

## **Non-Commercial Stakeholders Group**

*Representing the interests and concerns of  
non-commercial Internet users in domain name policy*

17 October 2018

To: ICANN Board of Directors

cc: Göran Marby, Chief Executive Officer

### **RE: ICANN org violates data protection laws and principles to advance the interests of certain parts of the community**

Dear Members of the Board,

The Non-Commercial Stakeholders Group (NCSG) represents the interests of non-commercial users in the formulation of Domain Name System policy within the auspices of the Generic Names Supporting Organization (GNSO). We are proud to have individual and organisational members in over 120 countries. Since our inception, we have facilitated global academic and civil society engagement in support of ICANN's mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues while raising awareness of the need for ICANN to comply with applicable privacy and data protection legislation.

We are writing to express our disappointment that ICANN the organization has taken a biased approach to the reform of WHOIS. In exchanges with the EPDP team and other interested parties, representatives from ICANN org have repeatedly focused on advancing certain interests to the point of eclipsing concerns emanating from other parts of the ICANN community. More concretely, the demonstrated intention of ICANN org has been to ensure the unrestrained and unlawful access to personal data demanded by special interest groups.<sup>1</sup> This not only undermines the privacy and other associated human rights of domain name registrants but also hobbles the efforts underway to bring ICANN's data processing and access policies into compliance with the GDPR and other data protection laws.<sup>2</sup> In justifying its desire to keep the personal information of domain name registrants as accessible as possible, ICANN org has made dangerous and inaccurate arguments about its mission. Despite repeatedly stating over the years that its "mission statement

---

<sup>1</sup> The CEO's response to the recommendations of the Article 29 Working Party insisted that if the personal data of domain name registrants was to be protected in WHOIS, it would have a detrimental impact on the "entire Internet." See CEO letter to WP29, 12 April 2018, <https://www.icann.org/en/system/files/correspondence/marby-to-jelinek-12apr18-en.pdf>. This narrative has been continuously stated in various settings and correspondence. See, for example, this documented intervention by the ICANN CEO: <https://twitter.com/eifonline/status/1052154913659244550?s=21>.

<sup>2</sup> Almost every action ICANN has undertaken relates to making the personal data within WHOIS more accessible, even when that violates long-standing, internationally-recognized data protection principles. Some of the actions are: 1) ICANN's effort to delay compliance with the GDPR by seeking a moratorium, 2) focusing heavily on access to data in its questions from the EDPB (formerly WP29), 3) filing lawsuits against a registrar to fight against the principle of data minimization which is a fundamental tenet of data protection law. These activities have been undertaken apparently with the approval of the Board.

sets forth a limited remit that is largely technical in nature” and that it is not “empowered to act as a global regulator of content and illegal activity throughout the world,”<sup>3</sup> more recently ICANN org seems to have shouldered responsibilities that are well beyond its mission. While collecting, processing, and disclosing personal information may be necessary for law enforcement functions, consumer protection, or cybersecurity, the implication that it is up to *ICANN* to facilitate identification of criminals, aid consumer protection agencies, protect intellectual property, or identify fake news through WHOIS<sup>4</sup> is fundamentally flawed. These exact functions were enunciated in response to guidance that was sought and provided by the Article 29 Working Party in April 2018, and appear to have been compiled by ICANN in favor of WHOIS access.<sup>5</sup>

The NCSG, which is bringing to the table non-state and non-commercial perspectives on issues, is an integral component of the multistakeholder model. We have engaged in the subject of WHOIS for nearly two decades. During this time, we have repeatedly highlighted violations of domain name registrants’ privacy and sought to assist ICANN in rectifying these abuses. Only with the threat of fines under the European Union’s General Data Protection Regulation (GDPR) have we finally seen a welcome - albeit overdue - move towards the redaction of personal information in registration data.

Once enforcement of the GDPR began, ICANN’s personal data requirements exposed contracted parties to the risk of substantial fines. This data was redacted in the Temporary Specification, a top-down, stop-gap solution in place until a consensus-based, community-led model is developed and deployed. However, subsequent ICANN org activities continue to focus disproportionately on how to circumvent barriers to access by third parties, rather than how to uphold the data subjects’ rights at the core of the GDPR. Beyond questions of values, competing definitions of public interest, or even the matter of compliance (which will presumably happen regardless), such activities set a dangerous precedent that should be carefully considered by all members of the ICANN community. For example, not being able to identify fake news as a pitfall of redacted WHOIS can directly relate to content regulation. *Content regulation is absolutely outside of ICANN’s mission and the ICANN Board and CEO have on many occasions told the NCSG that ICANN will not be involved in any way in content regulation.* Yet in its quest to find a rationale for disclosing WHOIS data ICANN org was motivated to step far outside the bounds of ICANN’s mission. There are many more examples of this even in the temporary specification language.

---

<sup>3</sup> See, for example, this 2015 blog post: <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>

<sup>4</sup> CEO’s blog specifically mentions fake news, 12 April 2018, <https://www.icann.org/news/announcement-2018-04-12-en>. Moreover, when dissatisfied with Article 29 Working Party response regarding the protection of personal data in WHOIS because it did not allow for unlimited access to personal information in WHOIS, ICANN CEO wrote a letter in response and argued that “ICANN’s mission with respect to names, while narrow, is not limited to technical stability.” it continued that “ICANN considers that each element included in the purpose description provided in Section 7.2.1 of the proposed Final Interim Model (page 34) is in furtherance of the coordinator role that ICANN is performing in ensuring access to the decentralized databases that make up WHOIS.” ICANN CEO’s response to Article 29 Data Protection Working Party, 10 May 2018, <https://www.icann.org/en/system/files/correspondence/marby-to-jelinek-10may18-en.pdf>.

<sup>5</sup> See <https://www.icann.org/news/announcement-2018-04-12-en>

Beyond underscoring ICANN's unflagging quest to find a rationale for disclosing WHOIS data, these exchanges lead us to believe that ICANN org's persistent efforts to seek guidance and "legal clarity" from data protection authorities, courts, and other agencies are not being made in a neutral manner. When legal advice and clarity is received but does not fit the prior assumptions of ICANN org, or the answers sought by ICANN org, about data collection or access to data by third parties, ICANN org tends to either ignore such advice or challenge it. The notes, findings, and strategy behind on- and off-record engagement between ICANN org and authorities in the European Union and beyond must be released for scrutiny by the ICANN Board and community, lest ICANN org's purported neutrality be further damaged.

Whether intentional or not, another way that ICANN org has exhibited bias is in its presentation of the so-called "unified access model." Despite vociferous opposition from numerous community members, ICANN continues to discuss guidelines related to access and ignore the privacy of domain name registrants. Considering this background, we believe the most likely explanation for ICANN org's urge to bring about "unified" access to the personal information of domain name registrants is that it is under unrelenting pressure from lobbyists for special interest groups. Let us be crystal clear: the whole community has never asked for "unified" access to registration data. Only the Intellectual Property Constituency and the Business Constituency have insisted upon it, along with certain members of the GAC — many of whom are ignoring their own national laws. ICANN org in much of its correspondence claims that the "community" "urgently" needs to have access to the personal and sensitive data of domain name registrants, or a cyber doomsday will result. We are part of the community, and we disagree. Kindly acknowledge and reflect our views.

Evidently, ICANN org still does not want to hear about registrant rights, nor does it wish to take into account the views of those who fight for them, seeking only the "legal clarity" that fits the idea of WHOIS "status quo" that ceased to exist after GDPR came into force.

In closing, we would like answers to the following questions:

- On what basis has ICANN decided that a unified access model is a priority? Please provide clear evidence/foundation for this goal.
- What additional clarity is ICANN org seeking in response to repeated statements from DPAs that open-access WHOIS is not compliant with GDPR? 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?

We also request that you:

- Please provide us with copies of your staff and board notes from meetings with Data Protection Authorities. We would like more substantive, informative reports than the information we have been able to obtain from your short blog posts.

We look forward to receiving a written response to these questions along with the staff and board notes that we have requested. Thank you.

Yours sincerely,

Dr. Farzaneh Badiei, current Chair  
Dr. Stephanie Perrin, incoming Chair  
Non-Commercial Stakeholders Group