



Translation of letter from DPA to FRLregistry B.V.

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Contact

T +31 (0)26 352 5500

support@sidn.nl

www.sidn.nl

Offices

Meander 501

6825 MD Arnhem

The Netherlands

Mailing address

PO Box 5022

6802 EA Arnhem

The Netherlands

The following is a faithful translation of the content of a letter from the Dutch Data Protection Authority to FRLregistry B.V. dated 26 October 2017. The translation was commissioned by SIDN and supplied by [G & J Barker Ltd.](#)

Public accessibility of Whois data for .frl and .amsterdam domain names

Dear Sir,

On 28 August 2017, you sought the opinion of the Data Protection Authority (DPA) regarding the publication of personal data concerning the registrants of domain names ending with .frl and .amsterdam for use in the context of an ICANN conflict procedure.¹ Your dispute with ICANN may be summarised as follows. As the registry for the extensions in question, you now offer private registrants the option of privacy-friendly (protected) publication of their contact details, but ICANN has instructed you, in your registry capacity and on the basis of the agreement governing your relationship with ICANN, to desist from offering protected publication. You indicate that ICANN is requiring you, in your registry capacity, to publish private registrants' contact details in a manner that would contravene our national Data Protection Act (referred to below by its Dutch initials 'Wbp') and the European General Data Protection Regulation (GDPR).

The DPA does not normally give opinions of the kind requested. An opinion is given only in exceptional cases, where it is deemed appropriate on the basis of an assessment of the particular circumstances. The DPA deems it appropriate to give an opinion in this case. Giving an opinion is deemed appropriate because many people would be affected by the mandatory unrestricted publication of Whois data, and because the DPA has not to date

¹ Revised ICANN Procedure For Handling WHOIS Conflicts with Privacy Law, URL: <https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en>



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published guidance on the compatibility of the unrestricted publication of Whois data with the Wbp and GDPR.²

The DPA hereby gives permission for an anonymised version of this letter to be used in the context of the ICANN conflict procedure.

FRLregistry B.V. has entered into an agreement with ICANN for the registration of domain names ending with .frl. FRLregistry B.V. also handles the marketing for .amsterdam. FRLregistry B.V. acts as the registry for both extensions. The extensions in question are 'generic top-level domains' (gTLDs) and, as such, fall under ICANN's direct control. ICANN requires registries to publish the details of domain name registrants. The data in question are known as Whois data and include personal data, such as the registrant's name, phone number and e-mail address.

Since 2003, the Article 29 Working Party has repeatedly expressed concerns about the unrestricted publication of domain name registrants' personal data. The corollary of the opinion of the Article 29 Working Party regarding the application of data protection principle to Whois registers is that personal data of the kinds described must not be published on the internet, but should be made available only on the basis of layered access.³

That conclusion is also evident from the following passage of correspondence between the Article 29 Working Party and ICANN: "while it is clear that the identity and contact information should be known to his/her service provider, there is no legal ground for justifying the mandatory publication of personal data referring to this person."⁴ The Article 29 Working Party went on to write: "In the light of the proportionality principle, it is necessary to look for less intrusive methods that would still serve the purpose of the Whois directories without having all data directly available on-line to everybody."⁵

Whois data include the name, phone number and e-mail address of the domain name' registrant. If the registrant is a natural person, the data are 'information relating to an identified or identifiable natural person' and therefore constitute personal data, as referred to in Section 1, preamble and under a, of the Wbp, and in Article 4(1) of the GDPR.

The publication of Whois data on the internet is a form of personal data processing, as referred to in Section 1, preamble and under b, of the Wbp, and in Article 4(2) of the GDPR. ICANN defined the original purpose of the Whois register as to enable technical personnel to contact website owners in the event of technical problems. By contractual means, ICANN requires registries and registrars to maintain a Whois register, accessible to the general public, for the domains that they operate. The registries and registrars may determine the

² In the context the Article 29 Working Party of data protection authorities in the EU, the DPA has repeatedly and publicly expressed the view that unrestricted public access to Whois data is not permissible.

³ Article 29 Working Party Opinion 2/2003 on the application of the data protection principle to the Whois directories, pp. 3 and 4, URL:
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp76_en.pdf.

⁴ Letter from the Article 29 Working Party to ICANN, 22 June 2006, p. 2, URL:
<http://www.icann.org/correspondence/schaar-to-cerf>
<http://www.icann.org/correspondence/schaar-to-cerf-22jun06.pdf>.

⁵ Idem.



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means by which that requirement is fulfilled. The registries and registrars independently operate and maintain administrative systems and infrastructures for the publication of personal data. Hence, ICANN and FRLregistry B.V. are jointly responsible for the publication of Whois data concerning domain name registrants.

Being jointly responsible, together with ICANN, FRLregistry B.V. is required to comply with the Wbp in connection with the publication of Whois data on the internet.⁶ The GDPR does not modify that requirement.

According to the Wbp and GDPR, ICANN and FRLregistry B.V. would require legal grounds for making Whois data publicly available on the internet on an unrestricted basis (Section 8 of the Wbp; Article 6 of the GDPR). Possible legal grounds include:

- Consent (Section 8, preamble and under a, of the Wbp and Article 6(1)a of the GDPR)
- Necessity for the performance of a contract (Section 8, preamble and under b, of the Wbp and Article 6(1)b of the GDPR)
- Legitimate interest (Section 8, preamble and under f, of the Wbp and Article 6(1)f of the GDPR)

FRLregistry B.V. and ICANN cannot rely on the contract principle (as per Section 8, preamble and under b, of the Wbp, and Article 6(1)b of the GDPR) for making Whois data publicly available on an unrestricted basis. Although FRLregistry B.V. has an agreement with ICANN that requires the Whois data to be publicly accessible, the domain name registrants (data subjects) are not party to that agreement. The agreement between FRLregistry B.V. and ICANN does not therefore afford legal grounds for the unrestricted public accessibility of personal data concerning domain name registrants.

Nor can FRLregistry B.V. and ICANN rely on the legitimate interest principle (as per Section 8, preamble and under f, of the Wbp and Article 6(1)f of the GDPR) for making domain name registrants' personal data publicly accessible on an unrestricted basis. Although legitimate purposes may be served by making certain Whois data available,⁷ those purposes could equally be served by arrangements that one may briefly describe as layered access. Unrestricted public access is neither necessary for nor proportionate to the purposes in question. Because the purposes in question could be achieved by less onerous means, FRLregistry B.V. and ICANN cannot rely on the legitimate interest principle as grounds for making domain name registrants' personal data publicly accessible on an unrestricted basis.⁸

On 31 July 2017, ICANN amended the Registry Agreement by means of the 2017 Global Amendment to Registry Agreements.⁹ Under the amended agreement, ICANN requires

⁶ See also: *Richt snoeren publicatie van persoonsgegevens op internet* ('Guidelines on the publication of personal data on the internet'), URL:

https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/rs/rs_20071211_persoonsgegevens_op_internet_definitief.pdf.

⁷ Article 29 Working Party Opinion 2/2003 on the application of the data protection principle to the Whois directories, p. 2, URL:

http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp76_en.pdf

⁸ Idem, p. 3; Letter from the Article 29 Working Party to ICANN, 22 June 2006, pp. 2 & 3, URL:

<http://www.icann.org/correspondence/schaar-to-cerf-22jun06.pdf>.

⁹ ICANN, 2017 Global Amendment to Registry Agreements, URL:

<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-global-amendment-31jul17-en.pdf>.



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registries to require their affiliated registrars to obtain consent for the publication of Whois data. The wording of the relevant provision is as follows: "Registry Operator shall (...) require such registrar to obtain the consent of each registrant in the TLD for such collection and use of Personal Data."¹⁰ Insofar as ICANN may seek to rely on consent for making Whois data publicly available on an unrestricted basis, the following applies. The requirement that ICANN makes of registries obliges registrars to obtain consent from domain name registrants for the publication of Whois data. Hence, in order to acquire a domain name, a data subject is obliged to give consent for his/her contact details to be made publicly accessible in the Whois register on an unrestricted basis. It is the DPA's opinion that such consent cannot be considered to be freely given and that the arrangement is therefore inconsistent with Section 8, preamble and under a, of the Wbp and Article 6(1)a of the GDPR in conjunction with Article 7(4) of the GDPR.

For the sake of absolute clarity, it should be added that the DPA does not believe that any of the other principles set out in Section 8 of the Wbp and in Article 6 of the GDPR may reasonably be relied upon as grounds for making Whois data publicly available on an unrestricted basis.

Moreover, Section 11, subsection 1, of the Wbp states that the processing of personal data is permissible only insofar as it is necessary for, relevant to and proportionate to the purpose for which the data were collected or subsequently processed. In the DPA's opinion, the active publication of domain name registrants' personal data to all internet users is disproportionate to the purpose of the Whois register.¹¹ The GDPR contains similar provisions (Article 5(1)c).

In view of the considerations set out above, the DPA concludes that, by making Whois data publicly available on an unrestricted basis, FRLregistry B.V. and ICANN are in contravention of the Wbp and the GDPR.

On behalf of the
Data Protection Authority,

Meester W.B.M. Tomesen
Chair

¹⁰ ICANN, 2017 Global Amendment to Registry Agreements, p. 4 par. 6, URL:

<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-global-amendment-31jul17-en.pdf>.

¹¹ Aside: unrestricted public accessibility encourages domain name registrants to provide false details for publication in the Whois register. To quote the Article 29 Working Party: "[T]he way the system is designed provides a strong incentive for natural persons to provide inaccurate contact details."