15 October 2018

To: ICANN Board of Directors

cc: Göran Marby, Chief Executive Officer

Andrea Jelinek, Chair, European Data Protection Board

**RE: ICANN org’s deliberate, sustained, and unacceptable bias in favor of surveillance interests at the expense of human rights**

Dear all,

The Non-Commercial Stakeholders Group (NCSG) represents the interests of non-commercial users in the formulation of Domain Name System policy within the auspices of the Generic Names Supporting Organization (GNSO). We are proud to have individual and organisational members in over 120 countries. Since our inception, we have facilitated global academic and civil society engagement in support of ICANN’s mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues and raising awareness of the need for ICANN to comply with privacy and data protection legislation.

We are writing to you today to express our disappointment that ICANN the organization has taken a biased approach to the reform of Whois. Time and time again it has focused on advancing the interests of certain parts of the ICANN community while completely ignoring the opinions and concerns of the others. When it comes to questions regarding the privacy and the associated human rights of domain name registrants and overall GDPR and data protection law compliance, the sole focus of ICANN org has been on ensuring the continuous access to personal data demanded by special interest groups.[[1]](#footnote-1)

The NCSG has been engaged in the struggle to help ICANN stop violating domain name registrants’ privacy for nearly two decades. We only saw ICANN org start to move towards the redaction of personal information in WHOIS data when all of its other efforts not to comply with the GDPR failed and the threat of getting fined under the GDPR became real.

While ICANN had to redact the personal data requirements which exposed the contracted parties to the risk of substantial fines, the temporary specification and subsequent ICANN org activities continue to focus on how to give access to this personal data to third parties. The temporary specification went above and beyond what it needed to do. In order to justify its desire to keep the personal information of domain name registrants as accessible as possible to whoever wanted it, ICANN org made dangerous, inaccurate arguments about its mission, claiming that ICANN is mandated to perform a law enforcement functions, consumer protection, and general cybersecurity policing, and is thus required to collect, use, and disclose personal information in order to perform these functions. ICANN org has been arguing that it is mandated to carry out tasks that are obviously not in its mission. That was an act of desperation after the Article 29 Working Party in its letter dated 11 April 2018 told ICANN that it is in violation of data protection laws if it continues doing what it has been doing for the past 20 years.

We find the constant references to ICANN org’s efforts to seek guidance from the data protection authorities to be in bad faith. We have asked repeatedly to see the notes and findings from the various meetings with the data protection authorities, including from the large mission which went to the 39th International Conference of Data Protection and Privacy Commissioners in Hong Kong in September 2017, but to date we have seen nothing but high level blogs from the CEO. We were advised by Trang Nguyen that the ICANN staff who travelled to Hong Kong did not take any notes from their meetings; if this is true, it is unacceptable.

We understand that the CEO and ICANN org were very dissatisfied with the responses from the data protection authorities and the actions of the German courts, who have repeatedly disagreed with ICANN org’s arguments. Not because they, as a neutral facilitator tasked to reflect the views of the multistakeholder community, were listening to all stakeholders who told them to be dissatisfied, but because ICANN org agreed with some part(s) of the community that access to the personal information of domain name registrants in WHOIS is absolutely vital.

Considering this background, we believe the only explanation for ICANN org’s urge to bring about “unified” access to the personal information of domain name registrants is that it is under a lot of pressure from lobbyists for special interest groups. Let us be crystal clear: the whole community has never asked for “unified” access to registration data. , Only the Intellectual Property Constituency and the Business Constituency have insisted on it, along with certain members of GAC who are ignoring their own national laws. ICANN org in much of its correspondence claims that the “community” “urgently” needs to have access to the personal and sensitive data of domain name registrants, or a cyber doomsday will result. We are part of the community, and we disagree. Kindly acknowledge and reflect our views.

It has come to the point that the CEO of ICANN wrote a blog in which he claimed that WHOIS redacted data could make it harder to fight fake news![[2]](#footnote-2) Later on the CEO implied that it might have been a mistake to include fighting against fake news as a pitfall of redacted WHOIS since it can directly relate to content regulation. Content regulation is absolutely outside of ICANN’s mission and the ICANN Board and CEO have on many occasions told the NCSG that ICANN will not be involved in any way in content regulation. Yet in his quest to find a rationale for disclosing Whois data the CEO was motivated to step far outside the bounds of ICANN’s mission.

The CEO and ICANN org have a right to seek legal clarity from the relevant authorities. However, legal clarity can only be obtained when the right questions are asked. Currently ICANN is only asking about how to give third parties access to the personal and sensitive information of domain name registrants. If ICANN org truly wants to support the community in its efforts to come up with a policy that protects domain name registrants personal and sensitive data while providing lawful access for the legitimate interests of identified actors, the starting point is a question “Does the ICANN community want a unified access model?” Instead, ICANN assumes that the entire community wants a “unified access model”, which inevitably leads to wrong questions and, consequently, answers that provide neither legal nor other clarity.

Moreover, when legal advice and clarity is received but does not fit the prior assumptions of ICANN org about data collection or access to data by third parties, ICANN org tends to either ignore it or challenge it. ICANN had received very good guidance from DPAs before drafting the Temp Spec. For instance, the Article 29 Working Party pointed out that they agreed with the working paper produced by the Berlin Group. Not only was that paper has been ignored, moreover - the RDS PDP WG continued to pretend that it was not the product of data commissioners. Guidance that has been received from data protection authorities literally for decades has not been heeded because of the fundamental problem of denying legal reality until there is too little time left to fix the problem. Surprisingly, ICANN org still does not want to hear about registrant rights, nor does it wish to take into account the views of those who fight for them, seeking only the “legal clarity” that fits the idea of WHOIS “status quo” that ceased to exist after GDPR came into force.

In closing, we would like answers to the following questions:

* A. On what basis has ICANN decided that a unified access model is a priority? Where does it think a consensus for this goal was developed?
* B. What exactly is unclear about the repeated statements from DPAs that open access whois is not compliant with GDPR?

We look forward to receiving a written response to these questions. Thank you.

Yours sincerely,

Dr. Farzaneh Badii, current Chair

Dr. Stephanie Perrin, incoming Chair

Non-Commercial Stakeholders Group

1. Almost every action ICANN has undertaken relates to making the personal data within WHOIS more accessible, even when that violates long-standing, internationally-recognized data protection principles. Some of the actions are: 1) ICANN’s effort to delay compliance with the GDPR by seeking a moratorium, 2) to focus heavily on access to data in its questions from the EDPB (formerly WP29), 3) to file lawsuits against a registrar to fight against the principle of data minimization which is a fundamental tenet of data protection law. These activities have been undertaken apparently with the approval of the Board. [↑](#footnote-ref-1)
2. CEO’s blog, 12 April 2018, https://www.icann.org/news/announcement-2018-04-12-en [↑](#footnote-ref-2)