

Privacy Protection for Domain Name Registrants at ICANN: Aspects of the Current Impasse

Dr. Stephanie Perrin
President Digital Discretion

Outline

1. Brief history of the WHOIS struggle at ICANN
2. Discussion of Factors Important to the Determination of Purpose
 - What have the data protection commissioners said?
3. Access to data vs inclusion as a purpose of processing
 - What standards are required for due diligence when data is disclosed to third parties?
4. Quiz and questions

Importance of Purpose Limitation

- A broad interpretation of the purpose of collection, use and disclosure allows subsequent reuse for different reasons
- Purpose limitation is the first premise of data protection analysis, purpose must be narrow, proportionate, tightly related to the mission of the organization
- Controllership is an issue ICANN has not yet addressed

2013 Registrars Accreditation Agreement

1. WHOIS data delivery requirements are stipulated here
2. Registrant data collection and retention requirements for law enforcement purposes (2 years after last contact with registrant)
3. Registrant data escrowed in US for recovery and legal issues
4. Data must be available for bulk processing by third party service providers

Factors in the Analysis

- ICANN is the data controller
- Registrars are data processors with respect to all data mandated by the RAA, data controllers for their customer relations data
- Registries are data processors with respect to the data required by their contracts, including PICs
- Purpose needs to be established in the context of ICANN's mandate and mission

What have the EU DPAs said?

- Art 29: 5/2000 The Use of Public Directories for Reverse of Multi-criteria Searching Services: new purpose not compatible with original
- IWGDPT 2000: Common position on WHOIS: State purpose, restrict data published, restrict marketing and secondary use
- 2003 EC DG15: Note reverse directories, define purpose, proportionality
- 2003 IWGDPT: Letter to ICANN re Names Council WHOIS task force: Notes earlier interventions, define purpose, objection to searching by name

What have the EU DPAs said?

- 2003 Art 29: Opinion 2/2003 on WHOIS: Summary of views expressed so far, response to WHOIS task force
- 2006 Art 29: Letter to ICANN 22/06 Schaar to Cerf re WHOIS discussions: Purpose not defined, data must be limited
- 2007 Art 29: Letter to ICANN 12/03 Schaar to Cerf re WHOIS Task Force: Expresses same concerns as earlier
- 2014 EDPS: Letter to ICANN 17/04 Hustinx to Jeffrey: Data retention practices required by RAA are not in compliance with EU Charter of Rights

Article 29 Opinion 2013

- Prepared as advice concerning the proposed regulation, discusses issues surrounding purpose limitation
- http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

Article 29 Opinion 2013 Key Points

“In particular, account should be taken of the following key factors:

- the relationship between the purposes for which the personal data have been collected and the purposes of further processing
- the context in which the personal data have been collected and the reasonable expectations of the data subjects as to their further use
- the nature of the personal data and the impact of the further processing on the data subjects
- the safeguards adopted by the controller to ensure fair processing and to prevent any undue impact on the data subjects.”

Proposed Solutions: Purpose

- Purpose of RDS data collection, use and disclosure (processing) must match narrow ICANN remit
- Public safety actors and private sector security firms want easy public access to data, but is lawful investigation and trade mark enforcement a purpose of registration data collection?
- Risk of purpose of RDS data collection being broadened through “public interest commitments” (PICS) in new top level domains
- Language barriers: use case vs purpose of processing

Access to data vs inclusion as a purpose of processing

- Most WHOIS exercises have started with listing all possible useful purposes for WHOIS data, or use cases
- There are many stakeholders at ICANN who want the data for market and cost effectiveness purposes
- The cost and convenience of access to registrant data has always been a key but little discussed factor
- Technical possibilities have advanced since the first WHOIS protocols were developed, a directory is not necessary on today's Internet
- Many value-added service providers have arisen, taking advantage of free data
- Governments have been stymied in negotiations vis a vis the Cybercrime treaty, for both political reasons and international legal harmonization reasons

Access to data vs inclusion as a purpose of processing

- Data uses have expanded over the past twenty years of a commercial Internet, some legally, some illegally
- Discerning what is “legitimate” as processing is inherently difficult, much more so when the data has been published with no controls
- The rights of the registrant have not, in the opinion of privacy advocates (NCSG) and the DPAs, been given sufficient attention.
- Now the registrants can sue, and not only the data controllers, but the DPAs who have not acted to defend their rights
- Coming up with a reasonable regime for legitimate disclosures of data is a priority, but it must be properly framed according to the parameters of data protection law.

University of Toronto Research Project: Can standards assist in third party disclosures of personal data?

- Funded by the Office of the Privacy Commissioner of Canada, under their grants and contributions program
- Discussed at Berlin group as an initiative of interest in the light of other standards projects and Art 42 of GDPR
- Focuses on ICANN WHOIS data first, then (if funded) ISP data, an issue where there has been considerable tension and legal battles
- NCSG workshop at Barcelona on Sunday 21st

Standards Project: Key questions

- What due diligence does a data controller or processor have to do before releasing registrant data to a requestor?
- Are there standards that satisfy management practices requirements which could be cited and audited (e.g. ISO 17065)
- What standards do requestors need to satisfy in order to become accredited?
- What security standards should ICANN be demanding in any access model?
- What can RDAP do to help?

Questions?

stephanie.perrin@mail.utoronto.ca

stephanie@digitaldiscretion.ca

15