

31-Aug-2017

To: Dr. Steve Crocker, Chair ICANN Board of Directors, and Göran Marby CEO, ICANN

Re: GDPR Compliance and ICANN's GDPR Compliance Task Force

Dear Dr. Crocker and Mr. Marby:

The Business Constituency (BC) writes to express its concerns with the current direction of ICANN's GDPR compliance efforts, and to ask that ICANN change its approach. While the BC appreciates ICANN's initiatives on the issue, we believe ICANN's activities, including the GDPR Compliance Task Force, does not currently accommodate full participation from the ICANN community or account for the community's valuable work product to-date on WHOIS.<sup>1</sup> Like the GAC,<sup>2</sup> the BC believes that adequate participation and representation is necessary to ensure that proper information about, and interest in, WHOIS is captured, analyzed, and conveyed to regulators.

Specifically, the BC believes that the proposed plan is not well informed, and must include the development of a background document that explains and defends WHOIS, and how ICANN's WHOIS system serves the public interest. Because WHOIS is critical to preserving the security, stability, and resiliency of the Internet's infrastructure, this issue is an ICANN community challenge that must be tackled *as a community*. The ICANN Board, CEO and staff must work with *the community*, including businesses representing billions of global users, to develop an action plan that will create a narrative to present to regulators that defends WHOIS, and examines how it is consistent with the GDPR. Without full community involvement, ICANN risks accounting for only partial views and information—missing relevant context, processes and fact patterns around data collection and use. As such, the current approach of staff engaging EU regulators with a collection of use cases will inevitably present limited data in a “vacuum.” This will create an incomplete narrative from which regulators will be called upon to make decisions—a dangerous approach to addressing the GDPR.

To protect against these dangers, the BC requests that ICANN:

- 1) Revise the current approach to include a more holistic examination of WHOIS, rather than focus on one aspect (the use case/data elements matrix) of WHOIS;
- 2) Ensure that there is broad community participation in the development of, and implementation of, the action plan (including interaction with EU regulators), and explain goals and specific strategy for “discussions with data protection agencies,” and describe any backup plans that are being considered;
- 3) Starting from a neutral position, complete and publish expert GDPR analysis that covers potential GDPR compliance concerns raised by existing WHOIS requirements; this analysis should assess the likely impact of GDPR on a system that serves the public interest, and could also suggest changes to the current WHOIS system that would achieve compliance with GDPR while minimizing the impact to legitimate users of WHOIS; and

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<sup>1</sup> As underscored in the work of the Expert Working Group on Registration Directory Services (EWG), many diverse categories of users rely upon WHOIS data to fulfill a wide range of purposes. See BC Response to gTLD Registration Dataflow Matrix and Information <https://www.icann.org/en/system/files/files/gdpr-dataflow-matrix-bc-24jul17-en.pdf> which restates the legitimate uses of WHOIS data identified by the EWG.

<sup>2</sup> See GAC letter dated July 24, 2017 <https://www.icann.org/en/system/files/correspondence/schneider-to-swinehart-24jul17-en.pdf>

- 4) Leverage the deep knowledge within the community and take advantage of the work product that the ICANN community has already produced in this area.<sup>3</sup>

While the BC appreciates that May 25, 2018 is fast approaching, it: 1) believes this is more reason to leverage the existing work product and knowledge of the ICANN community (rather than recreating the wheel from scratch); and 2) cautions that this pending deadline should not exclude key stakeholders from producing the basis of, or participating in, discussions with regulators.

In conclusion, the BC believes that ICANN's plan for addressing the GDPR must focus on the important public interest for maintaining the WHOIS system rather than assuming incompatibility with the GDPR. The current approach puts ICANN and the community at risk of increased regulatory scrutiny based on incomplete facts and one-sided assumptions. To guard against this risk, the BC believes that the new Chief Privacy Officer should immediately be called upon to produce a strategy (e.g., action oriented game plan that includes the aforementioned elements), solicit community feedback on that strategy, and produce a report for how *the community* will move forward to address the GDPR.

Sincerely,

Andrew Mack  
Chair, ICANN Business Constituency

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<sup>3</sup> See Final Report from the Expert Working Group on gTLD Directory Services:

A Next-Generation Registration Directory Service (RDS)

(<https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf>) that contains an entire section on "Users and Purposes" with accompanying annexes; see also WHOIS Policy Review Team Final Report

(<https://www.icann.org/en/system/files/files/final-report-11may12-en.pdf>) that contains an entire chapter on "The Extent to which ICANN's Existing WHOIS Policy and its Implementation Are Effective in Meeting Stakeholder Needs."