

To: Jonathan Matkowsky on behalf of RiskIQ, Inc.

Date: 24 April 2018

Re: Request No. 20180325-1

This is in response to your Request for Information dated 25 March 2018 (the “Request”), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP), which was submitted on behalf of RiskIQ, Inc. For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks the disclosure of “[a]ll documents or correspondence in electronic or paper form referring or relating to enforcement forbearance from [General Data Protection Regulation] GDPR, specifically including policies, plans, and correspondence with DPAs or any other authorities and any response thereto.”

Response

The GDPR was adopted by the European Union (EU) in April 2016 and takes effect on 25 May 2018 uniformly across the EU countries. Over the past several months, ICANN organization has consulted with contracted parties, European data protection authorities (DPAs), legal experts, and interested community stakeholders to understand the potential impact to personal data that participants in the gTLD domain name ecosystem collect, display and process, including registries and registrars, pursuant to ICANN contracts and policies in light of the GDPR. (See *Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union’s General Data Protection Regulation – Working Draft for Continued Discussion*, <https://www.icann.org/en/system/files/files/gdpr-compliance-interim-model-08mar18-en.pdf>.)

As part of its commitments to accountability and transparency, ICANN organization makes available all documents relating to its continued efforts towards GDPR compliance as a matter of course. The ICANN [Data Protection/Privacy Issues](#) page contains information about the Latest Announcements, Updates & Blogs, Legal Analyses, Proposed Compliance Models, & Community Feedback, and Correspondence and Meetings & Work Sessions. Similarly, ICANN organization has published all correspondence with all DPAs on the ICANN Correspondence webpage <https://www.icann.org/resources/pages/correspondence>.

Your Request seeks the disclosure of “[a]ll documents or correspondence in electronic or paper form referring or relating to enforcement forbearance from GDPR, specifically including policies, plans, and correspondence with DPAs or any other authorities and

any response thereto.” In responding to this Request, ICANN organization has identified the following documents and materials that are relevant to this request.

1. Relevant Documents and Correspondence

ICANN organization has been engaging with the DPAs on GDPR compliance since September 2017 regarding proposed compliance models. (See <https://www.icann.org/resources/pages/correspondence-2017>.) On 26 March 2018, ICANN organization sent letters to each European member states' DPAs and the European Data Protection Supervisor requesting specific guidance on the ICANN's [Proposed Interim Compliance Model](#) as it relates to the GDPR. In these letters, which have been published on the [ICANN Correspondence](#) page and are identified below, ICANN organization asked the DPAs and the European Data Protection Supervisor to "help ICANN and the domain name registries and registrars to maintain the global WHOIS in its current form, through either clarification of the GDPR, a moratorium on enforcement or other relevant actions, until a revised WHOIS policy that balances these critical public interest perspectives may be developed and implemented." (See <https://www.icann.org/news/announcement-2018-03-28-en>.)

- Ivana Janů, President of the Office for Personal Data Protection (See <https://www.icann.org/en/system/files/correspondence/marby-to-janu-26mar18-en.pdf>.)
- Andrea Vosshoff, Federal Commissioner for Freedom of Information (See <https://www.icann.org/en/system/files/correspondence/marby-to-vosshoff-26mar18-en.pdf>.)
- Irene Loizidou Nikolaidou, Commissioner for Personal Data Protection (See <https://www.icann.org/en/system/files/correspondence/marby-to-loizidou-nikolaidou-26mar18-en.pdf>.)
- Ancuța Gianina Opre, President of the National Supervisory Authority for Personal Data Processing (See <https://www.icann.org/en/system/files/correspondence/marby-to-opre-26mar18-en.pdf>.)
- Edyta Bielak-Jomaa, Inspector General for the Protection of Personal Data (See <https://www.icann.org/en/system/files/correspondence/marby-to-bielak-jomaa-26mar18-en.pdf>.)
- Cristina Angela Gulisano, Director, Danish Data Protection Agency (Datatilsynet) (See <https://www.icann.org/en/system/files/correspondence/marby-to-gulisano-26mar18-en.pdf>.)
- Saviour Cachia, Information and Data Protection Commissioner (See <https://www.icann.org/en/system/files/correspondence/marby-to-cachia-26mar18-en.pdf>.)
- Helen Dixon, Data Protection Commissioner (See <https://www.icann.org/en/system/files/correspondence/marby-to-dixon-26mar18-en.pdf>.)

- Viljar Peep, Director General, Estonian Data Protection Inspectorate (See <https://www.icann.org/en/system/files/correspondence/marby-to-peep-26mar18-en.pdf>.)
- Raimondas Andrijauskas, Director of the State Data Protection Inspectorate (See <https://www.icann.org/en/system/files/correspondence/marby-to-andrijauskas-26mar18-en.pdf>.)
- Konstantinos Menoudakos, President of the Hellenic Data Protection Authority (See <https://www.icann.org/en/system/files/correspondence/marby-to-menoudakos-26mar18-en.pdf>.)
- Antonello Soro, President of Garante per la protezione dei dati personali (See <https://www.icann.org/en/system/files/correspondence/marby-to-soro-26mar18-en.pdf>.)
- Isabelle Falque-Pierrotin, President of CNIL (See <https://www.icann.org/en/system/files/correspondence/marby-to-falque-pierrotin-26mar18-en.pdf>.)
- Filipa Calvão, President, Comissão Nacional de Protecção de Dados (See <https://www.icann.org/en/system/files/correspondence/marby-to-calvao-26mar18-en.pdf>.)
- Aleid Wolfsen, Chairman of Autoriteit Persoonsgegevens (See <https://www.icann.org/en/system/files/correspondence/marby-to-wolfsen-26mar18-en.pdf>.)
- Attila Péterfalvi, President of the National Authority for Data Protection and Freedom of Information (See <https://www.icann.org/en/system/files/correspondence/marby-to-peterfalvi-26mar18-en.pdf>.)
- Aiga Balode, Director of Data State Inspectorate (See <https://www.icann.org/en/system/files/correspondence/marby-to-balode-26mar18-en.pdf>.)
- Reijo Aarnio, Ombudsman of the Finnish Data Protection Authority (See <https://www.icann.org/en/system/files/correspondence/marby-to-aarnio-26mar18-en.pdf>.)
- Tine A. Larsen, President of the Commission Nationale pour la Protection des Données (See <https://www.icann.org/en/system/files/correspondence/marby-to-larsen-26mar18-en.pdf>.)
- Soňa Pötheová, President of the Office for Personal Data Protection of the Slovak Republic (See <https://www.icann.org/en/system/files/correspondence/marby-to-potheova-26mar18-en.pdf>.)
- Mojca Prelesnik, Information Commissioner of the Republic of Slovenia (See <https://www.icann.org/en/system/files/correspondence/marby-to-prelesnik-26mar18-en.pdf>.)
- María del Mar, España Martí Director of the Spanish Data Protection Agency (See <https://www.icann.org/en/system/files/correspondence/marby-to-marti-26mar18-en.pdf>.)

- Kristina Svahn Starrsjö, Director General of the Data Inspection Board (See <https://www.icann.org/en/system/files/correspondence/marby-to-starrsjö-26mar18-en.pdf>.)
- Elizabeth Denham, Information Commissioner (See <https://www.icann.org/en/system/files/correspondence/marby-to-denham-26mar18-en.pdf>.)
- Ventsislav Karadjov, Chairman of the Commission for Personal Data Protection (See <https://www.icann.org/en/system/files/correspondence/marby-to-karadjov-26mar18-en.pdf>.)
- Andrea Jelinek, Director, Österreichische Datenschutzbehörde (See <https://www.icann.org/en/system/files/correspondence/marby-to-jelinek-26mar18-en.pdf>.)
- Willem Debeuckelaere, President of the "Commission de la protection de la vie privée" (See <https://www.icann.org/en/system/files/correspondence/marby-to-debeuckelaere-26mar18-en.pdf>.)
- Anto Rajkovača, Director of the Croatian Data Protection Agency (See <https://www.icann.org/en/system/files/correspondence/marby-to-rajkovaca-26mar18-en.pdf>.)
- Giovanni Buttarelli, European Data Protection Supervisor (See <https://www.icann.org/en/system/files/correspondence/marby-to-buttarelli-26mar18-en.pdf>.)

ICANN organization has also published relevant announcements and correspondence with the Article 29 Working Party (WP29) relating “the need for a moratorium on enforcement in order for [ICANN] to act to protect Internet users globally.” (See letter from ICANN to Andrea Jelinek, 12 April 2018, <https://www.icann.org/en/system/files/correspondence/marby-to-jelinek-12apr18-en.pdf>; also see <https://www.icann.org/news/announcement-2018-04-12-en>.)

2. Other Relevant Materials

Additionally, during the ICANN public meeting in Puerto Rico, ICANN61, there were several sessions conducted regarding GDPR Compliance and WHOIS. (See [https://61.schedule.icann.org/meetings?classes\[\]=Groups%3A%3AMeetings%3A%3AMeeting](https://61.schedule.icann.org/meetings?classes[]=Groups%3A%3AMeetings%3A%3AMeeting).) The recordings of such meetings are available on the ICANN meetings website. (See <https://meetings.icann.org/en/sanjuan61>.) Specifically, the session on Thursday, 15 March 2018, titled “ICANN GDD: Registry & Registrar GDPR Compliance Model” included a discussion on enforcement forbearance. An audio and livestream of the session is currently available at <https://61.schedule.icann.org/meetings/647709>.

The DIDP exemplifies ICANN organization’s Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization’s operations and within ICANN organization’s possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. (See [DIDP](#).) However, neither the DIDP nor ICANN organization’s Commitments and Core Values supporting

transparency and accountability obligates ICANN organization to make public every document in ICANN organization's possession. The DIDP sets forth circumstances (Nondisclosure Conditions) for which those other commitments or core values may compete or conflict with the transparency commitment. (see [Nondisclosure Conditions](#).) These Nondisclosure Conditions represent areas, vetted through public consultation, that the community has agreed are presumed not to be appropriate for public disclosure (and the Amazon EU S.A.R.L. Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

([Amazon EU S.A.R.L. v. ICANN, ICDR Case No. 01-16-000-7056, Procedural Order](#) (7 June 2017), at Pg. 3.) ICANN organization's Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c).)

In this instance, ICANN organization has determined that certain drafts of letters, internal memos, and internal emails that may be responsive to this Request. These documents are subject to the following Nondisclosure Conditions and are therefore not appropriate for public disclosure:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the foregoing applicable Nondisclosure Conditions, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN organization has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.