

Registrar Data Retention Waiver Request (2013 RAA)

Complete this form to request a waiver of one or more of the data retention requirements specified in the 2013 Registrar Accreditation Agreement (RAA). ICANN's consideration of this request is made pursuant to sections 2, 3, and 4 of the Data Retention Specification to the RAA; a waiver is not automatically granted by submitting this form.

Registrar name: Blacknight Internet Solutions Ltd

GURID (IANA ID): 1448

Legal jurisdiction of registrar: Ireland

Jurisdiction in which legal conflict has arisen: Ireland

Contact person for this request: Michele Neylon

Email address for contact person: michele@blacknight.com

Telephone number for contact person: +353599183090 (+353879059502 mobile)

Registrar has determined in good faith that the collection and/or retention of the data element(s) specified in the Data Retention Specification to the 2013 RAA, noted below, violates applicable law based upon (check all that apply):

- 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 by Registrar is reasonably likely to violate applicable law (the "Opinion"); and/or
- a ruling of, or written guidance from, a governmental body of competent jurisdiction providing that compliance with the data collection and/or retention requirements of this Specification violates applicable law; and/or
- a data retention waiver determination previously granted by ICANN.

A copy of the Opinion and governmental ruling or guidance, as applicable, must accompany this waiver request. Please also include any documentation received by your registrar from any governmental authority related to such determination and complete the fields below.

Cite and provide a copy of the relevant applicable law:

Data Protection (Amendment) Act 2003

<http://www.irishstatutebook.ie/2003/en/act/pub/0006/index.html>

Data Protection Act 1988 <http://www.irishstatutebook.ie/1988/en/act/pub/0025/index.html>

Briefly describe the relevant applicable law in English (if the text of the law is not in English):

Specify the allegedly offending data collection and retention elements:

Please see attached / enclosed legal opinion for details

If this waiver request is based on a data retention waiver determination previously granted by ICANN (i.e., same law, same jurisdiction, same data retention requirement(s)), please provide the date, registrar name, and URL of the previously posted determination and explain why the determination should also be applied to your registrar:

n/a

If this waiver request is not substantially based on a data retention waiver determination previously granted by ICANN (i.e., same law, same jurisdiction, same data retention requirement(s)), please explain the manner in which the collection and/or retention of such data is believed to violate applicable law, and provide a description of such determination and any other facts and circumstances related thereto:

Please see attached / enclosed legal opinion for details

Please note that prior to granting any data retention waiver, ICANN will post its preliminary determination on its website for a period of at least 30 calendar days.

Submitted by:

Signature: _____ Date: ___17 September 2013_____

Print Name: __Michele Neylon_____ Title: _Managing Director_____

This form and accompanying materials may submitted by courier or fax to:

Attention: Registrar Accreditation Notices
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094-2536 USA

Facsimile: + 1 310 823-8649

If you wish to submit an electronic copy, please email attachments as PDF or DOC/x files to RAAquestions@icann.org.



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**The affects which Data Protection Legislation has on the 2013 Registrar
Accreditation Agreement within the Irish Jurisdiction.**

In Ireland Data Protection is governed under the Data Protection Acts 1998- 2003 (as amended) hereinafter 'The Act'. The amended Act implements the provisions of the EU Directive 95/46. The Acts set out the general principle that individuals should be in a position to control how data relating to them is used. The Data Protection Commissioner is responsible for upholding the rights of individuals as set out in the Acts, and enforcing the obligations upon data controllers.

Personal data- data relating to a living individual, who can be identified from the data, or from the data in conjunction with other information that is in, or is likely to come into the possession of the data controller. It can be electronic or paper files in a relevant filing system. It must be structured information to be defined as Data.

Under Section 2 of the Act, Data collected must be accurate, complete and up to date. The most important Section of the Act in relation to the RAA Agreement is **Section 2(1)(c)**, which states as follows:

2. (1) A data controller shall, as respects personal data kept by him, comply with the following provisions:

- (a) the data or, as the case may be, the information constituting the data shall have been obtained, and the data shall be processed, fairly,*
- (b) the data shall be accurate and, where necessary, kept up to date,*
- (c) the data—
 - (i) shall be kept only for one or more specified and lawful purposes,**





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(ii) shall not be used or disclosed in any manner incompatible with that purpose or those purposes,

(iii) shall be adequate, relevant and not excessive in relation to that purpose or those purposes, and

(iv) shall not be kept for longer than is necessary for that purpose or those purposes,

The RAA Agreement has requested the following:

*3.4.2 During the Term of this Agreement and for two (2) years thereafter, Registrar (itself or by its agent(s)) shall **maintain the following records** relating to its dealings with the Registry Operator(s) and Registered Name Holders:*

3.4.2.1 In electronic form, the submission date and time, and the content, of all registration data (including updates) submitted in electronic form to the Registry Operator(s);

3.4.2.2 In electronic, paper, or microfilm form, all written communications constituting registration applications, confirmations, modifications, or terminations and related correspondence with Registered Name Holders, including registration contracts; and

3.4.2.3 In electronic form, records of the accounts of all Registered Name Holders with Registrar.

*3.4.3 During the Term of this Agreement and for two (2) years thereafter, Registrar shall make the data, information and records specified in this Section 3.4 available for **inspection** and copying by ICANN upon reasonable notice.*

There is a potential conflict of the requirements as under the RAA Agreement and Sections 2(1)(c)(i) & (iv) of the Act. The RAA Agreement is seeking to retain data in excess of the actual agreement and for a further two year period. This is at odds with Section 2(1)(c)(i) of the Act on the basis that the lawful purpose for which the information was held has now passed, as the agreement is at an end. On this basis the Data Subject has not consented to the information being held, and further there is an





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obligation not to hold the information for such period. Further to this is the conflict with condition 2(1)(c)(iv) of the Act which places an actual restriction on the time frame in which data can be stored by a Data Controller. While there is no specific time frame, there is a subjective basis for same. That basis is that there is no further requirement for the information to be held. Where the RAA Agreement is at an end then there is no requirement to keep the information. It must be clear on the time frame for information to be kept and the reason why the information is being retained. Information should never be kept 'just in case'. If the purpose for which the information was obtained has ceased then the information must be deleted in a secure way. In the Irish jurisdiction the Data Commissioner has made numerous decisions on the issue of data retention. A relevant decision would be:

Ticketmaster case study 13 of 2008¹:

In that decision, Ticketmaster was holding credit card details for 16 months. The data commissioner said in that circumstance and given the relationship between the parties, 12 months was more appropriate, and if no activity on account during that time, then account should be deleted completely. This decision gives a very clear indication as to the intent of the Data Commissioners office in relation to over holding of personal data.

A final point to make would be in relation to Section 2(1)(b) of the Act which states that data shall be accurate and, where necessary, kept up to date. If there is a requirement on a Data Controller to hold information for a further period of two years after the determination of the agreement, then there is a high possibility that the data held could become inaccurate during that period. This would place the Data Controller in breach of the legislation, simply by not acting at all.

Further legislation which governs this area is the Communications (Retention of Data) Act 2011. This legislation governs certain information gathered from fixed and mobile telephone networks, Internet and email and Internet telephony operated by a public communications provider. It states that information obtained in this regard must be retained for a specific period

- **Part 1 of Schedule 2:** requires telephone service providers to retain telephone data for 2 years,

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http://www.dataprotection.ie/ViewDoc.asp?fn=/documents/casestudies/CaseStudies_2008.htm&CatID=96#13





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- **Part 2 of Schedule 2:** requires an ISP to hold internet Data (as defined under the Act) for a period of 12 months. This type of data could include the source number, or IP Address. It would not include content or detail. This date runs from when the data is first processed. Again this is in direct conflict with the RAA Agreement as the time requirements by the Agreement are in conflict with that of the Act.

Yours Faithfully,



William Clarke
Clarke Jeffers Solicitors

