

ARTICLE 29 Data Protection Working Party



Brussels, 12 March 2007
D (2007) 3055

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Subject: Comments on the GNSO Whois Task Force Preliminary Task Force Report on Whois Services of 22 November 2006; and on the Draft ICANN Procedure for Handling Whois Conflicts with Privacy Law of 3 December 2006

Dear Mr. Cerf,

In the context of:

- ICANN's launch of a public consultation on the Draft ICANN Procedure for Handling Whois Conflicts with Privacy Law of 3 December 2006; and
- the publication of the GNSO Whois Task Force Preliminary Task Force Report on Whois Services of 22 November 2006;

the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 WP)¹ welcomes the opportunity to participate in these consultation processes and offers the following comments:

The Working Party wishes to outline its position as to the consequences of the applicability of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Data Protection Directive") to the processing of personal data taking place in the context of domain name registration, which includes the making available of personal data in the context of the operation of the WHOIS services.

The Article 29 WP has closely followed the WHOIS discussions and has witnessed the growing importance of the WHOIS debate and welcomes the fact that privacy issues have now moved more into the focus of the debate.

¹ The 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.

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The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

The Article 29 WP recalls its Opinion 2/2003 on the application of the data protection principles to WHOIS directories² as well as its letter of 22 June 2006 to the Board of Directors of ICANN³, in which the relevant data protection principles were clearly spelled out. In particular, the Article 29 WP emphasizes once more the need to differentiate between legal and natural persons registering domain names. In the first case, the publication of certain information about the company or organisation (such as their identification and their physical address) is often a requirement by law in the framework of the commercial or professional activities they perform. The Article 29 WP's primary concern relates to private domain holders that use domains solely in a non-commercial context. Nevertheless, a privacy issue is at stake also for instance in a workplace with people (employees) named in the context of commercial domains.

The Working Party also reaffirms its support for earlier proposals concerning accuracy of the data (which is also one of the principles of the Data Protection Directive) published in WHOIS directories and limitation of bulk access for direct marketing issues. It recalls that bulk use of WHOIS data for direct marketing is by no means in line with the purpose for which the directories were set up and are being maintained.

Introducing a distinction between publicly accessible and publicly inaccessible data, e.g. for internal purposes of registrars for billing, etc., which is typical in many national legal systems might tackle many of the problems outlined above.

(i) Comments on the GNSO Whois Task Force Preliminary Task Force Report on Whois Services of 22 November 2006

The Article 29 WP welcomes that the GNSO Whois Task Force has adopted a definition for the purpose of WHOIS as a basis for its work. As pointed out in previous submissions, such a purpose definition is a central element in determining whether a specific processing or use of personal data is in accordance with EU data protection legislation. The definition given in the report reads:

"The purpose of the gTLD Whois service is to provide information sufficient to contact a responsible party for a particular gTLD domain name who can resolve, or reliably pass on data to a party who can resolve, issues related to the configuration of the records associated with the domain name within a DNS nameserver."

The Article 29 WP acknowledges the legitimacy of the purpose of the making available of some personal data through the WHOIS services, when this publication is necessary for the technical functioning of the Internet network as set out in the purpose definition. This publicity is necessary in order to put the person running a Website in a position to face the legal and technical responsibilities which are inherent to the running of such a site. However, in its current form the database does not take account of the data protection and privacy rights of those identifiable persons who are named as the contacts for domain names and organizations.

² http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp76_en.pdf

³ <http://www.icann.org/correspondence/schaar-to-cerf-22jun06.pdf>

The report suggests two alternative concepts for the future operation of the WHOIS service: the so called "OPoC" (Operational point of contact) proposal, and the "special circumstances proposal".

The Article 29 WP welcomes that the so called "OPoC" (Operational point of contact) proposal seems to offer a much more privacy-friendly solution compared to the current situation by reducing the amount of personal data published through the WHOIS services. Taking into account the purpose definition it however still remains unclear why for the stated purpose the domain name holder's name (and nationality) has to be published. The explanations given in the Task Force Report, not being related to the purpose definition, are unsatisfactory and not convincing. The Article 29 WP therefore recommends to modify the proposal in such a way that at least for private domain holders that use domains solely in a non-commercial context the name of the domain holder should only be published in the WHOIS service with the explicit, freely given consent of the data subject.

As regards the "special circumstances proposal", it remains totally unclear how this proposal is related to the purpose definition on which the task force has grounded its work. The very narrow justifications for eligibility to not having data published seems totally unsatisfactory from a privacy perspective, and is only acceptable if limited to commercial users. It would clearly not be sufficient if also applied to private, non-commercial domain registrants.

(ii) Comments on the Draft ICANN Procedure for Handling Whois Conflicts with Privacy Law of 3 December 2006

A first comment regarding the procedure that is being proposed pertains to the title for the procedure as posted on ICANN's website at <http://www.icann.org/announcements/announcement-2-03dec06.htm/> ("Procedure for Potential Conflicts between WHOIS Requirements and Privacy Laws"). As can be understood from point 0.3 of the related document, the procedure is intended for "*...a situation where a registrar/registry can demonstrate that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS...*".

The Working Party welcomes that ICANN tries to take into account the difficult situation that registrars operating under EU data protection legislation are facing due to their far-reaching obligations stemming from the registrar accreditation agreement to make personal data of registrants available to third parties.

A domain name registrar/registry must be considered as a "data controller" in the meaning of the EU Data Protection Directive (article 2-d). Any controller of a WHOIS database has to observe data protection rules set by the Data Protection Directive and national laws implementing it. As a matter of fact data protection law applies to controllers which process personal data in the context of the activities of an establishment on the territory of any EU Member State (article 4-1-a). It also applies to controllers who are not established on Community territory but who, for purposes of processing personal data makes use of equipment⁴, automated or otherwise, situated on the territory of an EU Member State (article

⁴ It must be noted that all other language versions of the EU Directive make use of a wider notion than equipment by referring to the concept of "means of processing". This notion of "equipment" must therefore be construed in a wide fashion.

4-1-c). In the latter case, controllers must appoint a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself (article 4-2).

The Article 29 WP sees, in the current situation, *actual* conflicts between current WHOIS practice and EU data protection and privacy laws, not just *potential* conflicts as the title of the proposed procedure on ICANN's website states. As a matter of fact, registrars operating in EU member states under the current ICANN registrar accreditation agreement face a generally present and unresolved conflict between EU data protection legislation and several international rules⁵ on the one hand, and current WHOIS practice on the other hand.

While the Article 29 WP understands the draft as a proposal for an internal procedure between ICANN and the gTLD registrars bound by the current registrar accreditation agreement, which should largely be left to the discretion of the parties involved, the Working Party would like to point out that the negotiation procedure between ICANN and a "local/national enforcement authority" as foreseen in 2.1 of the Draft should not obscure the fact that national privacy legislation is not negotiable as such.

The Article 29 WP wishes to express its doubts that the procedure as currently proposed by ICANN will substantially change the situation for registrars operating under the EU Data Protection Directive. Privacy issues stemming from the making available of personal data in the context of the operation of the WHOIS services should be solved through amendments to the registrar accreditation agreement that would offer at least to those registrars located in EU member countries to comply with EU data protection legislation in accordance with the basic principles of data protection and privacy.

Yours sincerely,



Peter Schaar
Chairman

Cc: Ms. Maria Farrell, Policy Officer, ICANN, Mr. Mohamed Sharil Tarmizi, GAC Chair

⁵ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980), UN Guidelines concerning computerized personal data files (1990)