



May 11, 2018

Mr. Cherine Chalaby
Chairman of the Board
Internet Corporation for Assigned Names and Numbers
cc: Göran Marby, CEO; Manal Ismail, GAC Chair

RE: Temporary Policy to Implement Interim GDPR Compliance Model; Privacy/Proxy Accreditation Implementation

Dear Members of the Board,

Pursuant to the bylaws of the Intellectual Property Constituency (IPC), which were approved by the Board, one of the primary purposes of the IPC is to “review and raise all intellectual property matters including any proposals, issues, policies, or otherwise, which may affect intellectual property, particularly as it interfaces with the DNS, and to provide to the GNSO and the ICANN Board timely and expert advice before it must make any decision or take any position thereon.” We write to you in this role to provide our advice concerning the Proposed Interim Model for GDPR Compliance, and presumably any temporary policy that follows this model (collectively, the “Interim Solution”).

Our opinion and advice is that such Interim Solution will unduly limit access to WHOIS data in a manner that is not required by the GDPR, is inconsistent with consensus GAC advice, is inconsistent with ICANN’s commitment to keep WHOIS data available to all legitimate stakeholders in a manner consistent with applicable law and other ICANN bylaws obligations, and is inconsistent with ICANN consensus policies including the UDRP.¹ Furthermore, adopting the Interim Solution violates ICANN’s commitment set forth in its bylaws to “preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.”

¹ We refer you to the following comments and advice that further explain these concerns: the GAC consensus advice in the GAC Communique dated March 15, 2018 (see <https://gac.icann.org/contentMigrated/icann61-gac-communicue>); the IPC comments and correspondence on the Interim Model dated March 28, 2018 (see <https://www.icann.org/en/system/files/files/gdpr-email-icann-ipc-bc-accreditation-access-non-public-whois-data-28mar18-en.pdf>), and April 20, 2018 (see <https://www.icann.org/en/system/files/files/gdpr-comments-ipc-article-29-wp-whois-20apr18-en.pdf>); the COA comments on the interim model dated February 16, 2018 (see <https://www.icann.org/en/system/files/files/gdpr-comments-coa-icann-proposed-compliance-models-16feb18-en.pdf>); the BC letter to the Board on the temporary policy dated May 11, 2018; the COA comments to the Board on the temporary policy dated May 11, 2018; and the letter from Flip Petillion to the EU Commissions, Article 29 Working Party and heads of the DPAs dated May 11, 2018. Because, to our knowledge, this last letter was not sent to the ICANN Board as of yet, we attach a copy of it to this submission.



Accordingly, IPC advises the Board that, consistent with the recommendations made by the Business Constituency in their letter sent to you today, the Board must ensure any temporary policy includes:

- The [Accreditation and Access Model](#) to provide access to non-public WHOIS data for legitimate purposes in the areas of intellectual property/consumer protection and cybersecurity (additional legitimate uses, such as for business domain name verification for purchase, management, and sale are under development and should be accommodated when ready);
- A mechanism to distinguish between legal and natural persons so that the temporary policy only applies to personal data (in-line with the GDPR requirements);
- Full automated, non-rate limited, machine-readable access to WHOIS for legitimate uses by Accredited parties and for ICANN Org to continue its existing access level for current uses to fulfill its obligations, without volume limitations (except as needed to ensure continued operational availability of the service);
- Continued availability of the ICANN-managed WHOIS look-up² to support access to both public and non-public WHOIS data for Accredited Parties; and
- A requirement to implement RDAP and the Privacy/Proxy Service Accreditation policy (as provided for in the RAA) with a June 15, 2018 target date, possibly with implementation incentives for contracted parties.

In addition, any temporary policy must ensure the public availability of all of the non-personal WHOIS data contemplated in the interim model, as well as the email address of the registrant, regardless of whether the registrant is a natural or legal person. As noted in previous IPC comments, the advice from Bristows, included in the COA letter dated May 11, 2018, the COA comments dated February 16, 2018, and in the Flip Petillion letter dated May 11, 2018, there is a legal basis under the Section 6.1(f) of the GDPR³ to keep the registrant's email address publicly available for the following legitimate purposes, among others: third party IP enforcement purposes arising from or related to the domains at issue, to protect Internet end users and the general public against fraud, identify theft, and various cybersecurity threats that may arise or be implicated by the domains at issue, and to protect the registrants themselves, for example in the event their domain is compromised. Specifically, the email address is used, among other things, (i) to expeditiously contact the registrant to (a) warn them of infringement related to the domain at issue before taking any legal action (as well as in connection with initiating a legal proceeding or UDRP claim), (b) contact them about possible illegality occurring via the domain, and (c) inform them if the domain is compromised; and (ii)

² See <https://whois.icann.org/en>

³ Section 6.1(f) of the GDPR provides that processing of personal information is lawful for such purposes where the "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."



even if the email address is fake, to investigate alleged harms and use it as a data point for correlation with other domains used to engage in similar harms. These purposes are legitimate interests of third parties consistent with section 6.1(f) of the GDPR.

We acknowledge that this is not the end of the inquiry, and that a further balancing analysis is required under Section 6.1(f). Assuming without deciding that the email address is personal information, in this case, the balancing of the registrant's privacy interests versus the interests of the third parties noted above and the registrant's competing interests in protecting his or her domain if it is compromised, weigh in favor of having the email address be publicly available. Please see the analysis in the Bristows memo and the Flip Petition letter as to why this balancing favors public disclosure of the email address.

There is a similar legitimate interest in the registrant name being readily available, and that limiting or denying access to the registrant name, even if fake, could significantly compromise the UDRP and URS systems, other IP enforcement efforts, and other efforts to deter illegality and cyberthreats online. Please see the Flip Petition letter for an analysis regarding the registrant name in the IP context.

Please note that the need and rationale for having this data accessible in the manner discussed above includes not only the temporary policy generally, but also timely implementing the already agreed-upon policy for privacy/proxy accreditation – which is the result of a tremendous amount of work by the multi-stakeholder community to achieve consensus policy.⁴

In order to achieve the stated ICANN goal of making only those changes to WHOIS policies that are required to achieve compliance with GDPR, IPC advises that the temporary policy should apply only to registrations made by registrants verified to be natural persons residing in the European Economic Area.

Failure to include reasonable access for all legitimate stakeholders in the temporary policy will cause significant harm to those stakeholders, and ultimately to the trust, safety and security of the Internet as a whole. Examples of such harms are manifold and have already been brought to the attention of ICANN and the Board from multiple perspectives, and decisions taken by the Board on this issue will have a direct impact on whether such harms materialize. ICANN org itself has recognized the significant risks to security and stability of the DNS that will flow from fragmentation, including a fragmented access to full WHOIS data for parties with legitimate interests.

It is the Board's responsibility to carefully examine all uses of WHOIS data and the risks to the DNS, the Internet, and Internet users if access to legitimate stakeholders is unduly limited, and balance this with the risks to natural persons who elect to provide their data for purposes of making a domain name registration, in considering what temporary policy to adopt for WHOIS data. As such, the Board should adopt the guidance offered by the IPC, Business Constituency and the GAC, in connection with the Interim Solution.

⁴ Please see the COA letter dated May 10, 2018 for a further discussion about the PPSAI IRT.



The Board also must not undermine the bottom-up multistakeholder policy agreed upon regarding privacy proxy services, and instead, the Board should insist that the implementation of the policy be expeditiously completed. Failure by the Board to insist that this policy be implemented expeditiously will severely undermine the credibility of ICANN and of any multistakeholder governance model.

We ask the Board to carefully examine and take up the recommendations set forth herein.

Sincerely,

The Intellectual Property Constituency