

From: Brian Winterfeldt

Date: Wednesday, March 28, 2018 at 22:55

To: "dsb@dsb.gv.at"

Subject: Outreach re ICANN WHOIS System and GDPR Compliance - Accreditation System and GAC Advice Requests

Dear Dr. Jelinek,

As you may know, in February, 2018 the Intellectual Property Constituency (IPC) and Business Constituency of ICANN sent a [letter\[icann.org\]](http://letter[icann.org]) addressed to the Article 29 Working Party concerning the efforts ongoing within ICANN to develop a [model\[icann.org\]](http://model[icann.org]) for complying with the General Data Protection Regulation (GDPR) for the WHOIS system of domain name registration data. This letter was circulated to data protection authorities and related contacts in the European legal and regulatory community.

We are writing to bring to your attention important developments with respect to the ICANN community's efforts to develop a GDPR compliance model for WHOIS, and to seek your guidance about integrating our concerns about the importance of preserving access to WHOIS data into any interim compliance solution that ICANN develops and implements. In particular, we would appreciate your guidance on our proposed draft accreditation system, discussed below, which we have put forward for community discussion.

ICANN community stakeholders are working diligently on a proposed accreditation system (posted on ICANN's Data Protection Page under community correspondence, the link to which is provided in Appendix 1 of Mr. Marby's latest communication to you), which would provide a mechanism for certain appropriate parties to access non-public WHOIS data for legitimate purposes under the GDPR. The current draft accreditation system proposal is available [here\[ipconstituency.org\]](http://here[ipconstituency.org]). To facilitate community input, the proposed accreditation system has been shared directly with different stakeholder groups, and as noted above, through the ICANN website.

The ICANN Community is unlikely to reach consensus on a proposed model for GDPR compliance and accreditation alone. We need your guidance on the model and this accreditation proposal to drive toward a consensus community solution. Without your guidance, we fear that gridlock will ensue and prevent the quick operationalization of a workable model and accreditation mechanism. More broadly, we fear that without your assistance, there will be an extensive period in which legitimate access to non-public WHOIS data will "go dark" or become functionally unusable. Allowing WHOIS to go dark,

even for a short period of time, would result in unintended consequences jeopardizing all Internet users and the stability and security of the global Internet.

We also want to alert you that the ICANN Governmental Advisory Committee (GAC) recently sent an important directive to ICANN's Board at the ICANN 61 meeting which took place in San Juan, Puerto Rico. This Consensus Advice [DEFINE and highlight the importance of Consensus Advice – since readers may not know what it is), (see San Juan [GAC Communique\[gac.icann.org\]](#)),) contained detailed guidance on what the world governments expect to see in any interim GDPR compliance model (see, in particular, page 8). Under its Bylaws, ICANN has an obligation to “take duly into account any advice timely presented by the Governmental Advisory Committee” particularly where such Advice relates to public policy matters. See [ICANN Bylaws\[icann.org\]](#), art. 3, Section 3.6(a)(iii); art. 12, Section 12.2(a)(x).

Under its Bylaws, we believe ICANN has an obligation to reconcile the relevant divergences between the current version of the GDPR compliance model and the GAC Consensus Advice. In particular, we note the following key areas from the GAC Consensus Advice, which must be included in ICANN's compliance model:

- Reconsider the proposal to hide the registrant email address as this may not be proportionate in view of the significant negative impact on law enforcement, cybersecurity and rights protection;
- Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;
- Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;
- Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs; and
- Ensure confidentiality of WHOIS queries by law enforcement agencies.

See San Juan Communique, at 8. These GAC concerns echo many of these same points the Intellectual Property Constituency has raised in our prior comments to ICANN.

We urge you to help us by endorsing the recent GAC Consensus Advice, and our work on a community-driven accreditation model. We ask that these developments be permitted as changes to ICANN's model, particularly in light of ICANN's stated goal of preserving the current WHOIS system to the greatest extent possible while also complying with the GDPR.

The recent letter from ICANN summarizes many of these issues and the current status of discussions within ICANN to finalize a compliance model which not only permits ICANN and domain name registries and registrars to comply with their obligations under the GDPR, but also preserve the ability of legitimate third parties to access domain name registration data for legitimate purposes including intellectual property enforcement, cybersecurity, law enforcement and other related consumer protection and public interest purposes. I hope you will also have an opportunity to review this letter, in the context of our two additional specific suggestions above.

We appreciate your consideration of these requests and look forward to any response you are able to provide.

Best regards,

Brian
President, ICANN Intellectual Property Constituency