

20 October 2018

RE: 17 October 2018 NCSG letter

Non-Commercial Stakeholders Group

Dear Members of the Non-Commercial Stakeholders Group,

We write in response to your [letter](#) of 17 October 2018 regarding ICANN organization's facilitation of the community work on developing a unified access model. While we typically would not respond in such detail, we were concerned with the mischaracterizations of the record and want to make sure that the record is clear on the high-level issues as the community heads into ICANN63.

A key question raised in your letter is "on what basis has ICANN decided that a unified access model is a priority?"

Since launching the process to develop the [Proposed Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation](#), or the "Calzone" model, ICANN org has solicited input and feedback from the community on every iteration of possible models for adjusting WHOIS output in light of the GDPR. This considerable community dialogue was transparently [documented](#), shared with the data protection authorities and considered in the development of the [Temporary Specification for gTLD Registration Data](#), which the ICANN Board of Directors adopted on 17 May 2018, in accordance with ICANN's Bylaws and contractual obligations. Following the community dialogue, the ICANN Board identified some implementation issues raised during the course of the Temporary Specification's development, which the Board encouraged the community to continue discussing so that the issues could be resolved as quickly as possible. Among the items the Board identified in the Annex to the Temporary Specification was "work to develop an accreditation and access model that complies with the GDPR, while recognizing the need to obtain additional guidance from the Article 29 Working Party/European Data Protection Board."

On 27 May 2018, the EDPB wrote to ICANN and endorsed the statement of the Article 29 Working Party (WP29), stating "WP29 expects ICANN to develop and implement a WHOIS model which will enable legitimate uses by relevant stakeholders, such as law enforcement, of personal data concerning registrants in compliance with the GDPR, without leading to an unlimited publication of those data."<sup>1</sup> In response to community input, the Temporary Specification itself, and this letter from the EDPB, ICANN org is seeking greater legal clarity whether and under what circumstances a unified access model could facilitate third party access to registration data consistent with applicable data protection law, including the GDPR.

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<sup>1</sup> <https://www.icann.org/en/system/files/files/statement-edpb-whois-27may18-en.pdf>

ICANN org does not presuppose the outcome of the policy development process, including what types of access -- unified or otherwise -- the community will recommend. This is the community's work. Whatever the outcome, it has to align with the GDPR and has to respect what is legally permitted.

In addition, your letter asks, "Why has ICANN org challenged or ignored the advice of Data Protection Authorities and Court rulings whenever they are in favor of the privacy of domain name registrants?" The premise of this question is without citation and is not true. ICANN org has not challenged or ignored the advice of any DPA. ICANN org has consistently acted to understand the scope of what is allowed under the GDPR, including seeking further clarity as possible, from both DPAs and governments.

ICANN's litigation against German registrar EPAG was filed in the hopes that a European court would provide some legal interpretation and therefore clarity of what is required under the GDPR. As ICANN noted when announcing the litigation, EPAG and ICANN have differing interpretations of what data collection is allowed under the GDPR.<sup>2</sup> Obtaining a court ruling that interprets the GDPR will assist everyone working to define the proper scope of registration data collection and publication. ICANN seeks to require collection and maintenance of the specific data points because that is what ICANN believes is required under the Temporary Specification, and it is ICANN's role to enforce that policy. ICANN has continually challenged the rulings so far to further its effort to achieve a court ruling which interprets the GDPR as opposed to ruling on more process-oriented questions, because the rulings to date have not answered ICANN and the registrar's substantive questions about how to apply the GDPR.

With these points in mind, we would like to set the record straight on several items in your letter:

1. We are concerned that your letter is at times based on opinion asserted as fact, and attempts to re-write some of the record of how the ICANN community as a whole is responding to data protection laws. ICANN does not and has not focused its GDPR compliance efforts to advance specific interests in the community, and does not work to "ensure the unrestrained and unlawful access to personal data demanded by special interest groups." When President and CEO Göran Marby states that "We strongly believe that if WHOIS is fragmented, it will have a detrimental impact on the entire Internet," in his 12 April 2018 [letter](#) to the WP29, he did *not* state that personal data must be displayed in public WHOIS. While this interpretation might fit your narrative, he was actually stating that having 2,500 different contracted parties each deciding on their own how to display registration data would bring a detrimental effect.

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<sup>2</sup> <https://www.icann.org/news/announcement-2018-05-25-en>

2. In your letter, you state that ICANN has a goal of “open” WHOIS or a fully public WHOIS. This is not true. In fact, the adoption of the Temporary Specification reflects the ICANN Board’s determination that the GDPR requires redactions of personal registration data from the publicly available WHOIS. The Temporary Specification itself was based on substantial community input, incorporating most elements of the “Calzone” model that was developed over many months.<sup>3</sup> As has been noted in several communications, ICANN’s publication of a possible access model is intended to facilitate further discussions with the EDPB and the ICANN community with the intention of securing legal clarity about options available to the community.<sup>4</sup> The information we receive through this dialogue is intended as input to the policy work, not to replace the community’s policy development work.
  
3. Your letter states that ICANN’s work on this topic is outside ICANN’s mission and pushes ICANN into the role of a content regulator. In fact, as discussed above, the inquiry that ICANN org is facilitating regarding a possible access model is directly within ICANN’s mission, and does not place ICANN in a position of regulating content. Facilitation of community work toward a predictable framework for proper and legally supported access to personal information contained in registration data falls directly within ICANN’s mission. ICANN’s Bylaws specifically identify “maintenance of and access to accurate and up-to-date information concerning registered names and name servers” as an area in which “uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.”<sup>5</sup> Policies in that area developed via the bottom-up consensus-based multistakeholder process are, by definition, within ICANN’s Mission. This includes WHOIS/registration data policy.<sup>6</sup> ICANN’s mission related to “access to” this data has always encompassed lawful third-party access and use, including for purposes that may not fall within ICANN’s mission. The WP29 guidance expressly acknowledged the existence of third party access, as well potential for such access to be GDPR compliant: “WP29 expects ICANN to develop and implement a WHOIS model which will enable legitimate uses by relevant stakeholders, such as law enforcement, of personal data concerning registrants in compliance with the GDPR, without leading to an unlimited

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<sup>3</sup> <https://www.icann.org/resources/pages/proposed-compliance-models-2018-05-24-en>

<sup>4</sup> <https://www.icann.org/news/blog/possible-unified-access-model-published-for-community-input>

<sup>5</sup> ICANN Bylaws, Annex G-1 and Annex G-2

<sup>6</sup> See also ICANN Bylaws, 4.6 (e)(i): Subject to applicable laws, ICANN shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations and Advisory Committees to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.

publication of those data.”<sup>7</sup> Neither the full implementation of the GDPR nor the implementation of the policy reflected in the Temporary Specification change the fact that WHOIS data is used to combat different types of illegal activity found on the Internet, or make facilitation of that third-party usage of WHOIS data outside of ICANN’s mission.

4. Your letter states that ICANN should not have an authoritative role in pursuing solutions relating to access models for non-public WHOIS data. We have previously indicated that ICANN’s role is that of a “data controller”, as set out in our Temporary Specification. ICANN’s requirements of registrars and registries to collect and publish WHOIS data causes ICANN to have a role in determining the legality of those contractual requirements.
5. Your letter states that ICANN org has not been transparent regarding its communications with data protection authorities. We note that ICANN org has transparently documented its [meetings](#) and [correspondence](#) with European data protection authorities. As you may know, ICANN org also provided members of the Expedited Policy Development Process working group with a [chart](#) detailing all the advice received from DPAs. In addition, on multiple occasions ICANN org has asked for your questions and input, and ICANN org has transparently shared that input with the data protection authorities.
6. Finally, you state that ICANN org “does not want to hear about registrant rights.” The Temporary Specification permitted and, in some cases, required that the personal data of registrants, as well as their administrative and technical contacts be masked in the public WHOIS. Section 4.4 of the Temporary Specification specifically mentions and protects the rights of individuals whose personal data is included in registration data: “Personal Data included in Registration Data may be Processed on the basis of a legitimate interest not overridden by the fundamental rights and freedoms of individuals whose Personal Data is included in Registration Data.”

The NCSG’s participation in these community conversations is important. You advance the interests of non-commercial users in conversations around what a unified or other access model might look like. The conversation on whether to adopt such a model must continue, but the outcomes of those discussions are for the community to decide. We expect that the community, using the bottom-up multistakeholder model, will take into account all stakeholders’ views and concerns. We urge you to continue raising these concerns in the EPDP. Your voice is valuable, just as are the voices of all our stakeholders across the globe who ask how to continue to

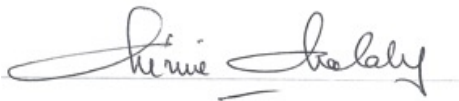
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<sup>7</sup> [https://edpb.europa.eu/news/news/2018/european-data-protection-board-endorsed-statement-wp29-icannwhois\\_en](https://edpb.europa.eu/news/news/2018/european-data-protection-board-endorsed-statement-wp29-icannwhois_en)

assure proper and predictable levels of access to registration data, as defined in ICANN's bylaws.

We offer this response to clarify the record as the NCSG and the rest of the community continue discussions on access, including whether a unified access model is possible and how it may be implemented. We look forward to continuing this important dialogue with the community.

Sincerely,



Cherine Chalaby  
Chair, ICANN Board of Directors