

9 August 2018

RE: 21 June 2018 Business Constituency letter to the ICANN Board of Directors, Göran Marby and John Jeffrey; and 11 May 2018 letter to the ICANN Board of Directors

ICANN Business Constituency

Dear members of the ICANN Business Constituency,

Thank you for your [letter](#) of 21 June 2018. We also appreciated the input you provided us in your 11 May 2018 [letter](#). The community's concerns were discussed by the Board prior to its adoption on 17 May 2018 of the [Temporary Specification for gTLD registration Data](#). With regard to the questions in your more recent letter, we have provided our replies below by subject area.

#### **Access to non-public WHOIS**

Together with the [Framework Elements for Unified Access Model for Continued Access to Full WHOIS Data](#) document published in June, ICANN org published a [chart](#) comparing our draft framework elements against those of two models proposed by ICANN community members, including the BC/IPC effort. The chart notes where there are commonalities among the three proposed models. As the community progresses in its discussions regarding access to non-public WHOIS, ICANN org will consider community input to help refine a proposed unified access model. ICANN org will also continue to engage in the process of community consultations, including with the European Data Protection Board (EDPB) and governments and may make adjustments based on feedback received. Any feedback from the EDPB will also be useful for the community as it progresses in its policy deliberations.

Until such a unified access model is available, each contracted party is encouraged to publish instructions on how third parties can obtain access to non-public WHOIS. Appendix A, Sections 4.1 and 4.2 of the [Temporary Specification for gTLD Registration Data](#) do not define reasonable access. Compliance with the requirement for registries and registrars to provide reasonable access to non-public WHOIS as specified in Appendix A will be evaluated on a case-by case basis, based on evidence provided by the requestor, including its request for access to non-public WHOIS from contracted parties, evidence of the requestor's legitimate purpose for accessing the non-public WHOIS, the timing and content of the contracted party's response to the request (if any) and any other information or evidence relevant to assessing the request and response. ICANN does not have any current plans to elaborate on these requirements concerning access, and encourages the community to continue to discuss the issue of access as part of ongoing discussions about the Unified Access Model and/or the relevant Policy Development Process.

### **Contractual Compliance and Enforcement of the Temporary Specification**

ICANN Contractual Compliance will enforce the requirements of the Temporary Specification as it does any other ICANN agreement or policy requirement - through the Contractual Compliance function, which employs the same approach and process for all enforcement areas. Details regarding this approach and process can be found at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

For purposes of enforcing ICANN's agreements with registries and registrars, including processing of third-party complaints, proactive monitoring and audits, ICANN Contractual Compliance will request registration data from contracted parties where it is not otherwise publicly available. The requests for registration data will be specific to the relevant matter and limited to the minimum, specific data elements that are needed to fulfill this function. ICANN's requests for access to non-public registration data from contracted parties will typically be via email and include a specific due date for providing the requested data that is relevant to the matter. The methods, timing and any reasons for not providing such data will be addressed by ICANN Contractual Compliance on a case-by-case basis.

Contractual Compliance will also continue to enforce WHOIS accuracy requirements, which have not changed as a result of the Temporary Specification. Reporters of WHOIS inaccuracies may continue to file reports at the following link, <https://forms.icann.org/en/resources/compliance/complaints/whois/inaccuracy-form>, and registrars continue to be required to take reasonable steps to investigate and correct inaccurate data. Reporters of WHOIS inaccuracy complaints may base their report on data that is publicly available in WHOIS, as well as non-public WHOIS data for which the reporter has been granted access for legitimate purposes by the relevant registrar or registry operator. In addition, the [WHOIS Accuracy Reporting System](#) will continue to report on registration data accuracy. Also, the community itself has mechanisms to review data accuracy and to make recommendations. For example, one of the topics that the Registration Directory Services Review Team is considering is data accuracy. The WHOIS Specification of the Registrar Accreditation Agreement also requires a review.

With regard to other items of contractual enforcement, the Temporary Specification also does not modify existing requirements for registry operators concerning the provision of access to zone files. Registry operators continue to be required to provide access to zones files (via the Centralized Zone Data Service) and to ICANN.

With regard to enforcing Section 4.4.7 of the Temp Spec, it is important to note that Section 7.2.1 of the Temporary Specification requires registrars to provide the opportunity for registrants to consent to publish additional contact data as soon as commercially reasonable.

### **Temporary Specification**

Your letter included several questions related to the interpretation of the Temp Spec, including the definition of certain terms, as well as next steps on the required reaffirmation of the Temp Spec. This section addresses those matters.

With regard to technical requirements in the Temp Spec, the service level agreement (SLA) requirements refer to the technical and operational requirements of a registration data access

protocol (RDAP) service by registries and registrars. Per the Temp Spec “ICANN and the contracted parties will negotiate in good faith the appropriate service levels agreements by 31 July 2018.” Once the proposed SLAs are developed by ICANN and the contracted parties, they will be published for review by the community prior to adoption and implementation. In a recent [blog](#), we noted that the RDAP pilot discussion group has submitted its proposed profile to ICANN org. The group plans to submit SLAs and reporting requirements by mid-August. Following this, ICANN org will provide an opportunity for community input via a public comment period in the second half of August prior to finalization and implementation of the RDAP profile.

The letter also requested clarification on some elements of the Temp Spec. This included how “periodic access” to bulk registration data is defined. “Periodic access” is further specified in the Registry Agreement. As provided in Specification 4, Section 3.1, Registry Operators are required to provide bulk access to registration data to ICANN once a week on a day selected by ICANN.

The letter asks for clarification on how it is determined that the interests or fundamental rights and freedoms of the registered name holder or the data subject are overridden by the request of a third party for access to non-public WHOIS data. It is up to each individual Registry Operator and Registrar to determine this. Support for such determinations may be requested by ICANN Contractual Compliance in the event it receives a complaint regarding a denied request for access to non-public WHOIS data.

With regard to questions about Section 7 of the Temporary Specification, this section only applies to ICANN-accredited registrars. Section 7.1.15 requires registrars to provide notice to existing, new or renewed registered name holders of “[t]he existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) of the GDPR and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such Processing for the data subject.” ICANN org will take into consideration the BC’s request for ICANN to issue an advisory that provides a timeline for satisfying the requirements of Section 7.2.1, including how “commercially reasonable” is defined. This will depend on the facts and circumstances of a particular situation. ICANN continues discussions with registrars on progress to develop mechanisms to allow registered name holders the option to consent to publishing additional contact information in public WHOIS.

It’s also important to note several areas that have not changed or created new requirements for contracted parties as a result of the Temp Spec. This includes the following:

- It is either expressed or implied in all of ICANN’s agreements that the contracted party must comply with all applicable laws. As always, ICANN will evaluate any potential conflicts issue identified by the contracted parties or ICANN community.
- In addition, Appendix A, Section 1.2. does not impose a new requirement concerning search capabilities for RDDS. Sections 1.2.1 and 1.2.2 specify requirements in cases where “search capabilities are permitted and offered”.
- Section 3.1 of the Transfer Policy remains unchanged by the Temporary Specification. Section 3.1 requires that, “A Registrar of Record shall confirm the intent of the

Registered Name Holder when a notice of a pending transfer is received from the Registry by notifying the Registered Name Holder of the transfer. The Registrar of Record must do so in a manner consistent with the standards set forth in the Transfer Policy.” This requirement continues to provide a safeguard against unauthorized transfers. Additionally, if an unauthorized transfer occurs, Registrars are encouraged to first attempt to resolve the problem among the Registrars involved in the dispute. However, remedies for registrants are available under the Transfer Dispute Resolution Policy.

- There is no requirement in the Temporary Specification requiring the Registrar’s data protection officer (where applicable) to be published in registration data. ICANN does not currently have plans to make this information publicly available. However, as noted above, contracted parties must comply with all applicable laws.

In the coming weeks, the Board will consider whether or not to reaffirm the Temp Spec. Section 8.2 of the Temporary Specification outlines the circumstances under which the Board anticipates possible changes to the Temporary Specification – namely, if ICANN receives further inputs from the European Data Protection Board, court order of a relevant court of competent jurisdiction concerning the GDPR, applicable legislation or regulation, or as a result of the Board-GAC Bylaws Consultation concerning GAC advice in the San Juan Communiqué about WHOIS and GDPR. Should the need arise to revise the Temporary Specification, the Board would engage with the GNSO Council on the potential impact to the policy development work, taking into consideration, for example, the timing and the scope of the proposed modification. At the GNSO Council’s request, the Board has appointed two Board liaisons to the EPDP to facilitate communications on an ongoing basis: Chris Disspain and León Felipe Sánchez. This may be helpful to discuss possible modifications to the Temporary Specification, should they arise.

In addition, as the community determines how it wishes to proceed on the issues listed for community action in the Temp Spec’s Annex, ICANN org stands ready to assist. We note that the EPDP’s charter indicates the team will turn its attention to the items listed in the Annex once it has resolved the gating questions identified in the charter. This includes development of a standardized access model.

### **Security and Stability**

ICANN org is continuing to use the available registration data for its ongoing security, stability and resiliency commitments. For example, registry operators continue to be required to provide ICANN on a weekly basis with up-to-date “thin” registration data and, as requested, registration data relevant for ensuring Contractual Compliance, as described above.

In closing, I'd like to thank you for your attention to this very complex topic. Input from the community is critical as the work of the EPDP progresses, and as ICANN org works to gain further legal clarity regarding a unified access model. We urge you to continue to remain engaged in these crucial discussions, particularly as they relate to the issues you've raised.

Sincerely,



Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers (ICANN)

cc: Cherine Chalaby, Chairman of the Board  
John Jeffrey, General Counsel & Secretary