsor (register) domains, and ICANN reassigns those domains to another registrar. We view this as being the data controller. It is worth noting that one of the recommendations of the business community proposal is that ICANN must retain access to all registrant data at all times, whatever the solution selected.
7. For those not following the GDPR closely, the issue of controllership may be extremely important in terms of liability.
8. I have been working to get funding for a standards development project, to develop proper accreditation standards for third parties to whom personal data is released by data controllers and processors. There must be strong management practices in place to ensure that the entities asking for the data are indeed who they say they are, and that their purported reasons to

request the data are legitimate, limited, and proportionate. There should also be standards cited to ensure proper safeguarding and eventual destruction of the data, and access rights for individuals, as well as transparency except in exceptional circumstances. The Article 29 Working Party released a paper in February detailing their expectations of requirements and their own involvement in the accreditation of various processors under the GDPR; this standards proposal is working in the same vein, to explore what best management practices look like.

I am very happy to answer any questions on this topic that members might have.

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