

8 June 2015

Summary and Analysis of comments for:

2013 RAA Data Retention Specification Data Elements and Legitimate Purposes for Collection and Retention

The comment period ran from 23 March 2014 to 23 April 2014. Five public comment submissions were received, which may be viewed in their entirety at:

<http://forum.icann.org/lists/comments-retention-21mar14/>

(Two additional purported comments appear to be spam and are not addressed in this Summary and Analysis.)

Disclaimer: The summary is not a full and complete recitation of the comments received. It is an attempt to capture in broad terms the nature and scope of the comments. The summary has been prepared in an effort to highlight key elements of the submissions in an abbreviated format, not to replace the comments. Every effort has been made to avoid mischaracterizations and to present fairly the views provided. Any failure to do so is unintentional.

SUMMARY OF COMMENTS

One comment was received from Rob Golding of Astutum Ltd, a United Kingdom based ICANN Accredited Registrar. This comment questioned why ICANN thinks a public comment period is necessary or called for and asserted that Data Retention and Data Protection Legislation is not 'open for public comment' and that ICANN is neither qualified or in a position to decide what that the legislation means. The comment also asserted that the Article 29 Group documents have been with ICANN for months and are clear on the position of the Data Protection entities of all EU member states.

Another comment from a person identified as Tamer Rizk, no affiliation identified, suggested that ICANN may be better served by focusing on registrar compliance with data escrow agreements, implementing systems to autonomously validate the integrity of the data, and working with legislative bodies within the context of proposed legislation, such as the GDPR, in order to safeguard the privacy of data that may facilitate processes such as UDRP.

Another comment from the Coalition for Online Accountability agreed that purposes identified for collecting WHOIS data, and for making it available to the public were legitimate, and also noted that many other legitimate purposes (beyond those listed) have been identified during the 15 years that WHOIS issues have been under discussion within ICANN. It observed that dozens of legitimate purposes were identified and described during an unsuccessful attempt by the GNSO to reach a consensus statement on "the purpose of collecting Whois data," including the purposes of identifying and enabling contact with the party or entity responsible for an Internet resource to which the domain name resolves. This commentator stated that it did not believe that ICANN, by

posting this “description” paper for public comment, intended to re-open, short-circuit, or redirect the long-running discussion within ICANN about the legitimate purposes for collecting Whois data, and that they understood that the key question on which it is seeking (in the words of the notice) to “provide guidance for Registrars” is the legitimate purpose(s) for requiring registrars to retain Whois data (as well as the other data elements listed in the Specification) for two years following the expiration of the domain name registration contract in connection with which this data was collected. The comment notes that the ICANN “description” document correctly notes, retention of such data can “help copyright owners locate and pursue copyright infringers, either through civil or criminal enforcement,” and that failure to retain such data can in some cases hamper the ability of rightholders to identify and locate persons who infringe copyright on a massive scale. The comment also seeks confirmation that the purpose of collecting Whois data is not actually at issue in this public comment exercise, and that nothing in either the Data Retention Specification; the process for waiving the Specification’s obligations; or the development of a common understanding of the purposes for collecting or retaining the data covered by the Specification, is intended to undercut or otherwise to affect the obligation of registrars to collect Whois data and to make it available to the public.

Another comment from Mathieu Pitté, no affiliation identified, asserted that ICANN has long failed to understand EU privacy laws and to take and has favored the opinion of law enforcement agencies and intellectual property owners, while allegedly largely disregarding EU data protection authorities comments. The comment states that the legal status of the document under consultation is highly unclear, and if adopted would apparently not be formally part of the 2013 RAA signed by the registrars, and thus would not be legally binding on them. It also questions the structure and phrasing of the document, especially as it relates to law enforcement and IP owners consideration, asserting that it restates the various opposing stakeholders’ positions on the subject. The comment asserts that the 2013 RAA Data Retention Specification is in breach of European Union law, cannot be salvaged by a “clarification document,” and that ICANN should abandon any clarification document” or “waiver” type mechanism and instead ensure that that privacy and data protection are embedded by default and enshrined in the RAA. The comment also notes that registrars implementing the 2013 RAA risk administrative and criminal complaints from EU consumers, privacy and digital rights groups.

A comment submitted by Peter Hustinx, European Data Protection Supervisor, notes that Draft Specification defines in more detail the data to be collected, the purposes for which they may be used and the retention periods for which the data are to be kept under the 2013 RAA, and states this is welcome in that it would offer more transparency. The comment asserts that the 2013 RAA and the Draft Specification continue to fall short of compliance with European data protection law, and that the Draft Specification should only require collection of personal data, which is genuinely necessary for the performance of the contract between the Registrar and the Registrant (e.g. billing) or for other compatible purposes such as fighting fraud related to domain name registration, with the data to be retained for no longer than is necessary for these purposes. The comment asserts that it would not be acceptable for the data to be retained for longer periods or for other, incompatible purposes, such as law enforcement purposes or to enforce copyright. The comment states that processing contrary to these recommendations would be contrary to three key principles of European data protection law set forth in Directive 95/46/EC: purpose limitation; having an

appropriate legal ground for the processing of data, such as contract, consent or the legitimate interest of the controller; and proportionality, including the requirement not to retain data 'longer than is necessary for the purposes for which the data were collected or for which they are further processed'. The comment notes that retention of personal data originally collected for commercial purposes, and subsequently retained for law enforcement purposes pursuant to Directive 2006/24/EC has recently been found to be invalid, as an unjustified interference with those rights by the European Court of Justice, on the basis that retention 'exceeded the limits imposed by compliance with the principle of proportionality'. The comment also notes that current European data protection legislation is under reform and urges ICANN to apply the waiver of the retention period under the 2013 RAA Data Retention Specification uniformly to all EU Member States as requested in the 'harmonised statement' of the Working Party issued by letter of 6 June 2013. The comment encourages ICANN to take a lead in ensuring that privacy and data protection are embedded by default, when new tools and instruments or new Internet policies are designed, for the benefit of all Internet users. The comment further reiterates its recommendations to reduce the data collection and retention requirements in the 2013 RAA 'by default' to what is genuinely necessary for the performance of the contract between the Registrar and the Registrant (e.g. billing), and to limit processing of this data to compatible purposes, such as proportionate measures to fight fraud related to domain name registration.

ANAYLSIS OF COMMENTS

ICANN appreciates the time spent by community members to provide their input on the 2013 RAA Data Retention Specification Data Elements and Legitimate Purposes for Collection and Retention

As noted when ICANN posted this document for comment, in the course of negotiations regarding potential data retention waivers under the 2013 RAA, some Registrars requested that ICANN (a) clarify and better define certain data elements described in the Data Retention Specification that the Registrars maintain are not clearly defined; and (b) describe potentially legitimate purposes for collection and retention of each data element that would help provide guidance for Registrars both as to whether such elements may be lawfully collected, and, if so, for how long such elements might lawfully be retained. ICANN's intention was not to undercut or circumvent applicable data protection laws, but to provide, at the request of some Registrars, greater clarity regarding definitions and a potential framework for Registrars to consider purposes that might be considered legitimate for collection and retention of data under applicable laws. ICANN believes that this effort may assist ICANN and Registrars in finding common ground to reach agreement on the appropriateness and the scope of data retention waivers under the 2013 RAA, and that was the purpose for posting the document. It was not and is not ICANN's intent to require collection or retention of data in a manner or for a purpose or a retention period that is inconsistent with applicable law.

CONCLUSION

ICANN is committed to working with registrars and the ICANN community to balance and reconcile the data collection and retention requirements of the 2013 RAA with local, regional and national laws and regulations. Since this document was posted, some registrars have continued to

seek guidance and input from ICANN regarding identification of potential legitimate purposes for data collection and retention, and in the interest of facilitating resolution of ongoing data retention waiver negotiations, ICANN may amend or supplement the posted document if ICANN determines that this will enable ICANN and one or more registrars to reach agreement on the scope of data retention waivers under the 2013 RAA.

Commentators:

Name:	On Behalf of:
Rob Golding	Astutium Ltd
Steve Metalitz	GNSO Intellectual Property Constituency
Tamer Rizk	No affiliation identified
Mathieu Pitté	No affiliation identified
Peter Hustinx	European Data Protection Supervisor