BRISTOWS

Publication of Registrants' Email Addresses

This memo advises on the merits of the publication of an email address relating to an individual registrant (i.e. 'personal data') (the '**Email Address'**) through the WHOIS database on the basis of Article 6.1(f) of the General Data Protection Regulation ('**GDPR'**).

In summary, while we accept that the publication of any personal data online necessitates a consideration of the privacy implications it does not appear to us that a detailed analysis has been conducted (or at least published) which establishes a compelling basis on which to argue the limited impact on the interests and fundamental rights of the data subjects through publication of the Email Address outweighs the significant and in our view overwhelming public interest pursued in its publication.

1. Processing on the basis of Article 6.1(f)

The publication of the Email Address constitutes the processing of personal data. In order for such processing of personal data to be lawful, each relevant data controller must ensure it can rely on a legal ground provided for by Article 6.1 of the GDPR. Article 6.1(f) provides such a ground, stating that processing shall be lawful where such:

'*processing is **necessary** for the purposes of the **legitimate interests pursued by the controller or by a third party**, **except where such interests are overridden** by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*'.

In order to determine whether the relevant data controllers can rely on Article 6.1(f) it is necessary to assess each of these three constitute elements.

2. 'Legitimate interests pursued by the controller or by a third party…'

It is accepted that the publication of the Email Address is for the purposes of a number of 'legitimate interests' pursued by the relevant data controllers and third parties, including the general public. The operation of the WHOIS database and the availability of public information is necessary for the proper and secure functioning of the Internet, including by facilitating effective law enforcement, IP enforcement, consumer and child protection, cybersecurity, anti-malware and related purposes. The publication of the Email Address is a necessary part of this allowing for direct and effective access to individual domain name holders, and discovering and mitigating illegal activity generally.

The importance of such information for the purposes noted above has been widely recognised by various governmental authorities[1].

3. 'Necessary for the purposes of the legitimate interests pursued…'

While it is clear and accepted that the Email Address is needed for the purposes described above, it has been argued that the relevant purposes could be achieved by alternative means.

[1] Please see the following for further discussion of the relevant legitimate interests: https://www.icann.org/en/system/files/correspondence/avramopoulos-et-al-to-marby-29jan18-en.pdf and https://gacweb.icann.org/display/GACADV/GAC+Communiques?preview=/28278854/50331722/GAC%20ICANN60%20Communique_Final.pdf

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The alternatives proposed include (i) providing only layered access to the Email Address (i.e. the registrar provides the Email Address only to law enforcement authorities or selected others on request and only in certain specified circumstances) or (ii) making available only a masked email address or message relay link. Each of these has been subject to criticism by those relying on the WHOIS database as it is currently operated on the basis that the alternatives are a significantly less effective means of safeguarding the important public interests at issue. One such criticism with respect to reliance on a masked email address and message relay link is that it does not provide a reliable means by which a requester could verify if the email has been delivered.

While it is not unreasonable to argue that the *same general purposes* may be achievable with an alternative approach (i.e. some form of IP enforcement tool will still be offered), the *same effective results and objectives* may not be achievable (i.e. an IP enforcement tool that is inherently dependent on the assistance and resources of registrars to quickly make available the Email Address on a case-by-case basis or a tool that cannot verify if an email has been delivered is not an effective IP enforcement tool). It follows that where it can be demonstrated that the same (or even substantially the same) effective results and objectives cannot be achieved without the publication of the Email Address, such publication must be considered necessary for the purposes of Article 6.1(f).

4. 'Interests are overridden…'

The final element requires an assessment and balancing of the legitimate interests of the controller and third parties that rely on the published Email Address with the interests and rights of the data subjects affected. The WP29 notes that the 'assessment is not a straightforward' and 'requires full consideration of a number of factors'. The primary factors are considered below:

4.1 The nature and source of the legitimate interests and whether it is in the public interest or benefits the community affected

As noted above, it is accepted that the 'legitimate interests' that must be taken into account are not solely those of a select number of commercial organisations. There is a general public interest and benefit to a much wider community in maintaining appropriate levels of access to key information (such as the Email Address) is essential to ensuring effective law enforcement investigations and other crime prevention, IP enforcement, consumer protection and the proper administration of domain name registration systems.

4.2 The impact on the individual and their reasonable expectations based on their relationship with the controller

It is not clear how the publication of the Email Address could have a material impact on the data subject. The Email Address is one that can be chosen by the data subject and there is no requirement that it be linked to any of the data subject's other activities (e.g. it does not need to be associated with a government issued identification number or profile). This is an important consideration for data subjects concerned about receiving spam or abusive content as it allows them to utilise an email address created solely for the purpose. This is in addition to the other safeguards in place (see below) to prevent such inappropriate use of the Email Address further reducing impact on the data subject. To the extent there is any impact, it is not clear how such a limited impact would not be understood and expected by a data subject given

that the practice of, and rationale for, publishing the Email Address on the WHOIS database is widely known and understood.

In addition, the publication of the Email Address does not deprive the data subject of the rights and protections afforded by applicable data protection laws. Any organisation seeking to process the Email Address must comply with such laws as well as adhere to the terms and conditions on which access has been granted.

4.3 Additional safeguards, which could limit undue impact on the data subject

Notwithstanding the relatively limited impact to the data subject discussed above, further safeguards are in place to ensure those accessing an Email Address are restricted in the following manner:

"*You agree to use this data only for lawful purposes and further agree not to use this data (i) to allow, enable, or otherwise support the transmission by email, telephone, or facsimile of mass unsolicited, commercial advertising, or (ii) to enable high volume, automated, electronic processes to collect or compile this data for any purpose, including without limitation mining this data for your own personal or commercial purposes.*"

Bristows LLP
8th March 2018

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