



2 February 2018

# EDRi's input to ICANN on WHOIS proposed GDPR compliance models

**Lead author:** Walter van Holst (EDRi member Vrijschrift, NL)

**Contributions by:** Joe McNamee (EDRi) and Maryant Fernández (EDRi)

European Digital Rights (EDRi) is an association of [civil and human rights organisations](#) from across Europe. We defend rights and freedoms in the digital environment. In view of ICANN's [community feedback request](#), EDRi takes the opportunity to convey our feedback on the WHOIS models proposed by ICANN with regard to their potential compliance with the EU General Data Protection Regulation (GDPR).

### General remarks about the commonalities across all models:

1. While we agree that the current Thick WHOIS registry can continue to be processed, provided that it happens in a non-public manner, ICANN seems to fundamentally misunderstand article 6 of the GDPR. The legal basis referred to in execution of a contract can only relate to the execution of a contract with the data subject (as clearly explained in recital 40 - "the **necessity** for the performance of a contract to which the data subject is party"). A great number of technical or administrative contact details in the WHOIS will be related to employees of domain name registrants. Furthermore, this is data that is not actually necessary for the execution of a contract in those cases where the technical contacts are the same natural person as the registrant. For example phone numbers are rarely used in practice to get in touch with a registrant and are therefore not actually necessary to collect and certainly not necessary to publish.

The only legal basis for processing appears to be the legitimate interest of the registrar, which creates several problems from a fundamental rights perspective regarding any sharing of this data across registrars or to further third parties. .

2. ICANN suggests that the transfer to registries of the personal data contained in Thick WHOIS records is allowed under the execution of a contract and/or legitimate interest. As stated above, these potential legal grounds for processing are invalid for a sizeable proportion of the records involved. Furthermore, ICANN omits to mention that, as a consequence, a notification obligation is triggered under article 14 of the GDPR for any recipient registry. In addition to this, a large number of registrars are based outside the European Economic Area. This will, for a great number of current transfers, mean that these would happen in violation of Chapter 5 of the GDPR unless brought into line with the GDPR.

3. ICANN fundamentally misunderstands the GDPR when it says that registrars may transfer to escrow agents, using the legal grounds of execution of a contract and/or legitimate interest. The same issues as mentioned under 1 and 2 arise. These issues may be mitigated in the case of data processing agreements meeting the criteria listed article 28 of the GDPR, provided that the requirements of Chapter 5 GDPR are met, insofar as such escrow agents are outside the European Economic Area.

4. When ICANN states "registrars must request from registrants specific and informed consent that is freely given, unambiguous, withdrawable at any time, and is otherwise consistent with the GDPR for publication of full Thick data" it is fundamentally misunderstanding the GDPR principles regarding consent.

2 February 2018

In a lot of cases, the technical or administrative contacts will not be in a position to deny consent since they are employed by registrants and therefore in a position of dependency vis-a-vis registrants. We point ICANN to the Article 29 Working Party guidelines on consent<sup>1</sup>.

Points 6, 7 and 8 of the commonalities across all models do not *a priori* pose irreconcilable problems from a GDPR perspective.

Regarding the models proposed for publicly available WHOIS data, it appears that only model 3 is reconcilable with the GDPR, provided that the issues noted above are addressed. Both models 1 and 2 result in the potential publication of personal data on a scale that is neither necessary, nor proportionate. The default should be that all the details about technical and administrative contacts should remain with the registrar.

**For more information, please contact**

**Joe McNamee**

[joe.mcnamee@edri.org](mailto:joe.mcnamee@edri.org)

**and**

**Maryant Fernández Pérez**

[maryant.fernandez-perez@edri.org](mailto:maryant.fernandez-perez@edri.org)

---

<sup>1</sup> [http://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=48849](http://ec.europa.eu/newsroom/just/document.cfm?doc_id=48849)