



Comments on Blacknight Data Retention Waiver Request

June 6, 2014

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the Data Retention Waiver Request submitted by accredited registrar Blacknight Internet Solutions Ltd. See <https://www.icann.org/news/announcement-fd-2014-05-07-en>.¹

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 such 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.

We have reviewed the material submitted by Blacknight (see <https://www.icann.org/en/system/files/files/waiver-request-blacknight-17sep13-en.pdf>), and the applicable provisions of the Data Retention Specification of the 2013 Registrar Accreditation Agreement (<http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#data-retention>). IPC would not object in principle to the specific waiver proposed, so long as it is adequately demonstrated that without a waiver Blacknight will face an irreconcilable conflict between its contractual obligations under the RAA and its legal duties under applicable national law. However, we question whether the materials thus far submitted constitute the adequate demonstration needed, as spelled out in the Specification.

Blacknight bases its request on “a written legal opinion from a nationally recognized law firm in the applicable jurisdiction that states that the collection and/or retention of any data element specified herein [i.e., in the Specification] by Registrar is reasonably likely to violate applicable law.” Specification, section 2(i). The attached opinion appears to be from a law firm that practices in Ireland (the legal jurisdiction of the registrar); but it does not make any reference to any data elements listed in the Data Retention Specification, much less state that the collection or retention of any specific elements listed there is likely to violate Irish law. Instead,

¹ We note that this announcement is entitled “Notice of Potential Grant of Registrar Data Retention Waiver Request.” By contrast, two previous similar notices regarding registrars in other countries were entitled “Notice of Preliminary Determination to Grant Registrar Data Retention Waiver Request,” and each of these earlier notices began, “ICANN has made a preliminary determination that it is prepared to grant a data retention waiver request...”, language that nowhere appears in the notice regarding Blacknight. See <http://www.icann.org/en/news/announcements/announcement-2-21mar14-en.htm> (Belgian registrar request); <http://www.icann.org/en/news/announcements/announcement-27jan14-en.htm> (French registrar request). We take this distinction to mean that the current notice is not the “determination” referred to in Section 2 of the Data Retention Specification, and that at some point in the future ICANN “will post its determination on its website for a period of 30 calendar days” in accordance with that section, once that determination is made.

the letter (which is undated) addresses wholly distinct provisions of 2013 Registrar Accreditation Agreement, found in Section 3.4.2 of the RAA.²

While there certainly is some overlap between the list of records in RAA section 3.4.2 and the list of data elements in Section 1 of the Specification, there are clearly some incongruities as well. In particular, it cannot be said that a legal objection to the retention of the categories of records in section 3.4.2 necessarily encompasses all the data elements listed in the Specification. Section 3.4.2 covers only registration data passed on to the Registry Operator; registrar communications and correspondence with Registered Name Holders; and account records of Registered Name Holders. Much of the information described in Section 1.2 of the Specification, such as log files, may fall well outside any of these categories. As such, it is questionable that the letter fulfills the requirements set out in Section 2 of the Specification, and equally questionable whether Blacknight's submission, which simply references the letter, demonstrates that the registrar has "determine[d] in good faith that the collection and/or retention of any data element specified in this Specification violates applicable law." (emphasis added)

No doubt the good faith discussions between ICANN and Blacknight that are referenced in the ICANN notice helped to shed some light on just what relief Blacknight was seeking, and its legal justification for seeking a waiver. IPC urges ICANN to spell this out more clearly when it posts its preliminary determination on Blacknight's request (see footnote 1), so that the public can more meaningfully comment on the proposed partial waiver.

IPC also believes that if a waiver is ultimately granted to Blacknight, its precedential effect under section 3 of the Data Retention Specification must be limited to other registrars located in and subject to legal jurisdiction in Ireland, since it is Irish law that provides the basis for the claimed conflict.³ In other words, if ICANN decides to grant the requested waiver, ICANN should clearly state that, for purpose of the waiver process spelled out in section 2 of the Specification, the "applicable jurisdiction" is Ireland, and the "applicable law" is the Irish statute cited in the submission.

Finally, IPC wishes to stress that this waiver applies only to the post-sponsorship period of retention of the data listed in the cited provisions of the Data Retention Specification, and that it can have no impact whatever upon any other obligations of Blacknight or any other registrar 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 such data, as well as the obligation to make such data available to the public, through Whois or otherwise, during the term of the sponsorship, or (to the extent applicable) during the reduced post-sponsorship period of retention

² The focus in Blacknight's submission on section 3.4.2 of the 2013 RAA is even more puzzling because that provision is almost the same as the corresponding provision of the 2009 RAA, except that the 2009 agreement called for the data to be maintained for three years, not two years as in the 2013 version. By contrast, the Specification sets forth a new obligation, while providing a mechanism for registrars to apply for full or partial waivers of the new obligation – not of any other provisions of the 2013 RAA.

³ The legal opinion relies upon the Data Protection Acts (1998-2003) as amended, while the ICANN notice refers to the "Ireland Data Retention Acts 1998-2003." We assume the latter reference is an inadvertent error. We also assume that the Communications (Retention of Data) Act 2011, cited at the end of the legal opinion, is not the basis for the "potential grant of waiver" under consideration, since the ICANN notice makes no reference to that statute. This point could also be usefully clarified in ICANN's eventual preliminary determination.

that would be required if the waiver is ultimately granted. 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, Vice President