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

Blacknight Internet Solutions Limited.

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.

Definition:

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





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*more specified and lawful
purposes,*

*(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.*





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There is a 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 obligation not to hold the information for such period. The RAA Agreement is in clear breach of the requirements under the Act.

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 a scenario where a customer's contract has come to an end, and a domain moved away from a registrar, then there is clearly no requirement for the retention of data. If a domain is still live at this stage, it will clearly be held by another Registrar who will be able to provide up to date Data on the customer. 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.

This point of view is also reflected in the Article 29 Working Group. In its 2/2003 opinion it states the following:

Article 6c of the Directive imposes clear limitations concerning the collection and processing of personal data meaning that data should be relevant and not excessive

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





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for the specific purpose. In that light it is essential to limit the amount of personal data to be collected and processed

A further 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.

The Registrar is obliged, at all stages where they hold data to allow for inspection, that data which they hold to the Data Subject, on foot of a simple request. This is contained under Section 4 of the Act which states:

4.—(1) (a) Subject to the provisions of this Act, an individual shall, if he so requests a data controller in writing—

(i) be informed by the data controller whether the data kept by him include personal data relating to the individual, and

(ii) be supplied by the data controller with a copy of the information constituting any such data,

as soon as may be and in any event not more than 40 days after compliance by the individual with the provisions of this section; and, where any of the information is expressed in terms that are not intelligible to the average person without explanation, the information shall be accompanied by an explanation of those terms.

This Section allows all data Subjects to access their information at any stage. There is an exemption to this Section contained in Section 5 of the Act, however, same may not be applicable in relation to information held by a registrar. If the Data is to be retained for a further period of 2 years from the cessation of the contract of Services, then this will give a Data Subject the right to request disclosure of the data for that period. Again, the Registrar will not have any issue in relation to disclosure of information to a Data Subject however; liability could be created through this requirement.

Section 7 of the Act states as follows:





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For the purposes of the law of torts and to the extent that that law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned:

Provided that, for the purposes only of this section, a data controller shall be deemed to have complied with the provisions of section 2 (1) (b) of this Act if and so long as the personal data concerned accurately record data or other information received or obtained by him from the data subject or a third party and include (and, if the data are disclosed, the disclosure is accompanied by)—

- (a) an indication that the information constituting the data was received or obtained as aforesaid,*
- (b) if appropriate, an indication that the data subject has informed the data controller that he regards the information as inaccurate or not kept up to date, and*
- (c) any statement with which, pursuant to this Act, the data are supplemented.*

The only defence for this Section is where the data was obtained from a third party, which is not the position here. Clearly this Section places a duty of care on the Registrar to ensure that all Data held by them is correct and accurate. Failing which, the Data Subject will have a cause of action under Tort. While the Registrar has no issue with this section in the normal course of business, the issue arises where information is being kept in excess of the contract period, as required under the RAA Agreement. The two year extension period for holding data under Section 3.4.2 will place the Registrar in the position where they will be holding data that may/ may not be correct, yet they will not be in a position to request or obtain any updated information, as the Data Subject will no longer be a customer of the Registrar. This position is completely unsatisfactory and cannot be agreed to. The RAA Agreement is placing the registrar in a position where liability can arise due to no fault of their own, and where there is really no requirement to hold information for such an extended period of time.

Further legislation which governs this area is the Communications (Retention of Data) Act 2011. This legislation governs certain information gathered from fixed and mobile





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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,

- **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.

Finally there are the additional security issues which surround the requirement of data retention under the RAA Agreement. Under the act the Registrar must have appropriate security measures against unauthorised access to, alteration, destruction or disclosure of data(in particular where the processing involves the transmission of data over a network) and against all other lawful forms of processing. There is a requirement on the Registrar to take reasonable steps to ensure that the Data is protected. Again, the Registrar will have no issue in relation to security measures while the Data Subject is a customer of the Registrar. A problem arises however where the contract of services is at an end, yet the Registrar must continue to secure the information. This again places an unfair burden, both in respect of liability and cost on the Registrar, for no relevant reason.

On foot of the above points, it would be our view that data retention as required under conditions **3.4.2-3.4.3** of the draft **RAA Agreement** is in breach of Irish Data Protection Legislation. In order to progress the matter, there might be an argument to state that data could be retained by the register, in line with conditions 3.4.2-3.4.3 of the draft RAA Agreement if the time frame for retention was shortened. As data retention time limits under Irish Data Protection legislation are based on subject criteria, a period of **90 days** might be acceptable, as it would seem adequate for the purpose which it is intended without being excessive. Please note however, that this is not confirmation that the Irish Data Protection Commissioner would accept such a time frame, due to the subjective nature of the legislation.

Yours Faithfully,



William Clarke

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