

ICANN | IPC

November 12, 2018

Mr. Cherine Chalaby
Chairman of the Board, ICANN
Via email cherine.chalaby@board.icann.org

Mr. Goran Marby
CEO, ICANN
Via email goran.marby@icann.org

Mr. Cyrus Namazi,
Interim Department Head, GDD, ICANN
Via email cyrus.namazi@icann.org

RE: Privacy and Proxy Service Provider Accreditation Policy Implementation

Dear Messrs. Chalaby, Marby, and Namazi,

We are writing to express our deep concern with ICANN's recent unilateral decision to "slow" the work towards final implementation of the Privacy and Proxy Service Provider Accreditation Program implementation project. This indefinite suspension of this work is quite disturbing on a variety of fronts.

We understand that "ICANN org believes that work toward implementation of the Privacy and Proxy Service Provider Accreditation Program should be slowed, pending the completion of work on the EPDP and related efforts, which are expected to provide greater clarity about third-party access to non-public registration data."

The privacy/proxy consensus policy was adopted unanimously by the GNSO and the ICANN Board of Directors in 2016. It represents one of the rare recent examples of a successful multistakeholder policy development process to produce a consensus outcome on an important and longstanding unresolved issue that is critical to the oversight of the Domain Name System. A broadly representative IRT was launched to help ICANN staff implement the policy recommendations in the Final Report.

After more than a year of weekly meetings, the work of the IRT was nearly finished by this past March. But since then, ICANN org has in effect shut down the Team's activities and cancelled virtually all of the weekly meetings since then.

We were encouraged by Akram Atallah's June 6, 2018 letter to Graeme Bunton and the Registrar Stakeholder Group and Akram's statement that "it would be more prudent to continue to drive the PP IRT's work to completion while a review of the GDPR's impact is underway concurrently," and by Amy Bivins' posting to the PPIRT list on October 5, 2018 stating that ICANN was planning on posting IRT documents for public comment, presumably immediately following ICANN 63. However, it appears now that ICANN org has not followed through on this prudent path and has instead done an abrupt and uncalled-for "about face".

We do not understand the explanations given for this abrupt change by ICANN org during the ICANN63 meeting. The explanation provided – that work on the EPDP might provide some clarity to the privacy/proxy service disclosure process for registrant data – makes no sense when one considers that disclosure of underlying registrant data by a privacy/proxy service is out of scope under the Temporary Specification and out of scope for what the EPDP is considering. Simply put, neither the Temporary Specification, nor any outcome from the EPDP under its current charter, will create any obligation or commitment for privacy/proxy providers to disclose the underlying registrant data in appropriate contexts, such as the disclosures contemplated in the privacy/proxy consensus policy.

In fact, today, there are no commitments or obligations for any privacy/proxy provider to disclose underlying registrant data in appropriate contexts. One of the purposes of the privacy/proxy consensus policy was to create standards around privacy/proxy services, including a framework for disclosure of underlying registrant data in appropriate contexts. That policy was developed and approved in full awareness of European privacy laws.

As explained by Cristina Monti of the European Commission, the GDPR "builds on rules that have been there a long time," in particular the EU Data Protection Directive adopted in 1995. The work undertaken in the privacy/proxy PDP was done with full awareness of European privacy law and took those requirements of the law squarely into account. Furthermore, uniform agreement exists among the European Commission, ICANN org and the various stakeholder groups of the ICANN community that the GDPR does not provide clear-cut and definitive answers to all situations involving data processing, including granting access to third parties with legitimate interests. Indeed, as Ms. Monti stated during ICANN63, the law around the GDPR involves balance and "the devil is in the details."

Therefore, we cannot understand how ICANN org could come to the conclusion that stopping or further slowing down the implementation of the privacy/proxy consensus policy will somehow provide an opportunity for gaining greater legal clarity or certainty. To the contrary, we believe that moving forward with a multistakeholder consensus policy that was developed with full awareness of and appreciation for current data privacy law—a policy that was unanimously approved by both the GNSO Council and the ICANN Board of Directors in 2016—will actually help serve to define some parameters around issues such as processing and providing access to serve the legitimate interests pursued by third parties.

We firmly believe that the implementation of the privacy/proxy consensus policy should be completed on an expedited basis. It has been more than two years since the Board unanimously approved the policy, and the work of the IRT was nearly finished more than six months ago. We believe a continued failure to implement the privacy/proxy consensus policy undermines the legitimacy and integrity of the multistakeholder process and operates to the detriment of ICANN and all of its stakeholders.

ICANN has elected to unilaterally suspend implementation of a multistakeholder driven consensus policy, ostensibly in deference to a subsequent process that (i) is not complete, and (ii) to our knowledge, will not address disclosure of data from privacy/proxy services.

We would like to have a call or meeting with you to discuss this further. We look forward to hearing from you.

Respectfully Submitted,

Intellectual Property Constituency