

## Statement of the Noncommercial Stakeholder Group Member of the RDS Review Team

I appreciate the opportunity to work on this very collegial and cordial review team on behalf of the Noncommercial Stakeholder Group, and offer this comment to highlight a number of issues which are not prominent in the final report.

The RDS Review Team 2 has worked very hard and done considerable research, in order to comment upon the work done by the first WHOIS Review Team, investigating whether their recommendations had indeed been carried out. This activity has been taking place during a period of change in attitude towards data protection law and its impact on ICANN, precipitated by a growing awareness, notably on the part of the contracted parties who are principal custodians of personal data, that the General Data Protection Regulation has much more potential enforcement and monetary damages than previous data protection law to which they had been subject. As a result, many of the basic principles upon which previous work had been built, including those principles found in the Registrars Accreditation Agreement which set out data processing requirements, the Thick Whois policy, the WHOIS Conflicts with law policy, and the entire data accuracy program, required a fundamental reexamination as to whether they continued to be fit for purpose under new data protection regimes. Just as ICANN and the tasks it undertakes have grown more mature and complex with the expansion of the Internet, so has the realization that data protection law is no mere fig leaf, but an essential ingredient of an information society that embraces democratic and human rights values.

So the Review Team was caught in a difficult situation, forced to add a caveat to every issue discussed, that there could be GDPR impacts. ICANN recommended via a public comment issued in June 2018 curtailing this Review Team's activities, but since the work had started and significant funds expended already, there was resistance to that idea, and we continued our work, despite the fact that much of it could be irrelevant.

Procedurally, the reviews should in our view be independent, and not subject to cancellation by the organization, however logical it might have been in this case. Nevertheless, the central problem which I wish to point out in this statement, is the difficulty of course correcting at ICANN on all matters WHOIS. Many issues we touched on in this Review, and in every WHOIS related activity in which I have participated since being invited to join the Experts Working Group as a data protection expert in 2013, are long overdue for a conceptual re-think. We do not, as a multistakeholder community, ever look at things de novo. It would appear that ICANN is incapable of doing this, possibly because the strongest members of the multistakeholder community are happy with the data access that they achieved in 1998, for various reasons, and are pushing to improve that basic paradigm and avoid change.

The Noncommercial Stakeholders Group (NCSG) has worked for decades now to try to get ICANN to appreciate the requirement to comply with data protection law, to listen to data protection commissioners when they ask politely that ICANN respect their advice, and more recently to perform the necessary privacy impact assessments that would illuminate all of our work in this area. So far, by any reasonable metrics, success has been meager. My success in influencing this Review Team has also been very meager, for which I apologize to my stakeholder group and to those who might have been looking for better results.

I therefore have issues with many of our recommendations in this report, despite the hard work, excellent discussion, and collegiality of this working team. We continue to pave the cow path, when we are long overdue for a de novo review of ICANN's purposes in the collection, use and disclosure of registrant data. We did debate these issues in this review team. Sadly, we just repeated the use case exercise again in the Expedited Policy Development Process to confirm or replace the Temporary Specification, although some progress was definitely achieved in that exercise. Here are a few key issues that I wish to highlight:

#### 1. Accuracy

I have raised several objections to our recommendations on accuracy, but do not wish to disrupt consensus. Clearly, it is not the position of the NCSG to argue for the right to put inaccurate data into the RDS, although for many years it was one of the few ways to avoid wholesale privacy invasion. I would note that some members of the group felt that one rationale for the very extensive section on accuracy in this report could be founded on the principles of data protection law. The accuracy requirements discussed in this report are for the benefit of third party requestors of data. This is not the purpose of data processing in the view of the NCSG. The purpose of the collection of personal data from registrants is to enable them to obtain access to domain names, in their own right. Any accuracy requirements need to be proportionate and construed with the benefits to the individual as the primary criterion. The registrars must obviously maintain contactability with the data subject, but it does not follow that the accurate address and phone number data needs to be immediately served to data requestors. Reference, therefore, to the GDPR or most other data protection law as a rationale for accuracy monitoring that is not for the benefit of the individual is inappropriate. I raised the issue many times during our discussions, and simply repeat it here for the record.

#### 2. Consumer Protection

It has long been held that the publication of accurate name, address, phone number and email elements permits end users of the Internet or the DNS to contact registered name holders (RNHs) for consumer protection purposes. Those purposes include knowing who they are dealing with, enabling access to

their own personal data in the case of a website, and filing complaints for abuse of all kinds. It is the position of the NCSG that such publication of data actually enables spam, identity fraud, and other kinds of data abuse, and does little to achieve the stated goals. Sites engaged in commerce should be required to either list their company details on their websites, under local law, (something which is not within ICANN's remit to dictate), or disclose them to the customer at the moment of the proposed transaction. Using WHOIS is a clumsy way for consumers to get data about those with whom they are having financial transactions.

### 3. Risk management

I have raised many times that the failure to do appropriate risk management with respect to the WHOIS/RDS is a spectacular failure on the part of ICANN org, that threatens the viability of the multistakeholder model. The NCSG has worked tirelessly to bring the concerns of data protection commissioners to the attention of ICANN since its inception, to no avail. I served as an invited data protection expert on the Expert Working Group before I was affiliated with any stakeholder group at ICANN. While no longer working for the Canadian data protection authority, I had managed the ICANN policy file in 2005-7 and could certainly speak with some authority on how data protection commissioners regarded the matter. This fell on deaf ears, even though the GDPR was in the process of passing the EU legislative process at the time. This refusal to address what was clearly a risk to the financial stability of the DNS market, and the reputation and financial risk of ICANN, in my view is a major strategic failure and should be noted as such.

In addition to missing the key risk of actual data protection law enforcement, many of the policies and procedures we have reinforced through this RDS Review exercise, are not ones that would be prioritized if a risk-based approach to RDS related procedures were to be followed. Instead, prompt attention to registrant rights is long overdue.

### 4. Registrant Rights under the GDPR

We did not address registrant rights under the GDPR, although there are many observations throughout this report stressing the possible impact of the GDPR. It might be argued that this is out of scope. However, the question of how one actually gets material issues to be considered in scope within the Review regime is in my view a good one. Specifically, I would identify the following activities as ones which are required by ICANN if it is to be compliant with data protection law:

- Full disclosure of registrant rights under data protection law in a central location

- Standard disclosure provisions to be included in contracted party model contracts
- ICANN Compliance branch ought to monitor data protection law compliance
- The breach disclosure discussion in this report refers to the need to disclose a breach to ICANN (or not). In fact, under data protection laws generally, the registrants have rights to be informed of breaches, as do the data protection authorities. This should have been included in our report, it is simple legal compliance.

I appreciated the opportunity to serve on this review on behalf of the NCSG, and hope that this comment will be useful.

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