

December 14, 2017

Göran Marby  
Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
Cc: Cherine Chalaby, Chair, ICANN Board of Directors

Re: 2 November 2017 [Statement from ICANN Compliance](#)

Dear Göran,

The IPC wishes to address certain issues and concerns relating to ICANN's recent communications regarding the forthcoming implementation of GDPR, and specifically, the impact thereof on the WHOIS obligations of registries and registrars. In particular, we refer to the 2 November 2017 [Statement from ICANN Compliance](#) ("Compliance Statement") as well as subsequent [recent communication](#) providing further guidance on the submission of proposed models to address GDPR.

As a general matter the Compliance Statement fails to endorse an existing consensus policy that requires a mechanism to reconcile conflicts between WHOIS obligations and privacy laws. The IPC is concerned that ICANN's decision to suspend enforcement of WHOIS obligations of registries and registrars, as outlined in the Compliance Statement, has been undertaken almost wholly without reference to the [Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws](#) ("WHOIS Procedure"). ICANN appears to have charted a process which therefore lacks the necessary elements of transparency, inclusiveness and accountability which are a part of the WHOIS Procedure and ICANN's general obligations to abide by and faithfully implement Consensus Policies. The IPC echoes the concerns raised by the Business Constituency in a letter addressed to you, dated 8 December 2017, and wishes to underscore the following further points:

- The consensus policy which underlies the WHOIS Procedure governs the "reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service."<sup>1</sup> The policy (and the Procedure) therefore applies to any process whereby WHOIS obligations are amended in response to conflicts with national laws, regardless of whether such laws are directed to the activities of contracted parties or to ICANN org, in relation to the collection and processing of data.
- The broad deferral of any action set forth in the Compliance Statement fails to take into account the threshold applicability of the GDPR to certain data subjects. The deferral of compliance action is therefore overbroad in that it does not clearly track the known contours of the GDPR, and is therefore manifestly inconsistent with existing policy.

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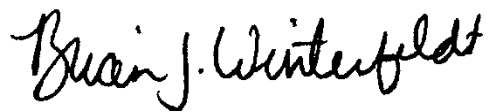
<sup>1</sup> <https://gns0.icann.org/en/meetings/minutes-gns0-28nov05.shtml>

- The Compliance Statement requested that models submitted by contracted parties should “reflect a reasonable accommodation of existing contractual obligations,” which appears to fall short of the goal outlined in the WHOIS Procedure to “preserve the ability of the registry/registrar to comply with its contractual WHOIS obligations *to the greatest extent possible.*”
- In addition, the process outlined in the Compliance Statement fails to explicitly include the basic safeguards that form the backbone of the WHOIS Procedure, such as input from relevant government authorities pursuant to GAC advice and the preparation of a report by the ICANN General Counsel for submission to the ICANN Board for a decision (which includes specific justifications for any departure from WHOIS obligations, and the anticipated impact on the operational stability, reliability, security or global interoperability of the DNS). The Board would also be required to consider public comment and GAC input. These attributes appear to be lacking in the current approach. (We recall that in its recent communique, the GAC stated that “it is urgent to address these issues and that the GAC should be fully involved in the design and implementation of any (including interim) solution and requests that ICANN practice transparency vis-à-vis the multistakeholder community in its GDPR activities.”) ICANN should publish all models submitted thus far and going forward, for review and comment by stakeholders. ICANN should also provide a step-by-step timeline to show how all submitted models would be considered, with appropriate input from ICANN legal counsel, the GAC, Board, and other SO and AC stakeholders, prior to May 25, 2018.
- Furthermore, the Compliance Statement and subsequent communication indicates that decisions regarding deviation from WHOIS obligations will be taken by ICANN org, not the Board. Since ICANN org has a direct stake in the outcome of this process, separately from that of the community, principles of accountability require that any solution proposed by ICANN org be subject to the Board’s approval, taking into account public input and the GAC advice on GDPR outlined in its recent communique.
- Communication from ICANN on 8 December referenced the WHOIS Procedure and noted that: “At this time, contracted parties do not need to initiate these service requests to share a proposed model with ICANN for analysis unless they plan to imminently deploy the model. Any deviation from ICANN contractual requirements must be approved or authorized in advance of deployment.” This appears to be at odds with the statement from ICANN’s General Counsel, John Jeffrey in response to letters received from the Dutch Personal Data Authority (AP) on 26 November 2017 regarding .frl and .amsterdam, which referenced invoking the WHOIS Procedure. Furthermore, despite the obvious overlap between the GDPR and the scenario that existing policy WHOIS Procedure was designed to address, ICANN has failed to commit itself to tracking the WHOIS Procedure in a manner that ensures accountability, transparency and inclusiveness.

As you are no doubt aware, the interruption of access to WHOIS data will unquestionably have an adverse impact for internet users, consumers and intellectual property owners, by

diminishing the effectiveness of efforts to address abuse in the DNS. We trust that this input will be constructively received. It is essential that ICANN explicitly clarify its position in relation to the overly broad deferral of enforcement of WHOIS compliance obligations as set forth in the Compliance Statement, and make it clear that the process going forward will track that set forth in the WHOIS Procedure.

Sincerely,

A handwritten signature in black ink that reads "Brian J. Winterfeldt". The signature is written in a cursive, slightly slanted style.

Brian J. Winterfeldt  
President  
Intellectual Property Constituency