

ARTICLE 29 Data Protection Working Party



Brussels, 06 June 2013

Dr. Steve Crocker and Mr. Fadi Chehadé
Chairman and CEO of the Board of Directors
Internet Corporation for Assigned
Names and Numbers (ICANN)
4676 Admiralty Way, Suite 330
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By email to the Director of Board Support:
diane.schroeder@icann.org

Subject: Statement on the data protection impact of the revision of the ICANN RAA

Dear Mr Crocker and Mr Chehadé,

In the context of ICANN's revision of the Registrar Accreditation Agreement (RAA) and the final **RAA Proposal**¹, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 WP)² wishes to provide a harmonised statement concerning compliance with European data protection law.

Following up on our letter of 27 September 2012³ and previous contributions to the process of collecting and disclosing WHOIS data⁴, this statement specifically addresses the legitimacy of the data retention obligation for registrars, contained in the new RAA.

The Working Party notes that ICANN has included a procedure for registrars to request a waiver from these requirements if necessary to avoid a violation of applicable data protection law. Such a waiver request can be based on written guidance from a governmental body of

¹ ICANN Proposed Final 2013 RAA of 22 April 2013, URL: <http://www.icann.org/en/news/public-comment/proposed-raa-22apr13-en.htm>

² The Article 29 Working Party on the Protection of Individuals with regard to the Processing of Personal Data is an independent advisory body on data protection and privacy, set up under Article 29 of the Data Protection Directive 95/46/EC. It is composed of representatives from the national data protection authorities of the EU Member States, the European Data Protection Supervisor and the European Commission. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC. The Article 29 Working Party is competent to examine any question covering the application of the data protection directives in order to contribute to the uniform application of the directives. It carries out this task by issuing recommendations, opinions and working documents.

³ Article 29 Working Party letter to ICANN, 26 September 2012, URL: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120926_letter_to_icann_en.pdf

⁴ URLs: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp76_en.pdf, <http://www.icann.org/correspondence/schaar-to-cerf-22jun06.pdf> and <http://gns0.icann.org/correspondence/schaar-to-cerf-12mar07.pdf>

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No LX-46 01/190.

competent jurisdiction providing that compliance with the data retention requirements violates applicable law.

In order to avoid unnecessary duplication of work by 27 national data protection authorities in Europe, with this letter, the Working Party wishes to provide a single statement for all relevant registrars targeting individual domain name holders in Europe.

The final proposed Data Retention specification roughly distinguishes between name and contact details for the domain name holder (specified in 1.1.1 to 1.1.7) and all other types of data a registrar might collect (specified in 1.2.1 to 1.2.3), such as logfiles and billing records containing the 'means and source of payment', logfiles about the communication with the registrar including source IP address, telephone number, e-mail address, Skype handle or instant messaging identifier, as well as the date, time and time zones of communications.

Registrars are required to keep the first category of personal data for a period of two years after the contract for the domain has been ended. The second category of personal data must be retained for six months after the contract has ended.

The first category of data includes payment data, defined as: *'card on file', current period third party transaction number, or other recurring payment data.*

The proposed new data retention requirement does not stem from any legal requirement in Europe.⁵ It entails the extended processing of personal data such as credit card and communication data by a very large number of registrars. The fact that these data may be useful for law enforcement (including copyright enforcement by private parties) does not equal a necessity to retain these data after termination of the contract. Taking into account the diversity of these registrars in terms of size and technical and organisational security measures, and the chance of data breaches causing adverse effects to individuals holding a domain name, the Working Party finds the benefits of this proposal disproportionate to the risk for individuals and their rights to the protection of their personal data.

Secondly, the Working Party reiterates its strong objection to the introduction of data retention by means of a contract issued by a private corporation in order to facilitate (public) law enforcement. If there is a pressing social need for specific collections of personal data to be available for law enforcement, and the proposed data retention is proportionate to the legitimate aim pursued, it is up to national governments to introduce legislation that meets the demands of article 8 of the European Convention on Human Rights and article 17 of the International Covenant on Civil and Political rights.⁶

The fact that these personal data can be useful for law enforcement does not legitimise the retention of these personal data after termination of the contract. Because there is no legal ground for the data processing, the proposed data retention requirement violates data protection law in Europe.

⁵ The European data retention directive 2006/24/EC imposes data retention obligations on providers of public electronic communication networks and services. Registrars are not such providers and are therefore not subjected to this European data retention obligation.

⁶ Obligations with regard to the protection of personal data also follow from the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) and the UN Guidelines concerning computerized personal data files (1990).

In general, we repeat that the problem of inaccurate contact details in the WHOIS database cannot be solved without addressing the root of the problem: the unlimited public accessibility of private contact details in the WHOIS database. In that light, the Working Party welcomes the growing number of registries in Europe that are offering layered access to the WHOIS data.

Yours sincerely,

On behalf of the Article 29 Working Party,

A handwritten signature in black ink, consisting of a large, sweeping initial 'J' followed by several loops and a horizontal stroke at the end.

Jacob Kohnstamm
Chairman