
WHOIS and Data Protection Policy

Session 8.1

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Session Objective

- Update the GAC Membership on development related to the Expedited Policy Development Process (EPDP): Phase 1 recommendation implementation and the ongoing Phase 2 policy development.
- This session will also be an opportunity to discuss other relevant developments in terms of ICANN engagement with DPAs, impact on law enforcement needs and other legitimate users.
- The GAC may also wish to consider specific substantive issues being discussed in the above processes.

Background

Over the past decades, information on the individuals or entities holding a domain name (“domain registration data”) made available publicly through the [WHOIS protocol and related Whois services](#), has grown to become an indispensable tool for attributing content, services and crime on the Internet.

As a consequence, Whois has been the subject of long-standing attention for the ICANN Community, including the GAC, in particular in relation to major challenges:

1. Concerns around the lack of protection of personal data, and
2. Inaccuracy of registration data.

Since as far back as 2003, European data protection authorities have taken issue with Whois. Despite a number of efforts to update Whois policy and design solutions that meet privacy needs while preserving access for legitimate purposes, the system has remained relatively unchanged.

The entry into force of the EU General Data Protection Regulation (GDPR) on 25 May 2018 forced the ICANN Organization, Contracted Parties and the ICANN Community to bring WHOIS into compliance with data protection regulations. Specifically, since [ICANN60](#), a process including several parallel efforts for bringing Whois into compliance with GDPR has raised a number of concerns for governments.

Issues

Protecting the public in the context of the DNS requires taking into account the equally important issues of data protection and the legitimate and lawful practices associated with protecting the public, including to combat illegal conduct such as fraud and infringement of intellectual property, cyber-security, promoting user confidence and consumer trust in the Internet, and protecting consumers and businesses. Prior GAC Advice and the ICANN Bylaws recognize these vital interests.

Moreover, both the Article 29 Data Protection Working Party and the European Data Protection Board have recognized that *“enforcement authorities entitled by law should have access to personal data in the Whois directories”* and stated their expectation that ICANN should *“develop a WHOIS model that will enable legitimate uses by relevant stakeholders, such as law enforcement [...]”*.

However, as highlighted in GAC Advice and various GAC contributions since the ICANN60 meeting in Abu Dhabi (Nov. 2017), efforts to date by ICANN org and the ICANN Community have failed to adequately accommodate both the necessity of data protection and protection of the public interest. Currently, much of the once public WHOIS information is now redacted with no real process or mechanism for accessing the information for legitimate use. Namely, law enforcement, cybersecurity experts, and intellectual property rights holders no longer have the ability to access information that is critical to protecting the public interest.

Leadership Proposal for GAC Action

1. **Consider the recent ICANN Board resolutions and response to GAC Advice** (see [Current Status](#) below), including pending GAC Advice (from San Juan Communiqué)
2. **Consider supporting the GAC representatives on the EPDP Team** (EPDP Policy Development Phase 2) **and on the Implementation Review Team** (EPDP Phase 1 Policy Implementation) with timely and substantive contributions to assist them in addressing policy issues to be discussed during the GAC plenary session.

Relevant Developments

Overview of Current Status

- Following the [adoption](#) by the GNSO Council (4 March 2019) of the [recommendations](#) (20 February 2019) made in the first phase of the Expedited Policy Development Process on gTLD Registration Data (EPDP Phase 1), **several stakeholders provided input to the ICANN Board** after the ICANN64 meeting; including:
 - The US Government in a [letter](#) from the Department of Commerce Assistant Secretary for Communication and Information (4 April 2019) to which the ICANN CEO [responded](#) (22 April 2019)
 - The European Commission in a [letter](#) and [public comment](#) (17 April 2019), and subsequent [clarification](#) (3 May 2019) following an ICANN Board [request](#) (26 April 2019)
 - The GAC in a [response](#) (24 April 2019) to the ICANN Board's [notification](#) (8 March 2019) of the GNSO's approval of the EPDP Phase 1 Policy Recommendations
 - Other stakeholders as [reported](#) in the [public comment period](#) (23 April 2019)
- On 15 May 2019, **the ICANN Board took action** (detailed in a [scorecard](#)) on the EPDP Phase 1 Recommendations. It **adopted all recommendations but two** which it deemed not to be *"in the best interest of the ICANN Community of ICANN"*, which are expected to be further discussed as part of Phase 2 of the EPDP:
 - **Recommendation 1, Purpose 2**¹ which it sees as needing to consider recent input from the European Commission amid concerns that as currently worded, this purpose for registration data processing may be deemed inconsistent with the GDPR;
 - **Recommendation 12 (collection and display of the Organization field)**, given concerns that deletion (as opposed to redaction) of this information may result in loss of or changes to the name of the registrant, and be inconsistent with the public interest.

¹ *"Contributing to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission through enabling responses to lawful data disclosure requests."*

- The ICANN Board also [responded](#) to the [GAC Kobe Communiqué](#) (14 March 2019) by acknowledging each piece of [GAC Advice](#) (which focused on ensuring appropriate continuation of work in Phase 2 of the EPDP and implementation of Phase 1 recommendations). In doing so, the ICANN Board also accepted one of the four [pending GAC Advice on GDPD and WHOIS](#) from the [GAC San Juan Communiqué](#) (15 March 2018)²
- On 20 May 2019, the [Temporary Specification on gTLD Registration Data](#) expired as expected, and is now replaced by the [Interim Registration Data Policy for gTLDs](#), which requires **Contracted Parties to continue to implement measures that are consistent with the Temporary Specification**, pending the [implementation](#) of the final Registration Data Policy once implementation of the EPDP Phase 1 recommendations is complete.
- In the meantime, the contours of a future GDPR-compliant WHOIS continue to be defined through the increasingly interrelated work ongoing in two settings:
 - **The EPDP Team**, which has resumed its work and initiated Phase 2 of its deliberations aiming to deliver on the definition of a Standardized Access Mechanism for Non-Public Data, and the resolution of a number of open issues from Phase 1
 - **The engagement by ICANN org of the European Commission and Data Protection Authorities**, including on:
 - the basis of the [Technical Model](#) for Access to Non-Public Registration Data ([complete](#) since 2 May 2019) which ICANN [hopes](#) may shift the legal liability away from contracted parties for providing access to non-public gTLD registration data.
 - the interplay between legitimate and proportionate access to registrant data and ICANN's Security Stability and Resiliency mission (see “whereas” clauses and rationale of ICANN Board [resolution](#), 15 May 2019)

EPDP on gTLD Registration Data

- On 20 February 2019, the **EPDP is concluded Phase 1 of its work** by releasing its [Final Report](#) to the GNSO Council, which [adopted](#) it on 4 March 2019.
- The EPDP Phase 1 report provides 29 policy recommendations to eventually replace the terms of the [Temporary Specification on gTLD Registration Data](#), and responds to a set of [charter](#) questions, a number of which were identified as a prerequisite (“gating questions”) to the EPDP discussing a “standardized access model”.
- Since 2 May 2019, the EPDP Team has resumed its [weekly meetings](#), with a few changes:

² San Juan Communiqué §1.a.v: *a. the GAC advises the ICANN Board to instruct the ICANN Organization to: v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;*

- A new Chair, Janis Karklins, current Latvian Ambassador to the UN in Geneva and former GAC Chair, [nominated](#) (see Item 4, p.3) on 18 April by the GNSO Council
- A slight recomposed GAC's representation in the EPDP Team:
 - 3 GAC representatives designated as "Members":
 - Ashley Heineman (US)
 - Georgios Tsenlentis (European Commission)
 - Chris Lewis-Evans (UK)
 - 3 GAC representatives designated as "Alternates"
 - Lauren Kapin (US)
 - Rahul Gossain (India)
 - Olga Cavalli (Argentina)
- The EPDP Team is working based on a [Phase 2 Approach](#) (22 May 2019) that attempts to balance the interests represented, and targets a **possible draft EPDP Phase 2 Report by ICANN66** (2-7 November 2019) and **completion of Phase 2 by ICANN67** (7-12 March 2020).
- Consistent with this approach, the scope of Phase 2 work, which the GAC [advised](#) (14 March 2019) should be clearly defined, is to include:
 - Priority 1 items: the development of policy recommendations for sharing non-public registration data with third parties, also known as the **System for Standardized Access/Disclosure of Non-Public Registration Data (SSAD)**, including the definition of user groups, accreditation and authentication of third parties, purposes and legal basis for disclosure of personal data to third parties, codes of conduct, and the various associated processes.
 - Priority 2: Addressing a number of **issues not fully addressed in Phase 1** including: the distinction between legal and natural persons; the feasibility of unique contacts to have a uniform anonymized email address; WHOIS data accuracy and possible additional ICANN purpose for processing data in connection to research needs of its Office of the CTO.
 - Phase 1 recommendation not adopted by the ICANN Board: considering the ICANN board's [resolution](#) (15 May 2019), the EPDP is also expected to deliberate further, in coordination with the GNSO Council's engagement with the ICANN Board, on Purpose 2³ for processing personal data in the WHOIS, and the collection and display of the Organization field.
- To date, EPDP Team Phase 2 deliberations to date have covered:
 - A proposed set of [Working definition](#) (30 May 2019)
 - [Clarifying legal questions](#) for seeking outside counsel, following the [legal memos](#) obtained during phase 1
 - An initial proposal for the [definition of user groups](#) (3 June 2019)

³ "Contributing to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission through enabling responses to lawful data disclosure requests."

gTLD Registration Data Policy

- Following the ICANN Board [action](#) on the EPDP Phase 1 Recommendations (15 May 2019), the [Temporary Specification on gTLD Registration Data](#) expired on 20 May 2019, and is now replaced by the [Interim Registration Data Policy for gTLDs](#).
- This interim Policy requires **Contracted Parties to continue to implement measures that are consistent with the Temporary Specification**, pending the [implementation](#) of the final Registration Data Policy per EPDP Phase 1 recommendations.
- Work of ICANN org and Community representatives in the [Implementation Review Team](#) (IRT), in which the GAC is represented by PSWG Member Gregory Mounier (Europol), delivered a [3-stage plan](#) (see slide 14) for the **implementation of the final Registration Data Policy**, consistent with the principles set out in Recommendation 28.
- It should be noted however, as highlighted during a [session](#) of the [GDD Summit](#) (8 May 2019) that **the ICANN implementation team is not able to confirm yet whether the 29 February 2020 effective date for the final Registration Data Policy can be met**. This will depend on ICANN's ability to propose for community consideration and subsequently finalize an implementation plan, in collaboration with the IRT, while giving appropriate notice to contracted parties (6 months contractually), before 29 August 2019.
- As a consequence, the **impact of the Temporary Specification on law enforcement investigations**, as noted in section IV.2 of the [GAC Barcelona Communiqué](#) (25 October 2018), **will not be addressed in the short term**. Concerns include:
 - The current Temporary Specification has created a fragmented system for providing access consisting potentially of thousands of distinct policies depending upon the registrar involved
 - Existing requirements in the Temporary Specification governing gTLD Registration Data are failing to meet the needs of the law enforcement and cyber-security investigators (with similar concerns existing for those involved in protecting intellectual property) due to:
 - investigations being delayed or discontinued;
 - users not knowing how to request access for non-public information;
 - and many of those seeking access have been denied access.
- In its [Advice](#) in the ICANN64 [GAC Kobe Communiqué](#) (14 March 2019), the GAC stressed the need for *“swift implementation of the new Registration Directory Services policies as they are developed and agreed, including by sending distinct parts to implementation as and when they are agreed, such as the questions deferred from Phase 1”*.
- In its [response](#) (15 May 2019), the ICANN Board accepted this advice and stated it *“will do what it can, within its authority and remit, and in light of other relevant considerations”*

ICANN Org Engagement with Data Protection Authorities (DPAs)

- **Between September and November 2018, ICANN reported on its work** with European DPAs seeking legal clarity on a possible unified access model, and its exploration of legal and technical avenues in order to shift the liability from Contracted Parties to ICANN for providing access to non-public registration data while establishing a globally scalable unified solution for access to such data. This was done through:
 - an [ICANN GDPR and Data Protection/Privacy Update blog](#) (24 September 2018),
 - a [presentation](#) by ICANN's CEO during the EPDP Team Fac-to-Face meeting (25 September 2018)
 - a [Data Protection/Privacy Update Webinar](#) (8 October 2018)
 - a [Status Report](#) to the GAC (8 October 2018) in response to [GAC Advice](#)
 - a [Data protection/privacy issues: ICANN63 wrap-up and next step blog](#) (8 November 2018)
- ICANN reported considering the following avenues:
 - Setting ICANN as the gateway for approving third party requests to access non-public WHOIS data, which it would in turn request from relevant Registries and Registrars through the new Registration Data Access Protocol (RDAP),
 - Developing a WHOIS Code of Conduct with relevant bodies, in line with Article 40 of the GDPR,
 - Researching whether existing documentation adopted in the EU regarding the public interest role of the WHOIS meet the requirement of the GDPR for justifying related data processing.
- In relation to these efforts, ICANN submitted for community comments two iterations of its framing documentation regarding a Unified Access Model: the [Framework Elements for a Unified Access Model](#) (18 June 2018) and subsequent [Draft Framework for a Possible Unified Access Model](#) (20 August 2018).
- The GAC submitted [Initial Comments](#) (16 October 2018) on the Draft Framework for a Possible Unified Access Model, shortly before the ICANN63 meeting.
- Since the ICANN63 meeting, substantial work was undertaken in the [Technical Study Group on Access to Non-Public Registration Data](#) that was [formed](#) (14 December 2018) to explore a technical solution that would have the ICANN organization serve as the sole entity receiving authorized queries for non-public registration data.
- On 2 May 2019, the TSG [announced](#) having submitted its [Final Technical Model](#) (30 April 2019) to the ICANN CEO which it indicated would be used in discussions with the European Commission and the European Data Protection Board to *"determine whether a unified access model based on the Technical Model reduces legal liability for the contracted parties."*

Current Positions

- GAC [letter](#) to the ICANN Board on EPDP Phase 1 Policy Recommendations (24 April 2019), which included the following statements:
 - The GAC has highlighted public policy concerns regarding these recommendations in the [GAC Input on the EPDP Final Report](#) (19 February 2019) and most recently in the [GAC/ALAC Statement on EPDP](#) (13 March 2019). In addition, in the [GAC Barcelona Communiqué](#) (25 October 2019), the GAC specifically took note of the fact that *“existing requirements in the Temporary Specification governing gTLD Registration Data are failing to meet the needs of the law enforcement and cyber-security investigators”*, due in particular to the *“fragmented system for providing access consisting of potentially thousands of distinct policies depending upon the registrar involved”*
 - The GAC deems the EPDP Phase 1 policy recommendations to be a sufficient basis for the ICANN Community and organization to proceed - with all due urgency - to the completion of a comprehensive WHOIS model covering the entirety of the data processing cycle, from collection to disclosure, including accreditation and authentication, which would restore consistent and timely access to non-public registration data for legitimate third party interests, in compliance with the GDPR and other data protection and privacy laws
 - The GAC commits to supporting subsequent developments with appropriate expertise towards the expeditious development and implementation of a comprehensive WHOIS regime, which balances the various legitimate public and private interests at stake, including privacy and accountability, for the foreseeable future.
- GAC [Advice](#) in the ICANN64 [GAC Kobe Communiqué](#) (14 March 2019) focused on ensuring appropriate continuation of work in Phase 2 of the EPDP and implementation of Phase 1 recommendations
- GAC [Input](#) on EPDP Final Report (20 February 2019)
- GAC [Input](#) on EPDP Initial Report (21 December 2018)
- GAC Notes on WHOIS and Data Protection Legislation (Section IV.2) and Follow up on Previous Advice (Section VI.2) in the [ICANN63 Barcelona Communiqué](#) (25 October 2018) and ICANN Board response in its [scorecard](#) (27 January 2019)
- GAC [Advice](#) in the ICANN62 [GAC Panama Communiqué](#) (28 June 2018)
- GAC [Advice](#) in the ICANN61 [GAC San Juan Communiqué](#) (15 March 2018) was the subject of an informal [consultation](#) between the GAC and the ICANN Board (8 May 2018) which led to the release of the Board’s [scorecard](#) (11 May 2018). In response, the GAC [requested](#) that the Board defer taking action on advice it could have rejected (17 May 2018). The ICANN Board released its updated [scorecard](#) (30 May 2018) as part of a formal [resolution](#).
- GAC [Feedback](#) (8 March) on the Proposed Interim Model for GDPR Compliance

- GAC [Comments](#) (29 January 2018) on the proposed interim models for compliance with GDPR including:
 - Highlights of the legal analysis supporting ICANN’s goal to maintain the WHOIS to the greatest extent possible
 - Concerns and disagreement with some conclusions of the legal analysis relating to hiding the Registrant email and the need for legal process to support law enforcement requests for non-public Whois data
 - A review of each of the 3 proposed models with recommendations
 - A proposed fourth compliance model calling for: a differentiated treatment of natural and legal person’s data; longer data retention periods; the development of an accreditation system for all parties with a legitimate need to access non-public data, including mandatory self-certification arrangements in the interim; a strict application of the model to parties covered within the scope of the GDPR, while others would keep an open Whois
- GAC [Advice](#) in the [ICANN60 Abu Dhabi Communiqué](#) (1 November 2017) accepted per the ICANN Board’s [scorecard](#) (4 February 2018) touched on 4 areas including:
 - the continued relevance of the [2007 GAC Whois Principles](#);
 - Accessibility of Whois for recognized users with legitimate purposes;
 - Lawful availability of Whois data for the needs of consumer protection and law enforcement, as well as the public;
 - Involvement of the GAC in the design and implementation of any solution and transparency of ICANN in this process.
- [GAC Principles regarding gTLD WHOIS Services](#) (28 March 2007)

Key Reference Documents

- [3-stage plan](#)
- TSG Model
- [Interim Registration Data Policy for gTLDs](#) (20 May 2019) replacing the [Temporary Specification on gTLD Registration Data](#) (25 May 2018)
- ICANN Board [Response](#) to the GAC Kobe Communiqué (15 May 2019)
- ICANN Board [Scorecard on EPDP Phase 1 Recommendations](#) (15 May 2019)
- European Commission [public comment](#) (17 April 2019), and subsequent [clarification](#) (3 May 2019) regarding EPDP Phase 1 Recommendations
- EPDP Phase 1 [Final Report](#) (20 February 2019)

Further Information

GAC Reference Page on WHOIS and Data Protection Legislation

<https://gac.icann.org/activity/whois-and-data-protection-legislation>

ICANN Org Reference Page on Data Protection/Privacy Issues

<https://www.icann.org/dataprotectionprivacy>

GNSO Expedited Policy Development Process on Temporary Specification for gTLD Registration Data

<https://gns0.icann.org/en/group-activities/active/gtld-registration-data-epdp>

Document Administration

Meeting	ICANN65 Marrakech, 24-27 June 2019
Title	WHOIS and Data Protection Policy
Distribution	GAC Members and Public (after meeting)
Distribution Date	Version 1: 6 June 2019