



Comments on Realtime Register Data Retention Waiver Request

December 30, 2015

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on ICANN's preliminary determination to grant the Data Retention Waiver Request submitted by accredited registrar Realtime Register B.V. ("the Registrar"). See <https://www.icann.org/news/announcement-2015-11-23-en>.

IPC would not object in principle to the specific waiver requested, so long as it is adequately demonstrated that without a waiver the Registrar will face an irreconcilable conflict between its contractual obligations under the 2013 Registrar Accreditation Agreement (RAA) and its legal duties under applicable national law. IPC has a long-standing and deep-rooted interest in a robust, reliable and accessible registration data directory system. Because the collection, accessibility, and appropriate retention of registrant contact data is so critical to maintaining the accountability and transparency of the entire Domain Name System, IPC believes that any procedure for obtaining a waiver of contractual requirements related to these important functions should be implemented with the utmost care, and with the goal of preserving the uniform application of these requirements to the greatest extent possible.

In some previous announcements granting data retention waiver requests, ICANN has not clearly specified the law which it deemed applicable as the basis for the waiver. This raises questions concerning the scope of the presumption created in paragraph 2 of the Data Retention Specification to the 2013 RAA, under which other registrars subject to the same laws upon which ICANN based its decision to grant a waiver are presumptively entitled to a similar waiver. If it ultimately decides to grant the waiver sought in this instance, ICANN should clearly state that it is doing so on the basis of a specific cited provision of Dutch law, and that the "applicable jurisdiction," for purposes of future waiver requests, is The Netherlands.

IPC wishes to stress that this waiver, if granted, applies only to retention of certain data listed in section 1.2 of the Data Retention Specification to the 2013 RAA (log files, source IP addresses, HTTP headers, and telephone numbers "associated with communications between Registrar and the registrant about the Registration"), and only during the period following the expiration or termination of the sponsorship of the registration by the registrar. It can have no impact whatever upon any other obligations of this Registrar (nor of any other registrar, Dutch or otherwise) under the 2013 RAA or other ICANN policies. These include, but are not limited to, all obligations with respect to the collection or maintenance of registrant contact data, as well as the obligation to make such data available to the public, through Whois or any future registration data directory service, during the term of the sponsorship.

In this regard, we note that the written legal opinion of 19 December 2013 from the Houthoff Buruma law firm, upon which the waiver request is based, specifically notes (in paragraph 14) that “arguably, the collection of the personal data mentioned in section 1.1 [of the Data Retention] specification is justified” under applicable law. This statement clearly applies to Whois data. Section 1.1.6 of that Specification explicitly references “WHOIS information, as set forth in the WHOIS Specification” of the 2013 RAA; other data elements comprising Whois output are also listed in Sections 1.1.1 through 1.1.5. There is no suggestion in either of the legal opinions on which the waiver request is based that any activity mandated by the RAA regarding the collection, maintenance, or disclosure of Whois data or any other data listed in section 1.1 is in conflict with any requirement of Dutch (or any other) national law; and of course nothing in ICANN’s Notice of Preliminary Determination supports any such suggestion either. This should be noted explicitly in any waiver that ICANN decides to grant.

Finally, we note that the Notice of Preliminary Determination refers only to a proposed waiver of certain provisions of Sections 1.2.2 and 1.2.3 of the Data Retention Specification, and that “[i]n all other respects the terms of the Specification would remain AS-IS.” IPC’s non-objection to the waiver request is conditioned on these limitations, and we urge ICANN to state these limitations clearly in its final decision on the waiver request.

Respectfully submitted,

GNSO Intellectual Property Constituency

by Steve Metalitz, IPC VP