

4 September 2018

Manal Ismail

RE: Request for Guidance on GDPR and Providing Access to Non-Public WHOIS Data

Dear Mrs. Ismail,

We would like to take this opportunity to thank you and your GAC colleagues for providing input and advice as part of the process leading up to the ICANN Board's adoption of the Temporary Specification for gTLD Registration Data. As you are aware, ICANN org continues its work to develop a draft framework for a possible unified approach to allow continued access to full WHOIS data for authenticated users with a legitimate interest for accessing non-public WHOIS data consistent with the European Union's General Data Protection Regulation (GDPR). On 20 August, we published the next iteration of this framework¹ to help facilitate further discussions with European data protection authorities and the ICANN community about a possible model. The paper outlines basic parameters of a possible unified access model based on ICANN org's current understanding of how the GDPR relates to such a model.

As highlighted in this framework paper and my recent Blog², one of the key purposes of publishing the next iteration of a framework for a possible unified access model is to be able to further engage with European data protection authorities to understand the legal foundation upon which a unified access model could potentially be built. It is anticipated that this additional guidance could increase legal certainty for data controllers about whether a unified access model could be implemented and what features of a model may or may not be permitted by the GDPR.

It is important to provide additional legal clarity to data controllers associated with the WHOIS system because under the GDPR, data controllers are legally responsible for implementing "appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with [the GDPR]."³ Controllers are the parties bearing primary responsibility for ensuring compliance with the data protection principles in the GDPR, including requirements concerning lawfulness, fairness and transparency of processing data; data limitation; data minimization; and accuracy.⁴

In the context of gTLDs, additional legal clarity for data controllers is of extra importance given the tension between the public interest nature of providing WHOIS services required by

¹ *Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data (20 August 2018)*
<https://www.icann.org/en/system/files/files/framework-elements-unified-access-model-for-discussion-20aug18-en.pdf>

² <https://www.icann.org/news/blog/possible-unified-access-model-published-for-community-input>

³ GDPR, Art. 24(1)

⁴ GDPR, Art. 5

agreements with ICANN (including collection, transfer and display WHOIS information), and the potentially significant legal liability of data controllers under the GDPR. More specifically, WHOIS is essential to ensuring the security and stability of the Internet, including to mitigate attacks that threaten the stable and secure operation of the Internet. ICANN's role in providing technical coordination of the globally distributed WHOIS system is a unique matter in that ICANN's mission directly involves facilitation of third party processing of WHOIS data for legitimate and proportionate purposes related to law enforcement, competition, consumer protection, trust, security, stability, resiliency, malicious abuse, sovereignty, and rights protection. Absent requirements in ICANN's agreements with registries and registrars to operate WHOIS services, at best could lead to fragmentation of the globally distributed WHOIS system, and at worse could lead to complete unavailability of WHOIS.

As noted in the GAC San Juan Communiqué (March 2018), "ICANN's Bylaws recognize that WHOIS data is essential for 'the legitimate needs of law enforcement' and for 'promoting consumer trust.' These rules reflect the nature of the Internet as a public resource whose governance not only serves the interests of the private parties operating the DNS but also serves a number of important public policy interests." Additionally, in the GAC's Panama Communiqué (June 2018), the GAC advised the Board to "take all steps necessary to ensure the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability..." In its rationale, the GAC noted that the provisions in the Temporary Specification requiring contracted parties to provide reasonable access to non-public WHOIS data to third parties with a legitimate interest are "insufficient to protect the public interest."

With this background, we'd like to understand from the GAC members who represent member states of the European Union whether they too can provide any guidance on the particulars of the GDPR that could also be used to help diminish the legal risk for data controllers (e.g. by increasing legal certainty) when responding to a request for access to non-public WHOIS data. Given the GAC's noted concern about ensuring that the WHOIS system continues to serve the public interest, it would be helpful to receive additional guidance from the GAC on how, perhaps, processing of personal data in WHOIS could be recognized by member states of the European Union as "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller..." Such recognition under the law would seem to serve as a lawful basis for processing the data as provided under Article 6, GDPR and would seem to address the GAC's concern noted in the Panama Communiqué. Also, it would be helpful to understand whether as a possible approach to reduce risks to data controllers in the context of WHOIS, it would be permissible under the GDPR to delegate to a third party the decision-making authority to make determinations about whether a particular person or categories of persons (e.g. law enforcement authorities, intellectual property rights holders) have a legitimate interest in accessing non-public WHOIS data. This potential approach is outlined further in Questions 1 -3 of the *Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data (20 August 2018)*.

We stand ready to discuss these matters further at your earliest convenience and appreciate any additional guidance from the GAC or GAC members who represent member states of the European Union.

Best wishes,



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