

To: Thick Whois Implementation Review Team
From: ICANN Staff
Date: 8 June 2015
Re: Review of Law Applicable to the Transition of Data from a Thin to Thick
Whois Model

I. EXECUTIVE SUMMARY

In March 2014, the ICANN Board adopted GNSO consensus policy recommendations requiring all gTLDs to provide thick Whois services. As part of the policy, ICANN was to undertake a legal review of privacy laws that may be applicable to transitioning from a thin Whois model to a thick Whois model building off the previous legal analysis undertaken as part of the work of the Whois Expert Working Group. As discussed in this memorandum, the analysis undertaken did not reveal any additional privacy issues not already considered by the Expert Working Group that would be implicated in the transition of data from a thin to a thick Whois model. To the extent that a contracted party finds that it is unable to comply with the Thick Whois policy requirements due to a conflict with its obligations under local privacy laws, such conflicts may be dealt with by exception through use of the Whois Conflicts Procedure, or requests to ICANN for an amendment to or waiver of certain provisions in the Registry Agreement or Registrar Accreditation Agreement.

II. INTRODUCTION/BACKGROUND

This memorandum is submitted by ICANN to implement Recommendation #3 of the GNSO Council Consensus Policy Recommendations on Thick Whois [adopted](#) by the Board on 7 February 2014 (the “Thick Whois Policy”). Consistent with the Thick Whois Policy, this memorandum focuses on potential data protection issues¹ with the transition from thin to thick Whois (it does not purport to discuss considerations relating to the existence of thick Whois per se). It takes note of the overview provided in (i) the Memorandum dated 29 August 2013 from ICANN to the Expert Working Group on gTLD Registration Data regarding Data Protection Considerations Applicable to the Collection of gTLD registration data in the Proposed Centralized and Federated Database Systems (the “[EWG Memo](#)”) and (ii) the Final Report on the Thick WHOIS Policy Development Process (the “[Thick Whois Final Report](#)”) dated 21 October 2013.

As further detailed below, to address the concerns previously highlighted in the EWG Memo, this memorandum provides practical recommendations about the move to Thick Whois and also notes that ICANN’s Procedure for Handling WHOIS Conflicts with Privacy Law is available to contracted parties to address specific cases where Thick Whois requirements may be inconsistent with the parties’ obligations under local privacy laws. Additionally, contracted parties may consider requesting amendments to or waivers from specific Thick Whois requirements in agreements with ICANN that may be inconsistent with contracted parties’ obligations under local privacy laws.

¹ In this memorandum the reference to “data protection” refers to legal obligations imposed on organizations processing personal data. They include principles such as fairness, limits on sharing, proportionality and data quality and transfers of personal data, and data security.

This memorandum does not provide specific legal advice or render a legal opinion upon which any specific future action or decision should be taken, but rather is submitted only as specific response to Recommendation #3. The present analysis is neither a detailed nor complete analysis of data protection laws within any particular jurisdiction. Instead, ICANN performed a general survey of EU data protection laws as the Data Protection Directive 95/46/EC embodies international principles which serve as a basis for many data protection laws around the world. This survey aims to examine whether there are any significant additional concerns that exist in the current environment not noted in the EWG Memo, or that have not already been otherwise identified and addressed in the Thick Whois Final Report.

II. FINDINGS

The Thick Whois Policy includes the following:

#3: As part of the implementation process a legal review of law applicable to the transition of data from a thin to thick model that has not already been considered in the [EWG memo](#) is undertaken and due consideration is given to potential privacy issues that may arise from the discussions on the transition from thin to thick Whois, including, for example, guidance on how the long-standing contractual requirement that registrars give notice to, and obtain consent, from each registrant for uses of any personally identifiable data submitted by the registrant should apply to registrations involved in the transition. Should any privacy issues emerge from these transition discussions that were not anticipated by the WG and which would require additional policy consideration, the Implementation Review Team is expected to notify the GNSO Council of these so that appropriate action can be taken.

The Thick Whois Final Report concluded that on balance there are more benefits than disadvantages to requiring thick Whois for all gTLD registries, and likewise acknowledges that potentially conflicting data protection legal requirements, as identified in EWG Memo, may exist in certain jurisdictions. However, because data protection laws are sometimes broad and principles driven and sometimes vague and amorphous², it is difficult for ICANN to demarcate those activities that might be instituted to avoid running afoul of such laws, especially in light of the disparity that exists across various jurisdictions.³

As noted in the Thick Whois Final Report, thick Whois registries have existed for many years without any formal government action having been brought against any registrar or registry due to its implementation (or arising from the transition from thin to thick WHOIS such as in the case of .ORG). This is not meant to imply that potential conflicts with data protection law do not exist, but rather to emphasize that there has been no definitive challenge to the existence of thick Whois as a viable global model. Thick Whois helps to create a safe, secure and stable global Internet economy. It aims to protect the legitimate and compelling interests⁴ of registrants, registrars, registries, consumers, and other interested stakeholders. As described in the Thick Whois Final Report, a thick Whois model includes the following benefits:

² As an example of the latter, see Russia's Federal Law 242-FZ ("Localization Law") which requires compliance by 1 September 2015, but is still the subject of significant uncertainty as to its scope, applicability and requirements.

³ Similar issues were identified and discussed in the Thick Whois Final Report.

⁴ The WG in its Thick Whois Final Report likewise acknowledged several legitimate interests, including increased security, stability and resiliency in the Internet.

1. A thick Whois model offers attractive archival and restoration properties. If a registrar were to go out of business or experience long-term technical failures rendering them unable to provide service, registries maintaining thick Whois have all the registrant information at hand and could transfer the registrations to a different (or temporary) registrar so that registrants could continue to manage their domain names.

2. A thick Whois model reduces the degree of variability in display formats.

3. Establishing requirements such as collecting uniform sets of data, and display standards, improves consistency across all gTLDs at all levels and result in better access to Whois data for all users of Whois databases (e.g. law enforcement, Intellectual Property holders, etc).

4. The uptime of the registry with respect to Whois data has typically been found to be better (at least marginally) than the registrar.

These benefits of Thick Whois have been and will continue to be realized with respect for important data protection principles. The previous transition from a thin to thick Whois model in 2003 by .ORG, a registry with several million global registrations⁵, demonstrates that such transition is feasible and possible. To the extent conflicts might arise as to any particular registry or registrar when transitioning from a thin to thick Whois model, the Whois Conflicts Procedure, amendments and waivers are available to address such concerns⁶. These solutions to address conflicts with local law requirements are discussed in more detail in Section IV. of this Memorandum.

⁵ In December 2003, .ORG reported to have 3,015,179 registrations.

⁶ This procedure is currently under review in response to the previous review process soliciting community feedback on the effectiveness of the existing procedure (see <https://www.icann.org/public-comments/whois-conflicts-procedure-2014-05-22-en>).

III. LEGAL CONSIDERATIONS⁷

It is true that in some countries there are some important and legitimate questions relating to data protection obligations under local law that must be addressed as implementation of Thick Whois across all gTLDs is considered. As noted in the EWG Memo, any business model implemented by registries and registrars must account for general principles of data protection (e.g., purpose limitation, data quality and proportionality, transparency, security and confidentiality, rights of access, rectification, deletion and objection, data retention, restrictions on transfer etc.⁸). While the applicability of these principles vary from jurisdiction to jurisdiction, they generally encompass the full menu of potential issues for any registry or registrar.

ICANN recognizes that two of those principles trigger particular attention in relation to the transition to Thick Whois: the need for registrars in some countries to establish a 'lawful basis' (i) for the disclosure of registrants' personal data to the relevant registry and (ii) for the transfer of such data to another country (in this case, the U.S., where all three relevant registries are located).

“Transfer” generally covers any sharing, transmission or disclosure of, providing access to, or otherwise making available, personal information to third parties. The EU Data Protection Directive (95/46/EC) (“EU Directive”), for example, requires that personal information may only be transferred to third countries outside the European

⁷ To assist with the legal analysis reflected in this Section, ICANN engaged Bird & Bird, a leading international law firm with over 1100 lawyers in 27 offices across Europe, the Middle East and Asia with a highly regarded International Privacy & Data Protection Group that advises clients throughout the world.
<http://www.twobirds.com/~media/PDFs/Brochures/Privacy%20and%20Data%20Protection/International%20Privacy%20and%20Data%20Protection%20flyer.pdf>

⁸ EWG Memo, pages 5-7.

Economic Area (EEA) if the receiving countries provide an “adequate” level of protection, as determined by the European Commission or the transfer satisfies one of the exceptions permitted by the EU Directive. One of the two most viable “exceptions” to permit lawful transfer is the consent of the data subjects. However, utilizing this “exception” does entail some challenge that the registrar and registry must ensure are addressed.

Consent in some form and degree is of significant importance across most jurisdictions as it relates to implementation of thick Whois. For example, consent is one way in which organisations can meet one of the ‘conditions’ for processing of personal data throughout the EEA. It also serves to justify transfers outside the EEA - the EU Directive clearly specifies consent⁹ as a lawful ground for these purposes. In Russia, transfer is permitted provided that (1) consent of the data subject is properly obtained and (2) the transfer is as legally prescribed.¹⁰ If proper consent is obtained, such data may be collected, stored, published and/or transferred in the manner consistent with the specific consent provided. Other data protection requirements will still need to be met— for example, proportionality, data quality and security considerations still apply even where consent has been obtained.

⁹ Article 2(h) of the EU Directive provides that 'the data subject's consent' shall mean "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed." However, the key elements of ("informed indication," "specific" and "freely given") are not clearly defined and open for some interpretation.

¹⁰ Consent of the data subject will, however, not overcome the requirement of local storage of personal data as provided for under the upcoming Russian data localization law, but can serve as the basis for onward transfers from Russia.

However, in certain jurisdictions there exists the right to revoke consent. In such instance, the registry or registrar must determine the effect on the registration and the corresponding registration data. The EU Directive does not contain any procedural guidance around withdrawal of consent (e.g. time periods for acting on this). The Article 29 Working Party¹¹ requires that consent should be possible to be withdrawn at any time with effect for the future. It regards consent to be deficient if no effective withdrawal is provided.¹²

The Article 29 Working Party itself has made clear that withdrawal of consent is not retroactive¹³. Accordingly, if a registrant withdrew consent, this would not affect the lawfulness of data which had already been transferred from an EU registrar to a relevant registry.

Apart from the possibility to revoke consent, there may also be doubts as to whether the consent of registrants granted as a condition for the transfer of the registrant data to the registry under the thick Whois should be regarded as “freely given,” in particular if all registrars “require” registrants to grant consent in a similar form. However, ICANN notes that this concern can actually be addressed via the provision of privacy/proxy services by the relevant registrars, as these do provide effective choice to the registrant.

¹¹ A group established under Article 29 of the EU Directive, and consisting of a representative from the supervisory authority of each member state, the European Data Protection Supervisor and the Commission, to give guidance on interpretation of the Directive

¹² See http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf.

¹³ “Decisions or processes previously taken on the basis of this information can therefore not be simply annulled.” See

http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf

In any case and especially for the application of the thick Whois in the EU, ICANN considers it is important that the data processing under thick Whois and the transition thereto can also be based upon the legitimate interests of a party (including ICANN, registries, and registrants). Legitimate interests can be an alternative basis for EU registrars to justify processing of personal data, as long as the processing is not unwarranted because of the (privacy) interests of the individuals whose data is processed. Acknowledged legitimate interests include increased security, stability and resiliency in the Internet.

However, from an EU perspective, if the data processing under thick Whois is based upon legitimate interests, instruments to provide for an adequate level of data protection on part of the data recipient located outside of the EEA will also become relevant (e.g., Standard Contract Clauses, Safe Harbor, approval from the relevant data protection authorities, etc.¹⁴). This is because while sharing of data within the EEA may be justified on this basis, there are additional restrictions on transfers of data outside the EEA. Those instruments contain restrictions on onward transfers (to be imposed on third parties wishing to look up EU Whois data) and contracted parties will need to assess whether and in which form it is practically feasible to implement those restrictions; these restrictions are likely to mean that consent is the most suitable approach, notwithstanding the difficulties outlined above. Furthermore, in addition to consent, (i) privacy/proxy services, and perhaps (ii) thick Whois services where the data stays in the region subject to restrictions to avoid data transfer limitations remain as options available to address transfer of the data.

¹⁴ EWG Memo, p. 9

IV. IMPLEMENTATION CONSIDERATIONS

Notwithstanding the concerns over the validity of consent and the ability of registrants to revoke consent, it is likely to be the most expedient way of addressing the transition to thick Whois. In addition to the above recommendations, registrars and registries must determine how best to manage their operations as they work to ensure they do not violate principles of local laws. To the extent a legitimate conflict exists with local privacy laws thick Whois requirements, as referenced in the Thick Whois Final Report ICANN's Procedure for Handling WHOIS Conflicts with Privacy Law ("Whois Conflicts Procedure")¹⁵ is available to contracted parties. The Whois Conflicts Procedure is the implementation of GNSO consensus policy adopted "*in order to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD Whois service.*" The Whois Conflicts Procedure is designed to ensure regulatory obstacles on the collection, processing, transfer and display of gTLD registration data can be dealt with by exception in instances where a registry or registrar can demonstrate that it is legally prevented by local/national data protection laws or regulations from fully complying with applicable provisions of its contract.

ICANN has commenced a review of the Whois Conflicts Procedure to determine whether modifications to that procedure might be considered. The most common complaint of ICANN contracted parties is that the Whois Conflicts Procedure requires

¹⁵ <http://www.icann.org/en/resources/registrars/whois-privacy-conflictsprocedure-17jan08-en.htm>

“notification of an investigation, litigation, regulatory proceeding or other government or civil action . . .” as its trigger. To the extent any proposed changes to implementation of the Whois Conflicts Procedure are recommended, they would be presented to the GNSO Council, which would determine next steps.

Additionally, contracted parties may wish to consider requesting amendments to or waivers from specific contractual requirements in connection with the transition from a thin to a thick Whois model to the extent the contracted parties’ obligations conflict with its local laws. Historically, ICANN has granted amendments to specific Whois provisions in the Registry Agreement when requested by registry operators with support of relevant Data Protection Authorities to comply local privacy laws. For example, the registry operator of the .name TLD requested¹⁶, and ICANN approved¹⁷, changes to various appendices to the .name Registry Agreement to revise the manner in which, and the conditions under which, the registry operator provides public Whois data. The registry operator requested the changes to ensure that its Whois service complied with applicable data protection laws in the United Kingdom. ICANN’s approval of the amendment to the .name Registry Agreement predates the development of the Whois Conflicts Procedure. Similarly, ICANN approved an amendment to the .cat Registry Agreement¹⁸ to implement Fundacio puntCAT’s October 2011 requested submitted under the Registry Services Evaluation Process (RSEP) requesting Whois changes according to EU data protection legislation¹⁹. In 2007, ICANN also approved an

¹⁶ <https://www.icann.org/resources/unthemed-pages/burr-letter-to-touton-2002-11-09-en>

¹⁷ <https://www.icann.org/resources/board-material/minutes-2002-12-02-en>

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2012-05-06-en#1.2>

¹⁹ <https://www.icann.org/en/system/files/files/puntcat-cat-request-05oct11-en.pdf>

amendment to the .tel Registry Agreement to implement TELNIC's request submitted under the RSEP requesting changes to the Whois obligations according to UK data protection legislation and EU Directive 95/46/EC.²⁰ In each case, the proposed revisions to the registry agreements were published for public comment prior to being approved by the ICANN Board.

In other cases, ICANN has granted limited waivers from compliance with specific terms and conditions in the 2013 Registrar Accreditation Agreement regarding data retention requirements in cases where registrars requests such change because they believe the requirements violate their countries' data retention laws.

Where a conflict is proven to exist by a registrar or registry by way of the Whois Conflicts Procedure, or an amendment or waiver from certain Whois requirements is granted by ICANN, the Registration Data Access Protocol, or RDAP, could be a means to mitigating such conflict without eliminating entirely the benefits of thick WHOIS (e.g. an end-user looking up Whois data would see "thick" data, even though the underlying data is not be stored with the registry). Because RDAP would only permit registry-level access to thick Whois output by redirect to the registrar's own portal, meaning such data would not be "thick" in the sense of existing also at the registry level, there are questions as to whether its implementation would be consistent with policy recommendation #1 and the identified benefits of the thick Whois model outlined in the Thick Whois Final Report. RDAP would, however, ensure certain continued benefits of

²⁰ <https://www.icann.org/resources/board-material/minutes-2007-12-18-en>

thick Whois (e.g., as it relates to output) albeit under less restrictive data collection measures.²¹

V. CONCLUSIONS

Overall, the analysis undertaken to review data protection laws applicable to the transition of data from a thin to thick Whois model did not reveal any additional privacy issues not already considered in the EWG Memo and discussed by the Working Group as it developed the policy recommendations in the Thick Whois Final Report. To the extent that a contracted party finds that it is unable to comply with the Thick Whois policy requirements requiring transition from a thin to a thick Whois model due to a conflict with its obligations under local privacy laws, such conflicts can be dealt with by exception through use of the Whois Conflicts Procedure, or requests to ICANN for an amendment to or waiver of certain provisions in the Registry Agreement or Registrar Accreditation Agreement.

²¹ See generally EWG Memo, p.7-9