



Strasbourg, 12 November 2013 (draft)

T-CY (2013) 26

Cybercrime Convention Committee (T-CY)

T-CY Guidance Note #8

Obtaining subscriber information for an IP address used in a specific communication within a criminal investigation

Proposal prepared by the Bureau

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1 Introduction

The Cybercrime Convention Committee (T-CY) at its 8th Plenary (December 2012) decided to issue Guidance Notes aimed at facilitating the effective use and implementation of the Budapest Convention on Cybercrime, also in the light of legal, policy and technological developments.¹

Guidance Notes represent the common understanding of the Parties to this treaty regarding the use of the Convention.

The present Note addresses the question of the obtaining subscriber information related to an IP address used in a specific communication within a criminal investigation. Reference is made to article 18 of the Convention on production orders, especially the provisions of article 18, para 1, under b, as well as article 18, para 3.

Within criminal investigations and proceedings regarding cybercrime, it is commonly necessary to obtain information from ISPs, regarding:

- the identification of the customer who has used a known IP address at a specific time; or
- the identification of the IP address used by a customer of an ISP whose identity is already known.

The information sought is comparable to the information needed to identify the owner of a telephone number in a criminal investigation. It is to identify the person who used a known IP address at a particular days and time, or to identify the IP addressed used by a known person.

Obtaining such subscriber information is different from obtaining information related to ongoing communications (“real time”), which is not covered by Article 18 of the Budapest Convention, but would be within the scope of Article 20 or Article 21.

It is also different from traffic data to determine communications by a suspect over a certain period of time or multiple communications established by a suspect or the route of a communication for which stricter safeguards and conditions may apply.

The legal conditions to obtain subscriber information depend on domestic laws which establish different solutions.

In some Parties, IP-related subscriber information can be obtained in any type of investigation and on the initiative of the police.

Other Parties treat subscriber information related to an IP address in the same way as traffic data. In some, law enforcement authorities can obtain traffic data in relation to serious crime and following a court order only. Such solutions impede domestic investigations and may prevent Parties to meet their obligations under the Convention on Cybercrime also with respect to international cooperation. A large share of requests for international cooperation is related to subscriber information.

¹ See the mandate of the T-CY (Article 46 Budapest Convention).

2 The approach of the Budapest Convention on Cybercrime (ETS 185)

The Convention does not define or give a particular status to an IP address. Moreover, the Convention does not state expressly whether and in which situations an IP address is or is not traffic data.

The definition of traffic data in Article 1.d of the Convention is very broad, covering "any computer data relating to a communication by means of a computer system, generated by a computer system (...) indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service". In this sense, an IP address used in a specific communication could be considered traffic data.

However, Article 18.3 offers clarification that an IP address used in a specific communication is indeed to be considered subscriber information.

According to that provision:

- 3 For the purpose of this article, the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:
 - a the type of communication service used, the technical provisions taken thereto and the period of service;
 - b the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;
 - c any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

Even if the term "IP address" is not used explicitly, the term "access number" (Article 18.3.b) precisely refers to an IP address.

The Explanatory Report of the Convention² notes that this provision refers to all technical measures that enable the subscriber to enjoy a communication service. Thus, the provision includes all technical numbers or addresses (telephone number, web site address or domain name, email address, etc.). In paragraph 180, the Explanatory Report adds that subscriber information "also means any information, other than traffic data or content data, by which it can be established the user's identity, postal or geographic address, telephone and other access number". And it concludes (paragraph 182) that "for example, on the basis of the provision of a particular name (...) a particular associated telephone number or private email address may be requested. On the basis of a particular telephone number or email address, the name and address of the subscriber concerned may be ordered".

² See Paragraph 179 - <http://conventions.coe.int/Treaty/en/Reports/Html/185.htm>.

In this context, it is irrelevant whether the IP address is a fixed address, assigned permanently to a single user, or a dynamic address, successively assigned to multiple users. Each of them represents an "access number".

3 T-CY statement

The T-CY considers that

- Subscriber information (as defined in Article 18.3) is different from traffic data (as defined in Article 1.d Budapest Convention) and that different rules may apply regarding accessing subscriber information;
 - The IP address used in a specific communication is considered subscriber information.
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4 Appendix: Extracts of the Budapest Convention

Article 1 - Definitions

For the purposes of this Convention:

- a "computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data;
- b "computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;
- c "service provider" means:
 - i any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and
 - ii any other entity that processes or stores computer data on behalf of such communication service or users of such service;
- d "traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

Article 18 - Production order

- 1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:
 - a a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and
 - b a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.
- 2 The powers and procedures referred to in this article shall be subject to Articles 14 and 15.
- 3 For the purpose of this article, the term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:
 - a the type of communication service used, the technical provisions taken thereto and the period of service;

- b the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;
- c any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

Explanatory Report – Extracts

177. "Subscriber information" is defined in paragraph 3. In principle, it refers to any information held by the administration of a service provider relating to a subscriber to its services. Subscriber information may be contained in the form of computer data or any other form, such as paper records. As subscriber information includes forms of data other than just computer data, a special provision has been included in the article to address this type of information. "Subscriber" is intended to include a broad range of service provider clients, from persons holding paid subscriptions, to those paying on a per-use basis, to those receiving free services. It also includes information concerning persons entitled to use the subscriber's account.

178. In the course of a criminal investigation, subscriber information may be needed primarily in two specific situations. First, subscriber information is needed to identify which services and related technical measures have been used or are being used by a subscriber, such as the type of telephone service used (e.g., mobile), type of other associated services used (e.g., call forwarding, voice-mail, etc.), telephone number or other technical address (e.g., e-mail address). Second, when a technical address is known, subscriber information is needed in order to assist in establishing the identity of the person concerned. Other subscriber information, such as commercial information about billing and payment records of the subscriber may also be relevant to criminal investigations, especially where the crime under investigation involves computer fraud or other economic crimes.

179. Therefore, subscriber information includes various types of information about the use of a service and the user of that service. With respect to the use of the service, the term means any information, other than traffic or content data, by which can be established the type of communication service used, the technical provisions related thereto, and the period of time during which the person subscribed to the service. The term 'technical provisions' includes all measures taken to enable a subscriber to enjoy the communication service offered. Such provisions include the reservation of a technical number or address (telephone number, web site address or domain name, e-mail address, etc.), as well as the provision and registration of communication equipment used by the subscriber, such as telephone devices, call centers or LANs (local area networks).

180. Subscriber information is not limited to information directly related to the use of the communication service. It also means any information, other than traffic data or content data, by which can be established the user's identity, postal or geographic address, telephone and other access number, and billing and payment information, which is available on the basis of the service agreement or arrangement between the subscriber and the service provider. It also means any other information, other than traffic data or content data, concerning the site or location where the communication equipment is installed, which is available on the basis of the service agreement or arrangement. This latter information may only be relevant in practical terms where the equipment is not portable, but knowledge as to the portability or purported location of the equipment (on the basis of the information provided according to the service agreement or arrangement) can be instrumental to an investigation.

181. However, this article should not be understood as to impose an obligation on service providers to keep records of their subscribers, nor would it require service providers to ensure the correctness of such information. Thus, a service provider is not obliged to register identity information of users of so-called

prepaid cards for mobile telephone services. Nor is it obliged to verify the identity of the subscribers or to resist the use of pseudonyms by users of its services.

182. As the powers and procedures in this Section are for the purpose of specific criminal investigations or proceedings (Article 14), production orders are to be used in individual cases concerning, usually, particular subscribers. For example, on the basis of the provision of a particular name mentioned in the production order, a particular associated telephone number or e-mail address may be requested. On the basis of a particular telephone number or e-mail address, the name and address of the subscriber concerned may be ordered. The provision does not authorise Parties to issue a legal order to disclose indiscriminate amounts of the service provider's subscriber information about groups of subscribers e.g. for the purpose of data-mining.