

11-May-2018

Dear Members of the ICANN Board of Directors:

We understand ICANN may rely upon a Board-issued temporary policy to establish an interim WHOIS model for implementation of the European Union's General Data Protection Regulation (GDPR). The Business Constituency (BC) greatly appreciates the Board's leadership in addressing this critical matter. We support an individual's right to privacy and are committed to the proper implementation of the GDPR.

We write to remind the ICANN Board that for this process to occur correctly in line with ICANN's bylaws and procedures *and* in line with the advice ICANN has received to-date, global access to non-public WHOIS for legitimate purposes must be included in the temporary policy. We ask that the ICANN Board mandate that the interim model include the proposed [Accreditation and Access Model](#)<sup>1</sup> for cybersecurity and intellectual property/consumer protection developed by community members under the auspices of the Business and Intellectual Property Constituencies. This, and additional elements, that should be included in the Board's temporary policy are detailed below and are based on global recognition of the critical nature of this access, and recommendations by ICANN Org, governments, law enforcement, and a diverse, international coalition of community members.

A broad cross-section of the global Internet community has been weighing-in on this issue for some time now,<sup>2</sup> including the GAC,<sup>3</sup> the Article 29 Working Party,<sup>4</sup> and the ICANN CEO himself who is on record regarding the potential damage caused by a fragmented, non-accessible WHOIS system.<sup>5</sup>

The body of authoritative advice is clear, as is apparently the ICANN CEO's understanding of the danger. All of this, of course, underscores the recommendations and requests submitted to ICANN from our constituency and others who clearly have pointed out not only that an accreditation and access model is necessary, but one in fact has been developed,<sup>6</sup> including a technical model advanced by a contracted party.<sup>7</sup>

Inclusion of the Accreditation and Access Model also enables the Board to fulfill its obligations for temporary policies, as stated in the 2013 Registrar Accreditation Agreement, which notes such policies

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<sup>1</sup> 11-May-2018, version 1.5 at <https://mm.icann.org/pipermail/accred-model/attachments/20180511/6a48da24/DRAFT-WHOISAccreditationandAccessModelv1.5-0001.pdf>

<sup>2</sup> <https://www.icann.org/resources/pages/gdpr-comments-2018-04-04-en>

<sup>3</sup> <https://www.icann.org/en/system/files/correspondence/gac-to-icann-15mar18-en.pdf>, in which the GAC advised the Board to "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".

<sup>4</sup> [http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc\\_id=51021](http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51021), in which the Article 29 Working Party said "it welcomes the decision of ICANN to propose an interim model which involves layered access, as well as an "accreditation program" for access to non-public WHOIS data."

<sup>5</sup> <https://www.icann.org/news/announcement-2018-04-12-en>

<sup>6</sup> <https://www.icann.org/en/system/files/files/gdpr-aam1-ipbc-whois-access-accreditation-process-1-4-20apr18-en.pdf>

<sup>7</sup> <https://www.ietf.org/id/draft-hollenbeck-regext-rdap-openid-07.txt> and <https://datatracker.ietf.org/doc/draft-hollenbeck-regext-rdap-openid/>

may be necessary to maintain the stability or security of the DNS or the Internet.<sup>8</sup> A temporary policy without global accreditation and access is a policy that -- according to multiple authorities -- will have a detrimental impact on the security and stability of the DNS and the Internet by removing a key investigatory tool put to use by experts daily to thwart criminal activity, enforce rights, address or prevent technical harm and produce other positive outcomes. It even will preclude ICANN's ability to ensure the accuracy of the underlying database, against the advice of the European Commission that 1) underscored the GDPR's "Accuracy" principle, 2) made clear that reasonable steps should be taken to ensure the accuracy of any personal data obtained for WHOIS databases, and 3) recommended that ICANN incorporate this accuracy requirement in whatever model it adopts.<sup>9</sup>

It would be irresponsible to tell the Internet community that, through a temporary policy that falls short of such inclusion, ICANN will intentionally fragment WHOIS (as CEO Marby predicts) and that there's little to be done.

The Board may be under the impression that its hands are tied. That is not the case. The Board has both a mandate from governments and authorities who have instructed ICANN to include accreditation and access, and the comfort of knowing that their ask is technically feasible. A temporary solution is immediately available as proposed by the APWG, FIRST and M3AAWG, and an RDAP-based solution also is available and can be implemented quickly.

Furthermore, the Board is required to consider GAC advice now, not later, when the "ultimate" policy is adopted. Section 12.2a.(x) states:

*The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.*

Clearly, WHOIS is a public policy matter. The Bylaws do not permit the Board to defer consideration of the GAC advice until such time as the "ultimate policy" is adopted. The BC believes it is critical, in this post- IANA Transition period, for ICANN to respect the multi-stakeholder processes embodied in the Bylaws as it adopts the Interim Model for WHOIS.

For these reasons, the Board should direct that the following be included in a temporary policy and implemented by 25 May 2018:

- 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 natural persons (in-line with the GDPR requirements);
- Full, without volume limitations (except as needed to ensure continued operational availability of the service), automated, non-rate limited, machine-readable access to WHOIS for legitimate

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<sup>8</sup> <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#consensus-temporary>

<sup>9</sup> <https://www.icann.org/en/system/files/files/gdpr-comments-european-commission-union-icann-proposed-compliance-models-07feb18-en.pdf>

uses by Accredited parties and for ICANN Org to continue its existing access level for current uses to fulfill its obligations;

- Continued availability of the ICANN-managed WHOIS look-up<sup>10</sup> to support access to both public and non-public WHOIS data for Accredited Parties; and
- A requirement to implement RDAP and the Privacy Proxy Accreditation mechanism (as provided for in the RAA) with a June 15, 2018 target date, possibly with implementation incentives for contracted parties.

In sum, to maintain the stability and security of the DNS and the Internet, and to avoid further increased risk to ICANN Org, we ask the Board to carefully examine and take up the recommendations and actions listed here and supported by many.

Sincerely,

The ICANN Business Constituency

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<sup>10</sup> See <https://whois.icann.org/en>