

22 May 2020

Dr. Andrea Jelinek, Chair  
European Data Protection Board  
Rue Wiertz 60, B-1047 Brussels, Belgium  
Email: [edpb@edpb.europa.eu](mailto:edpb@edpb.europa.eu)

Dear Chairperson Jelinek,

As noted in our [previous communications](#) to the European Data Protection Board (EDPB) on this topic, the Internet Corporation for Assigned Names and Numbers (ICANN) is working to build a model for third parties with a legitimate interest to request and, when such access is legally permissible, receive access to non-public gTLD domain name registration data (directory information including a domain name registrant's name and contact data).

Access to gTLD registration data serves the public interest and contributes to the security and stability of the Internet by providing contact information to support efforts related to consumer protection and cybercrime investigation, to prosecute DNS abuse and intellectual property infringements, and to address appropriate law enforcement needs. Registration data also enables network administrators and others to identify and correct system problems and to maintain Internet stability. Domain name registration data can be used to determine domain name availability, combat spam and fraud, and enhance the accountability of domain name registrants.

Following ICANN's implementation of new, heightened standards for access to this previously public directory information to comply with the European Union's General Data protection Regulation (GDPR), entities with legitimate interests in accessing this data face challenges in obtaining it. At least part of this issue appears to be uncertainty surrounding how to perform the legitimate interests assessment contemplated in Article 6(1)f of the GDPR. Notably, even data protection authorities sometimes require access to gTLD registration data to monitor and enforce the application of GDPR. As explained in further detail below, complaints submitted to ICANN from a data protection authority illustrate that even authorities charged with enforcing the GDPR are facing challenges in obtaining access to this data.

### **Uncertainty Surrounding Legitimate Interests Assessment**

ICANN has received complaints from a European data protection authority contending that a registrar wrongly denied its request for access to non-public registration data. The data protection authority noted its permission for ICANN to forward information about its complaints to the registrar and any other party with whom ICANN may consult in order to address its complaint. ICANN org is sharing generalities about this complaint for the purposes of highlighting this issue to the EDPB.

ICANN-accredited registrars are required to comply with ICANN's Temporary Specification for gTLD Registration Data (Temporary Specification), which was adopted to bring ICANN's requirements for registry operators and registrars into compliance with the GDPR. The data protection authority's complaints allege that, in each instance, the relevant registrar denied the authority's requests for access to personal data in registration data, notwithstanding the authority's legitimate interest in obtaining this data.

These complaints demonstrate the uncertainty in applying the so-called "balancing test" contemplated in Article 6(1)f of the GDPR. Appendix A Section 4.1 of the ICANN [Temporary Specification for gTLD Registration Data](#) requires registrars to provide reasonable access to personal data in registration data to third parties on the basis of a legitimate interest pursued by the third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject. This provision therefore assumes that a registrar is permitted to grant access to a third party on the basis of the third party's legitimate interests, pursuant to Article 6(1)f GDPR.

In these instances, the data protection authority requested access to non-public registration data in furtherance of its investigation into alleged violations of the GDPR, reported to the authority by a data subject(s) within its jurisdiction. According to the compliance complaints submitted to ICANN involving multiple registrars, instead of disclosing the requested data, the registrar in each instance denied its request for access to nonpublic registration data. For example, the authority contended in one of its complaints that the registrar instructed it to contact the webhost or domain registrant and advised it would "not act against a domain name without any clear and unambiguous evidence for the fraudulent behavior" and would "react to requests by the local authorities" of the registrar's jurisdiction, which are outside the European Union. Following our usual compliance procedure for each complaint, ICANN has requested information from the registrar concerning its process of providing third parties with access to non-public registration data, on the basis of legitimate interests in light of the Temporary Specification's requirements.

### **Need for Guidance on Legitimate Interest Assessment**

Noting that the topic of legitimate interest of the data controller is already on the EDPB's [2019/2020 agenda](#), ICANN org would like to bring this issue to the attention of the Board.

The complaints from the data protection authority to ICANN demonstrate the uncertainty that data controllers are facing in applying the so-called "balancing test" contemplated in Article 6(1)f of the GDPR. The uncertainty about how to balance legitimate interests in access to data with the interests of the data subject leaves much to the subjective judgment and discretion of the registrar, as the controller receiving an access request, on whether to grant or refuse access to the non-public gTLD registration data. Due to a lack of legal certainty, registrars, as controllers, are likely to evaluate privacy and data protection in absolute terms, without considering other rights and legitimate interests, to avoid possible regulatory sanctions or a judgment against them. In light of the above, ICANN org would respectfully suggest to the EDPB that a more explicit recognition of the importance of certain legitimate interests, including the relevance of public interests, combined with clearer guidelines on balancing, could address these problems.

In the same context, given that the complaints illustrate the current challenges in ensuring efficient, predictable, and transparent access to registration data overall, ICANN org would respectfully suggest to the EDPB to consider issuing additional specific guidance on this topic to ensure that entities with a legitimate interest in obtaining access to non-public gTLD registration data are able to do so. Guidance would in particular be appreciated on how to balance legitimate interests in access to data with the interests of the data subject concerned. Absent such guidance, which could inform ICANN's enforcement of agreements with registrars and registries, ICANN org and the other relevant stakeholders of the ICANN community will continue to face difficulties in ensuring that data protection authorities and others with legitimate interests in this data can obtain consistent access to the data needed to protect their legitimate interests and the public interest.

Such guidance would provide greater legal certainty for registrars faced with access requests. It would also help ICANN org to evaluate whether the registrar (as the data controller) has appropriately balanced the legitimate interests pursued by the requesting third party against the interests or fundamental rights and freedoms of the data subject, considering that such evaluation is modeled on the legitimate interests assessment contemplated in Art. 6(1)f of the GDPR.

ICANN org looks forward to any additional guidance the EDPB will be able to share on the topic of legitimate interest of the data controller, whether it will be issued separately or as part of updated guidelines on this topic, as foreseen on the EDPB's [2019/2020 agenda](#).

Respectfully,



Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers (ICANN)