

Lawful Basis Memo

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1. Example of 6(1)(b) from UK Information Commissioner's Office

After working through the data elements workbooks on F2F Day 1, Thomas Rickert created a tool to aid the group in deliberating on the appropriate lawful basis, e.g., 6(1)(b), 6(1)(f), 6(1)(a), etc., for a processing activity. In applying the test to the data elements workbooks, some members continued to express confusion over 6(1)(b); specifically, how does one determine if processing is necessary for performance of a contract?

Staff undertook some further research to assist the EPDP Team in its deliberations, and we found an [example](#), detailed below, from the UK Information Commissioner's Office web-site, which may provide some further insight into what is considered a 6(1)(b) legal basis.

When is processing 'necessary' for a contract?

'Necessary' does not mean that the processing must be essential for the purposes of performing a contract or taking relevant pre-contractual steps. However, it must be a targeted and proportionate way of achieving that purpose. This lawful basis does not apply if there are other reasonable and less intrusive ways to meet your contractual obligations or take the steps requested.

The processing must be necessary to deliver your side of the contract with this particular person. If the processing is only necessary to maintain your business model more generally, this lawful basis will not apply and you should consider another lawful basis, such as legitimate interests.

Example

When a data subject makes an online purchase, a data controller processes the address of the individual in order to deliver the goods. This is necessary in order to perform the contract, so the legal basis is Article 6(1)b.

However, the profiling of an individual's interests and preferences based on items purchased is not necessary for the performance of the contract and the controller cannot rely on Article 6(1)(b) as the lawful basis for this processing. Even if this type of targeted advertising is a useful part of your customer relationship and is a necessary part of your business model, it is not necessary to perform the contract itself and so the legal basis for such collection and use might be Article 6(1)(f).

2. Explanatory Lawful Basis Table, including rationale

Applying this rationale to the processing activities identified as well as the lawful basis proposed by the small team, would result in the following (note, the blue tables were agreed to by the small group, while the orange tables were not):

PURPOSE A		
Establish the rights of a Registered Name Holder in a Registered Name and ensuring that the Registered Name Holder may exercise its rights in respect of the Registered Name (Workbook A)		
Processing Activity (PA)	Responsible Party	Lawful Basis
PA1: Collecting registrant data to allocate a string to a registrant	ICANN: joint controller Registry: joint controller Registrar: joint controller	6(1)(b) This is a 6(1)(b) purpose because it is necessary to collect registrant data to allocate a string to a registrant. Without collecting minimal registrant data, the contracted party has no way of tracing the string back to registrant and is not able to deliver its side of the contract.
PA2: Transmission of registration data from registrar to registry	ICANN – joint controller Registrar – joint controller Registry – joint controller	6(1)(b) This is a 6(1)(b) purpose because transmission of the minimal registration data from the registrar to the registry is necessary to allocate the string to the registrant. <hr/> 6(1)(f) For additional registration data which is not necessary to technically allocate a string to a registrant, there could be a 6(1)(f) because while it is not necessary to allocate the string to a registrant, there may be a legitimate interest in enabling registries to perform checks on patterns of abusive behavior. ¹

¹ Members of the BC and SSAC [add others as appropriate] expressed the view that Purpose A is 6(1)(b) for all processing activities, including registries checking on patterns of abuse as protecting against abuse is considered necessary for performance of a contract.

PURPOSE B

Provide for lawful disclosure of registration data to third parties with legitimate interests to data that is already collected ([Workbook B](#))

Processing Activity (PA)

PA1: Disclosure of non-public, already collected, RDDS/WHOIS to third parties
([Data Processing Workbook B](#))

Responsible Party

Registries – controller
Registrars – controller
[ICANN]

Lawful Basis

6(1)(f)

This is a 6(1)(f) purpose because although there may be a legitimate interest in disclosing non-public RDDS/WHOIS to third parties (such as law enforcement, IP interests, etc.), this disclosure is not technically necessary to perform the registration contract between the registrant and registrar. (Note: the requisite balancing test must be performed for each third-party type of disclosure.)

PURPOSE C

Enable communication or notification to the Registered Name Holder and/or their delegated parties of technical and/or administrative issues with a Registered Name ([Workbook C](#))

Processing Activity (PA)

PA1: Collection of registration data for contactability/notification purposes

Responsible Party

ICANN, registries and registrars as joint controllers

Lawful Basis

6(1)(b)

For registrars: This is a 6(1)(b) purpose because it is necessary to collect registrant data so that the registrar can contact the registrant in the event a communication is necessary to maintain the domain operation.

6(1)(f)

For third parties who would like to report technical issues to a technical contact: This would be a 6(1)(f) purpose because while there may be a legitimate interest in third parties contacting the registrant (for example, to inform the registrant or designee of a technical issue with the domain name), this is not necessary for the performance of the contract.

PURPOSE E		
Provide mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator (Workbook E)		
Processing Activity (PA)	Responsible Party	Lawful Basis
<u>PA1</u> : Collection of registration data for escrow	ICANN – sole controller; Registries and Registrars - processors	6(1)(f) ² This is a 6(1)(f) purpose because although there is likely a legitimate interest in providing mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator, it is not technically necessary to collect data for an escrow agent in order to allocate a string to a registered name holder, and is therefore not necessary to perform the registration contract.
<u>PA2</u> : Transmission of registration data to escrow agent	ICANN – sole controller; Registries and Registrars - processors	6(1)(f) This is a 6(1)(f) purpose because although there is likely a legitimate interest in providing mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator, it is not technically necessary to transmit data to an escrow agent in order to allocate a string to a registered name holder, and is therefore not necessary to perform the registration contract.

² The BC [\[add others as appropriate\]](#) expressed the view that [Purpose E was a 6\(1\)\(b\) because safeguarding registrants in the event of business failure is necessary for the performance of the contract, and a registrant would expect their data to be escrowed accordingly.](#)

PURPOSE F		
Handle contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users. (Workbook F)		
Processing Activity (PA)	Responsible Party	Lawful Basis
PA1: Collection of registration data for compliance with ICANN contracts	ICANN – controller Registries - processor Registrars - processor	6(1)(f) ³ This is a 6(1)(f) purpose because although there may be a legitimate interest in collecting registration data for ICANN org compliance to confirm compliance with the RAA/RA, this collection is not technically necessary to perform the registration contract.
PA2: Transmission of registration data to ICANN org compliance (Data Processing Workbook F)	ICANN – controller Registries - processor Registrars - processor	6(1)(f) This is a 6(1)(f) purpose because although there may be a legitimate interest in transmitting registration data to ICANN org compliance to confirm compliance with the RAA/RA, this transmission is not technically necessary to perform the registration contract.

³ The BC and IPC [add others as appropriate] disagree that Purpose F is a 6(1)(f) purpose. The Team tentatively agreed to the following: (a) 6(1)(f) is an appropriate legal basis for the compliance purpose; (b) Some (BC and IPC [add others as appropriate]) believe Purpose F may be a 6(1)(b); (c) There are concerns that 6(1)(f) may cause issues where the controller determines that the privacy rights outweigh the legitimate interest and therefore data cannot be provided.

PURPOSE M

Coordinate the development and implementation of policies for resolution of disputes² regarding the registration of domain names (as opposed to the use of such domain names). (ICANN bylaws Annex G and 1(1) section I(a) ([Workbook M](#)))

Processing Activity (PA)	Responsible Party	Lawful Basis
PA1: Collection of registration data to implement the (UDRP, URS, PICCDRP, RDDR, PDDR)	ICANN – Controller Registries – Processor Registrars - Processor	6(1)(b) This is a 6(1)(b) purpose because it is necessary to collect registration data in order to facilitate/implement a UDRP or URS decision. For example, in the case of a UDRP/URS proceeding, the registrant must agree to be bound by the UDRP/URS in order to register a domain name, so the collection of data for this purpose is necessary to fulfill the registration agreement.
PA2: Transmission of registration data from registrar to registry	ICANN – joint controller Registrar – joint controller Registry – joint controller	6(1)(b) This is a 6(1)(b) purpose because transmission of (at least minimal) registration data from the registrar to the registry is necessary to identify the registrant for purposes of dispute resolution.
PA3: Transmission of registration data to dispute resolution provider (UDRP, URS, PICCDRP, RDDR, PDDR) (Data Processing Workbook M)	ICANN- controller Registries – processor Registrars - processor	6(1)(f) This is a 6(1)(f) purpose because although there may be a legitimate interest in transmitting registration data to dispute resolution providers, this transmission is not technically necessary to perform the registration contract.

PURPOSE N		
Enabling validation of Registered Name Holder satisfaction (fulfillment) of registration policy eligibility criteria. (Workbook N)		
Processing Activity (PA)	Responsible Party	Lawful Basis
<u>PA1</u> : Collecting specific data for eligibility requirements (Data Processing Workbook N)	ICANN – joint controller Registry – joint controller Registrar - processor	6(1)(b) (for registries with special eligibility requirements) because it is necessary to collect specific registrant data to confirm the registrant meets the specific requirements of the registration agreement, i.e., registrar needs to verify the registrant is a licensed attorney to register a .abogado string.
		6(1)(f) for registries with no special eligibility requirements because additional collection is not necessary to perform the contract. Even if this type of additional collection is a useful part of a customer relationship and is a necessary part of a contracted party’s business model, it is not necessary to perform the registration contract itself.

3. Thomas' Lawful Basis Test (used by small group to deliberate on some processing activities)

LAWFUL BASIS TEST

1. Briefly describe the processing activity
2. What purpose does it relate to?
3. Is the processing necessary to perform the registration agreement?
 - a. From a technical perspective?
 - b. Based on a lawful ICANN requirement?
4. - If yes, stop here.*
 - if no, continue to 5+

5. Is a legitimate interest pursued? By the controller? By a third party?
 - legitimate interest? To be construed broadly.
 - Is the processing necessary?
 - What are the interests of the data subject?
 - Balance!**

6. Who is responsible for the processing activity?
 - List the parties!

*If "yes" to questions 3(a) and 3(b), the legal basis would be 6(1)(b).

**If the processing is necessary and passes the balancing test, the legal basis would be 6(1)(f).

4. Consolidated Lawful Basis Table (no rationale)

Purpose	Processing Activity	Responsible Parties	Legal Basis
A: Establish the rights of a Registered Name Holder in a Registered Name and ensuring that the Registered Name Holder may exercise its rights in respect of the Registered Name	<ul style="list-style-type: none"> Collecting registrant data to allocate a string to a registrant 	ICANN = joint cont. Registrar = joint cont. Registry = joint cont.	6(1)(b)
	<ul style="list-style-type: none"> Transmission of registration data from registrar to registry 	ICANN = joint cont. Registrar = joint cont. Registry = joint cont.	6(1)(b)
B: Provide for lawful disclosure of registration data to third parties with legitimate interests to data that is already collected	<ul style="list-style-type: none"> Disclosure of non-public, already collected, RDDS/WHOIS to third parties 	{ICANN} Registry = controller Registrar = controller	6(1)(f)
C: Enable communication or notification to the Registered Name Holder and/or their delegated parties of technical and/or administrative issues with a Registered Name	<ul style="list-style-type: none"> Collection of registration data for contactability purposes 	ICANN = joint cont. Registrar = joint cont. Registry = joint cont.	6(1)(b)
E: Provide mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator	<ul style="list-style-type: none"> Collection of registration data for escrow 	ICANN – sole cont. Registrar = processor Registry = processor	6(1)(f)
	<ul style="list-style-type: none"> Transmission of registration data to escrow agent 	ICANN – sole cont. Registrar = processor Registry = processor	6(1)(f)
F: Handle contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users.	<ul style="list-style-type: none"> Collection of registration data for compliance with ICANN contracts 	ICANN – sole cont. Registrar = processor Registry = processor	6(1)(f)
	<ul style="list-style-type: none"> Transmission of registration data to ICANN Org 	ICANN – sole cont. Registrar = processor Registry = processor	6(1)(f)
M: Coordinate the development and implementation of policies for resolution of disputes ² regarding the registration of domain names (as opposed to the use of such domain names). (ICANN bylaws Annex G and 1(1) section I(a))	<ul style="list-style-type: none"> Collection of registration data to implement the (UDRP, URS, PICCDRP, RDDRP, PDDRP) 	ICANN – Controller Registries – Processor Registrars – Processor	6(1)(b)
	<ul style="list-style-type: none"> Transmission of registration data to registry operator 	ICANN – Controller Registries – Processor Registrars – Processor	6(1)(b)
	<ul style="list-style-type: none"> Transmission of registration data to dispute resolution provider 	ICANN – Controller Registries – Processor Registrars – Processor	6(1)(f)
N: Enabling validation of Registered Name Holder satisfaction (fulfillment) of registration policy eligibility criteria	<ul style="list-style-type: none"> Collecting specific data for eligibility requirements 	ICANN – joint controller Registry – joint controller Registrar - processor	6(1)(b) for registries with eligibility requirements / 6(1)(f) for registries with no eligibility requirements