

ICANN attracts attention of International Working Group on Data Protection in Telecommunications: Yes, the Data Commissioners Care about Privacy at ICANN!

On April 26-28, Stephanie Perrin and Monika Zalnieruite attended the meeting of the International Working Group on Data Protection in Telecommunications (IWGDPT) in Seoul Korea. The group had put on the agenda the Council of Europe report on ICANN and Human Rights <http://www.coe.int/t/information/society/icann-and-human-rights.asp>, written by Monika and Thomas Schneider, as well as the Experts Working Group Report on Next Generation WHOIS <http://whois.icann.org/en/file/rds-final-report-06jun14-en>, and the dissenting report by Stephanie <http://stephanieperrin.com/>. NCUC very kindly paid for the hotel accommodation, and the Berlin group and Council of Europe covered travel costs for Stephanie and Monika respectively. We were very glad of the opportunity to meet with the experts, and explain some of the challenges of implementing human rights, and privacy especially, at ICANN. For an update on all things privacy in general, check out the privacy update on the NCUC website, and come to the outreach event at Dublin ICANN 54 on Saturday October 17th, where we will kick off a discussion on the many privacy issues we are working on at the moment.

Sometimes we hear at ICANN that privacy is just too hard to figure out, what with all the different countries and all the variety in data protection law, which runs the gamut from nothing to regulation in every sector. The fact is though, that data protection commissioners have been telling ICANN they should do something about the WHOIS directory ever since ICANN was founded. A further discussion of their arguments will appear in the privacy update on our NCUC blog shortly.

One group of data commissioners that have been keenly interested in ICANN from its inception is the International Working Group on Data Protection in Telecommunications (IWGDPT). Founded in 1983, they are a global group of data protection authorities and interested technical experts who have been meeting twice a year, to discuss the impact of telecommunications and new media on privacy, and to formulate common positions. You can find their reports and statements, as well as important correspondence, here <http://datenschutz-berlin.de/content/europa-international/international-working-group-on-data-protection-in-telecommunications->

[iwgdpt/working-papers-and-common-positions-adopted-by-the-working-group](#). Chaired by the data protection commissioner of Berlin, they are also known as the Berlin group.

Another important group of data protection authorities is the Article 29 group, a committee of European data protection authorities who were created by Article 29 of the EU Data Protection Directive 95/46, which harmonized requirements for data protection law within the EU in 1995. Given the potential for different interpretations of law amongst the European authorities, and a requirement for a consensus view on the determination of adequacy of foreign data protection law in order to permit onward transfers of personal data out of Europe, the EU created this body of data protection authorities. The European Commission provides support for its work.

Since 2000, the IWGDPT and the Article 29 Working Party have made contact with ICANN numerous times to express their opinions on how ICANN has managed registrant data. A brief summary:

- 2000 the IWGDPT issued a common position on WHOIS data
- 2000 the IWGPT issued a ten commandments for protecting privacy on the Internet
- 2003 IWGPT wrote to ICANN with concerns about the Interim Report Of The Names Council's WHOIS Task Force Of October 14, 2002
- 2003 Article 29 Working Party issued an opinion on WHOIS (2/2003)
- 2005 IWGDPT wrote to the International Working Group on Internet Governance (IWGIG) to let them know that the two groups exist and are interested in Internet privacy issues and further cooperation
- 2006 Article 29 WP wrote to Chairman (Vint Cerf) with concerns about ongoing WHOIS review and failure to identify purpose of data collection
- 2013 the Article 29 WP wrote to the Chairman (Crocker) and the CEO with its concerns about the 2013 RAA, indicating that all European registrars would require a “waiver” according to the ICANN-decreed conflicts with law procedure
- 2014 the Article 29 WP wrote to ICANN’s General Counsel (Jeffries) re-iterating its concerns about the 2013 Registrar’s Accreditation Agreement, and reaffirming its own authority to represent the 26 members of the group in a common position

- 2014 Peter Hustinx, then European Data Protection Supervisor wrote to the Chairman (Crocker) to inform him that the data retention directive had been declared unconstitutional by the European Court of Justice, and that ICANN's data retention requirements were not lawful.

Despite these interventions, it is fair to say that efforts to get ICANN to recognize the reality of data protection law, and protect the privacy and confidentiality rights of its registrants have not been particularly fruitful. The US government argues for the provision of WHOIS data in its trade negotiations, which will further complicate the situation because there is a clause about pre-emption in the Registrars agreement, which could nullify compliance with data protection law.

For those unfamiliar with the WHOIS struggle, in which the NCUC has played a key role since its inception, here is a brief summary. Registrants of domain names must provide contact data to the Registrar who sold them the service, and that data in turn is made public in the WHOIS directory (not an acronym). Detailed requirements are set out in the Registrars Accreditation Agreement, which the registrars must sign in order to be permitted to register domain names. Along with considerable other data about the customer transactions (eg. IP address, all email correspondence about the domain, and financial information) it must be maintained by the registrar for two years after the last contact with the customer. The registrar must also escrow a range of data elements with ICANN and an escrow agent. Some of this data retention is for the benefit of the customer, guarding against the sudden disappearance of a registrar, and with that the records of ownership of a domain, which can have considerable financial impact.

However, new uses and disclosures for this information have grown over the years, causing concern with respect to privacy and human rights. Since the Internet is the dominant method of expression in 2015, some of the rights of confidentiality are extremely important to vulnerable groups, political speakers, and dissidents. The debate at ICANN over disclosure, fought by a small team of civil society groups, has therefore been about both data protection and the broader human rights issues associated with speech and freedom of assembly. It is worth noting here that many of these concerns are shared by other groups at ICANN, notably the Security and Stability Advisory Committee of ICANN (SSAC), which has commented regularly on WHOIS issues, and

the Government Advisory Committee (GAC). The GAC has, over many years, called for ICANN to collect more data and work harder to ensure its accuracy. The focus has mostly been on facilitating the work of law enforcement in combatting the very real issues of cybercrime, phishing, fraud, and trademark infringement.

Monika presented her work on the human rights issues at ICANN, and Stephanie gave a brief summary of the future work coming on WHOIS as a result of the EWG report, and the forthcoming first report of the Privacy/Proxy Services Accreditation Issues Working Group, which was at the time about to be released for public comment on May 4. She also updated the group on what was happening with the WHOIS conflicts with law group. The conflicts with law procedure provides a way for registrars, who wish to comply with local data protection law and not provide their customer data to WHOIS, to present evidence to ICANN that they would indeed be breaking the law if they complied with the Registrars Accreditation Agreement (RAA). At the moment, those procedures are onerous. Since many members of the IWGDPT are also members of the Article 29 WP, they were aware of the standoff that has been going on between the group and ICANN. (The Chairman of the group wrote to ICANN to tell them that every European jurisdiction would be in conflict with ICANN's contractual requirements, and therefore all European registrars needed exemption from the WHOIS requirements, but ICANN is not recognizing them as a competent body).

The data commissioners find themselves in the awkward position that the actual data controller responsible for forcing registrars to disclose data is ICANN, yet the only responsible parties within their jurisdictions are almost always their own national registrars, who are not the ones who are wanting to release customer data, but who lack the tools to protect data given the strictures of the 2013 RAA. It is not surprising that there has been little enforcement action, even though the issues are long-standing.

This was a great opportunity to update a group of global data commissioners on our work, and we look forward to staying in touch with them and seeking advice as the whole WHOIS stream of work moves forward. To keep up with all things privacy, watch the NCUC website and blog for updates.

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