



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND
TECHNOLOGY

Future Networks
The Director

Brussels,
CNECT.E/POD/OB

Dear Mr. Marby,

Thank you for your letter requesting further clarifications on our comments to the EPDP report on the Temporary Specification for gTLD Registration Data.

I would like to clarify at the outset that our comments address specifically the recommendations contained in the EPDP report. The Commission has on several occasions, as part of the GAC deliberations and in direct correspondence with ICANN¹, made clear what is our position on the development of a gTLD registration data policy. Members of the community who reacted publicly to the extent of the Commission comments need to bear in mind that much of those comments had been clearly expressed in the course of discussions and on this issue over the previous two years.

In particular, we have constantly urged ICANN and the community to develop a unified access model that applies to all registries and registrars and provides a stable, predictable, and workable method for accessing non-public gTLD registration data for users with a legitimate interest or other legal basis as provided for in the General Data Protection Regulation (GDPR). The European Commission considers this to be both vital and urgent, and we urge ICANN and the community to develop and implement a pragmatic and workable access model in the shortest timeframe possible, to which we will contribute actively.

Such a unified access model should be fully in line with EU data protection rules, in particular the GDPR. On the purpose and lawfulness of processing and on the issue of controllership, which you raise in your letter, I would like to provide the following clarifications:

Purposes of processing and access model

Your understanding is correct that we do not suggest that ICANN or the contracted parties should not be able to disclose registration data to third parties. On the contrary, finding a timely and workable solution for access to non-public gTLD registration data is a matter of priority.

¹ EU Commission letter of 29 January 2018; technical input of 7 February 2018; and letter of 17 May 2018.

However, in order to develop a solution for access to non-public gTLD registration data that is compliant with GDPR, a clear distinction should be maintained between the different processing activities that take place and the respective purposes pursued by the stakeholders involved, as was stated very clearly by the European Data Protection Board (EDPB) in previous correspondence²:

"Nevertheless, the EDPB considers it essential that a clear distinction be maintained between the different processing activities that take place in the context of WHOIS and the respective purposes pursued by the various stakeholders involved. There are processing activities determined by ICANN, for which ICANN, as well as the registrars and registries, require their own legal basis and purpose, and then there are processing activities determined by third-parties, which require their own legal basis and purpose.

The EDPB therefore reiterates that ICANN should take care not to conflate its own purposes with the interests of third parties, nor with the lawful grounds of processing which may be applicable in a particular case."

Accordingly, we consider that a clear distinction needs to be made between ICANN's own purposes for processing personal data and the purposes pursued by the third parties in accessing the data. For this reason, we would recommend revising the formulation of purpose two by excluding the second part of the purpose *"through enabling responses to lawful data disclosure requests"* and maintaining a broader purpose to *"contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission"*, which is at the core of the role of ICANN as the "guardian" of the Domain Name System.

ICANN and the contracted parties may enable access to and disclose registration data upon request from a third party showing a legitimate interest, provided both the controller - ICANN and/or the contracted parties - and the third party have a legal basis for such processing (see below).

As the Commission already noted, the current situation where access to non-public registration data for public policy objectives is left at the discretion of registries and registrars affects the EU Member States authorities' ability to obtain legitimate access to non-public registration data necessary to enforce the law online, including in relation to the fight against cybercrime. The need to ensure effective and secure treatment of third party access requests requires therefore ICANN and the community developing a unified method for accessing non-public gTLD registration data. This was also recognised by the EDPB, which expressed the expectation that *"ICANN [develops] and [implements] a WHOIS model which will enable legitimate uses by relevant stakeholders, such as law enforcement, of personal data concerning registrants in compliance with the GDPR, without leading to an unlimited publication of those data"*.³

Legal basis for processing

As explained in our comments, Art. 6(1)f GDPR (legitimate interest) is one of the six possible legal bases provided under Art. 6(1) GDPR. For instance, disclosure of non-public gTLD registration data could be necessary for compliance with a legal obligation

² Letter of 5 July 2018.

³ Statement of the WP29 on ICANN/WHOIS, endorsed by EDPB during its first plenary meeting on 25 May 2018.

to which the contracted parties are subject (see Art. 6(1)c GDPR). It is for ICANN, the contracted parties and the third parties to determine the appropriate legal basis for disclosure depending on the circumstances.

When relying on Art. 6(1)f the legitimate interest of the third party requesting disclosure needs to outweigh the interest of the individual concerned. As stated by the EDPB in the correspondence quoted above: *"the personal data processed in the context of WHOIS can be made available to third parties who have a legitimate interest in having access to the data, provided that appropriate safeguards are in place to ensure that the disclosure is proportionate and limited to that which is necessary and the other requirements of the GDPR are met, including the provision of clear information to data subjects"*. Accordingly, a model for access to registration data needs to incorporate steps that ensure that the disclosure is proportionate and limited to the legitimate interest of the third party when the latter relies on Art. 6(1)f.

We also clarified in our comments that public authorities, for any processing performed by them rather than by ICANN and/or the contracted parties, cannot rely on Art. 6(1)f GDPR for processing personal data in the performance of their tasks. Instead, they need to rely on another legal basis, which is normally provided for in national law.

Controllorship

Finally, you ask for clarifications on our comment on controllorship. Our comment responds to the recommendation of the EPDP team that a Joint Controllorship Agreement be negotiated between ICANN and the contracted parties. In principle, ICANN and the contracted parties appear to jointly control the gTLD registration data. But it is also possible that for specific processing activities individual data controllers may be identified. This would need to be established by examining the relevant processing activities and the role of the relevant stakeholders. In case of joint controllorship, an agreement is advisable to establish the roles and the responsibilities of the joint controllers for the relevant processing activities.

I hope the above provides sufficient clarification in reply to your questions.

As already mentioned⁴, we think it is crucial in the work of the EPDP going forward to involve a legal counsel who can advise at working level on how to develop an access model that is compliant with the GDPR, taking into account previous advice of the EDPB and the European Commission. We note in this regard that the EPDP planned further legal analysis of purpose two⁵ but such analysis was not provided on time for the examination of the final report by the ICANN Board.

In general, ICANN should maintain a close dialogue with the EDPB on the revisions of the temporary specifications and the development of a final policy for gTLD registration

⁴ See for example the GAC "Response to ICANN Board regarding EPDP Phase 1 Policy Recommendations", where the GAC reiterated its request that a legal review be undertaken to ensure that the purposes referenced in the EPDP Report take into account previous guidance provided by the EDPB and Article 29 Working Group.

⁵ See footnote 5 of the EPDP report.

data. The Commission will continue to play a facilitating role in this dialogue, which aims at ensuring compliance of the gTLD registration policy with the GDPR.

Yours faithfully,

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