

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

Overall notes for RDS PDP WG consideration when drafting this list:

From Leadership Team:

Criteria for including questions on this list should include 'Would the answer to this question help the WG's deliberations?' Need to ask questions that are specific enough to result in helpful answers that clarify application of data protection laws to the RDS, but without assuming what future RDS policies may or may not be.

From Tjabbe:

Suggest that we phrase these questions carefully. First of all, we cannot assume that Commissioners are fully aware of the current WHOIS service, or of the particularities of the ICANN ecosystem and our policy process. Secondly, given the nature of our process, we should probably avoid asking closed questions that would overly restrict ourselves in our deliberations.

From Nathalie:

[As a reminder, the exceptions to the application of the GDPR are:

- state security*
- public safety*
- the monetary interests of the State*
- the suppression of criminal offences*
- protecting the data subject or the rights and freedoms of others*
- statistical and research purposes*

BUT, processing of personal data for national security, law enforcement etc. purposes can constitute an interference with the right to privacy and to the protection of personal data. The interference has to be " provided for by law and has to constitute a necessary measures in a democratic society" (based on law, necessary and proportionate to the aim pursued).]

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 need 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.

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Questions for consideration by Data Commissioners

Ed Note: Questions below were proposed by volunteers from the RDS PDP WG: TB (Tjabbe Bos), NC (Nathalie Coupet), TG (Theo Geurts), SK (Susan Kawaguchi), BS (Brian Scarpelli), VS (Vicky Sheckler), CG (Chuck Gomes), and Stephanie Perrin (SP). Similar questions were numbered for reference and organized into sections by Susan Kawaguchi, with staff support from Lisa Phifer.

Members of the RDS PDP WG are invited to provide feedback on the scope, clarity, and completeness of this draft list no later than 3 March, resulting in 10-12 questions (total) to be finalized during the 7 March WG call and then relayed to panellists in advance of ICANN58.

Purpose

SP-1

Our working group has had several discussions about the purpose of domain name registration data and the WHOIS system that provides public access to that data. Can you please help us understand how you analyze the purpose of data processing, and what the data protection supervisors have meant over the years when they have told ICANN to specify the purpose of WHOIS?

TB-1

How would you assess the purpose of collecting, maintaining and providing access to gTLD registration data and safeguards to protect that data?

TB-3

How does the current and future European Union data protection framework affect the formulation of legitimate purposes of collecting, maintaining and providing access to gTLD registration data?

TG-4

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. Is publishing personal data related to a domain name registration in a public directory service such as WHOIS a violation of Article 6(1)(b)?

Registration Data Elements

TB-4

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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TG-2

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? If so, would entities that collect and process this data be considered in violation of the Directive and the GDPR?

VS-1

How does Article 5 of the EU commerce directive requiring service providers to disclose their contact information interact with the General Data Protection Regulation as it may relate to the above-described registrant data for those same service providers?

CG-1

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 Investigation

NC-1

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 by using data obtained through a registration data directory service?

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NC-3

In such a case, to comply with the General Data Protection Regulation:

- Would the private cybersecurity firm investigating crime in this manner need to state a specific purpose for accessing any registration data to be disclosed?
- Would the registrant of that domain name have to give consent for his/her personal data to be disclosed for use in a criminal investigation?
- In the absence of such consent, would the private cybersecurity firm need to obtain a court order to gain access to data and thus run the risk of losing evidence?
- Or should the cybersecurity firm request a court authorization before requesting registration data, every time they wish to access such data during an investigation?

NC-5

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 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?

SP-4

In 2014, the then head of the Article 29 committee wrote to ICANN, taking exception to the retention of data for potential law enforcement use. Can you explain what the Article 29 committee's objection is to the requirement to maintain data for potential investigation of unlawful activity? If the registrars don't maintain that data, how will crime be investigated?

Personal Privacy/Human Rights

NC-2

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.

NC-4

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?

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NC-7

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)?

NC-8

For example, could access then be granted to registration data with just an email, no declaration of purpose, and a paper trail submitted to some internal due process for granting access by the provider of the registration data (or automated dynamic process?)

SP-6

A proxy service provider registers a domain name on behalf of a third party, allowing that third party's identity and data to be replaced by the proxy provider's name and address in WHOIS. Within another gTLD policy development process, there was a vigorous debate concerning whether or not companies and organizations should be allowed to use such proxy services. Some believe they should not. Human rights advocates feel strongly that the safety and free speech rights of groups, associations, and journalists would be jeopardized by such a policy. What are your views on this matter?

SP-8

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

SP-7

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?

TB-5

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?

TG-6

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?

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NC-6

Is ICANN habilitated to determine in which situations the General Data Protection Regulation does not apply? And make these determinations in such a way as to harmonize its data collection as a data processor with its Mission Statement?

Compliance with Applicable Laws

VS-2

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 defacto public resource, do you agree this information should continue to be made readily available to those investigate fraud, consumer deception, intellectual property violations, or other violations of law?

SK-1

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?

TG-5

It is our understanding that processing of personal data is allowed to a limited number of legitimate grounds, specified in the Article 7 Directive. Given this, how can gTLD Registrars and Registries operating in the EU comply with Article 7 without breaching the contractual obligations that require public access to gTLD registration data through WHOIS?

SP-3

[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?

SP-5

There has been much discussion after the Schrems decision concerning export of data to the United States from Europe. What are your views on this matter, as it pertains to the collection and processing of domain name registration data?

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Consumer Protection

BS-1

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?

SP-2

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, track down purveyors of counterfeit goods, and prevent fraudulent websites from engaging in illegal activity on the Internet. Is creating a repository of information to facilitate reaching those individuals a valid purpose for this directory service and, if not, why not?

Parked for further consideration

TG-1

The display of personal data by Thick WHOIS USA registries through the public WHOIS do they meet the information obligations that are central to the privacy principles of Privacy Shield? And how is the data protection element satisfied?

TB-2 In view of your assessment in the context of the current and future European Union data protection framework, would you consider that a next-generation Registration Directory Service is needed to replace WHOIS? Which aspects should the working group consider?

TB-6

Building on the extensive correspondence between the ICANN board and the Article 29 Working Party on WHOIS and data protection, how do you think coordination with the working group on safeguards to protect gTLD registration data could best be achieved?