



## Comments on Ascio Data Retention Waiver Request

January 10, 2016

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 Ascio Technologies Inc. Danmark ("Ascio"). See <https://www.icann.org/news/announcement-2015-12-09-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 RAA's Data Retention Specification ("Specification") 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 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.

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 Specification, 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, ICANN should clearly state that it is doing so on the basis of a specific cited provision of Danish law, and that the "applicable jurisdiction," for purposes of future waiver requests, is Denmark.

Ascio's waiver request is based solely upon a written legal opinion, dated 23 December 2013, from the Danish law firm Kromann Reumert.<sup>1</sup> While IPC expresses no view on whether anything in this opinion justifies the specific data retention waiver that ICANN proposes to grant Ascio, we wish to note for the record that the opinion contains several statements on a separate

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<sup>1</sup> The waiver request and the legal opinion are both accessible at <https://www.icann.org/en/system/files/files/waiver-request-ascio-technologies-09dec15-en.pdf>.

topic --- the contractual requirement to make Whois data publicly available – which are irrelevant to the proposed waiver under consideration, and which we strongly contest as inaccurate. The opinion’s analysis on this topic is fundamentally flawed because it is based on the “understanding that ICANN’s main purpose for the publication of registered name holder data is law enforcement considerations.” This is not true. The purposes for the collection and publication of registered name holder data (a feature of the current Whois system since its inception) have been extensively canvassed in a number of ICANN studies and reports over the past decade, and law enforcement use is only one of many identified legitimate purposes.<sup>2</sup>

Because the law firm’s “understanding” of the “main purpose” for making Whois data publicly available is incorrect, its conclusion that the publication of such data is in some unexplained way “excessive in relation to the purposes for which the data are collected and the purposes for which they are subsequently processed,” in purported violation of Danish law, is entirely unsupported. Furthermore, to the extent that the legal opinion relies on the positions of the Article 29 Working Party, we note that, as stated in Article 29 of the EU data protection framework directive (Directive 95/46/EC), the Working Party “has advisory status” and has no authority to enforce or to make authoritative rulings regarding the data protection laws of Member States (see Art. 30, providing the Working Party with authority to provide advice, recommendations and opinions to the European Commission). The legal opinion itself acknowledges that “the 29WP has no force of law.”<sup>3</sup>

In any event, the discussion in the legal opinion regarding the publication of Whois data during the period that a domain name registration sponsored by Ascio is active is irrelevant to the data retention waiver request under consideration. IPC wishes to stress that the proposed 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 this registrar (nor of any other registrar, Danish 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 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. This should be specified in ICANN’s final decision on the waiver request.

Finally, we note that this Notice of Preliminary Determination omits important limiting language that appears in most other such notices previously posted.<sup>4</sup> To avoid any uncertainty on this score, IPC urges ICANN to include in any waiver that it decides to grant to Ascio language that confines the waiver to the reduction of the specified post-sponsorship time period during which the registrar must retain the data listed in sections 1.1.1 through 1.1.8 of the Data Retention Specification, and that states that “[i]n all other respects the terms of the Specification

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<sup>2</sup> See, e.g., the Final Report of the Expert Working Group on Registration Data Services, June 2014, <https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf>, at 8-9, identifying 11 categories of permissible purposes.

<sup>3</sup> IPC has no comment on the legal opinion’s assertion that the Article 29WP “is seen by the [Danish Data Protection Authority] as an authoritative advisory body for data protection and privacy matters in Denmark.”

<sup>4</sup> See, e.g., the Notice of Preliminary Determination regarding Realtime Register B.V., see <https://www.icann.org/news/announcement-2015-11-23-en>.

would remain AS-IS.” IPC’s non-objection to the waiver request is conditioned on this limitation, and we urge ICANN to state this limitation clearly in its final decision on the waiver request.

Respectfully submitted,

GNSO Intellectual Property Constituency

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