
WHOIS and Data Protection Policy

Block 6, 10 - GAC WHOIS Policy

Sessions: 6.1, 10.2 - WHOIS and Data Protection Policy

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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 regulation. Specifically, since [ICANN60](#), a process including several parallel efforts¹ 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 (28 Oct - 3 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 uses. 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.

¹ See overview of current developments and prior discussions of interim WHOIS compliance models

Leadership Proposal for GAC Action

1. **Review prior GAC positions and recent developments in order to ensure a productive discussion with the ICANN Board.** In preparation for the GAC/ICANN Board meeting during ICANN64 in Kobe the GAC Leadership has asked the ICANN Board to share *“its overall assessment of outcomes to date in the Expedited Policy Development Process on gTLD Registration Data (EPDP), in the Technical Study Group on Access to Non-Public Registration Data and in the engagement of ICANN org with Data Protection Authorities, and what plans it currently has to ensure these efforts meet the needs of the global public interest.*
2. **Discuss concerns and consider the need for further Advice to the ICANN Board or, other forms of input,** regarding the adequacy of current outcomes or future work needed, in the EPDP, the Technical Study Group or any other ongoing processes, towards achieving *“the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability, and applies to all contracted parties, as quickly as possible”* ([GAC Panama Communiqué Advice, 28 June 2018](#)). In particular, the GAC may wish to highlight the need for more transparency about the Technical Study Group and the engagement of ICANN org with Data Protection Authorities.
3. **Consider the need for GAC Comments** on the current [public comment proceeding](#) (closing 17 April 2019) seeking input prior to Board action on the final EPDP recommendations (per [letter](#) from Board Chairman to GAC Chair on 8 March 2019)
4. **Consider a possible Joint GAC-ALAC statement,** subject to ongoing discussion among GAC and ALAC leaders
5. **Discuss lessons learned in the GAC’s involvement in the EPDP** to date, including both in terms of engagement with the EPDP Team, and in terms of internal coordination of GAC views
6. **Confirm GAC intentions to participate, and possible GAC representation in** subsequent processes, in particular:
 - a. **The EPDP Phase 1 Implementation Review Team** to work with ICANN Org in implementing relevant recommendations of the EPDP’s Final Report (should they be adopted by GNSO Council and ICANN Board)
 - b. **The EPDP Phase 2 Team** to deliberate on the definition of a Standardized Access Model (per EPDP [charter](#)) as well as outstanding issues identified in Phase 1 of the EPDP.
7. **Consider GAC support for seeking an end-date for phase 2 and the EPDP**

Overview of Recent Developments

Following previous advice on the matter in the [GAC Abu Dhabi Communiqué](#) (ICANN60) and the [GAC San Juan Communiqué](#) (ICANN61), in the [GAC Panama Communiqué](#) (ICANN62), as further reiterated in the [GAC Barcelona Communiqué](#) (ICANN63), **the GAC advised the ICANN Board to:**

“Take all steps necessary to ensure the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability, and applies to all contracted parties, as quickly as possible”.

In addition, the GAC noted in the GAC Barcelona Communiqué (Section IV.2):

“the GAC is of the opinion that there [...] exists a risk that the comprehensive [gTLD Registration Data] policy may not be in place before the Temporary Specification expires. Therefore, the community should consider how to mitigate this risk”

“Although the EPDP Charter tasks the team with defining what is meant by ‘reasonable access’, community work on developing a unified access model should proceed in parallel and can complement the EPDP’s efforts.”

in response to the GAC Barcelona Communiqué, **the ICANN Board indicated** it:

“appreciates the GAC’s communication on the sense of urgency as it relates to developing a unified access model. The Board notes that the ICANN org continues to seek input on the critical components of a unified access model for continued access to WHOIS data. The Board welcomes and encourages the GAC’s input to this process”

([GAC Panama Communiqué Advice Scorecard](#), per ICANN Board [Resolution 2018.09.16.09](#))

“acknowledges and appreciates this follow-up on the GAC’s advice regarding GDPR and WHOIS. ICANN org continues to solicit community input on a possible unified access model with the aim of diminishing the legal risks for contracted parties and in order to create a predictable and consistent user experience. In relation to this and as raised at ICANN63, in order to inform the EPDP and the Community, the ICANN org is forming a technical study group to explore possible technical solutions for accrediting, authenticating and providing access to nonpublic registration data. ICANN org will continue to keep the community apprised and updated.”

([GAC Barcelona Communiqué Advice Scorecard](#), per ICANN Board [Resolution 2019.01.27.18](#))

In the meantime, in the course of the past year, ICANN received **guidance from European Data Protection Authorities**, notably in the form of correspondence [from the Art. 29 Working Party \(11 April 2018\)](#), and [from the European Data Protection Board \(5 July 2018\)](#) which highlighted in particular:

- an expectation that ICANN “develop[s] a WHOIS model that will enable uses by relevant stakeholders, such as law enforcement [...]”
- the need for ICANN to define the purposes for processing registration data in a comprehensive and exhaustive manner, in a way which “comports with the requirements of the GDPR” and which also “corresponds to its own organizational mission and mandate”, while cautioning “not to conflate its own purposes with the interests of third parties” as “Purposes pursued by other interested third parties should not determine the purposes pursued by ICANN”.

Several processes in the ICANN Community have been delivering or actively discussing parts of a future WHOIS model to ensure compliance with the GDPR (further discussed in subsections below):

- **The Temporary Specification on gTLD Registration Data** adopted by the ICANN Board on 17 May 2018 to ensure WHOIS compliance with the EU GDPR, and set to expire after 12 months, on 25 May 2019
- **The Expedited Policy Development Process on gTLD Registration Data**, a GNSO PDP tasked in July 2018 to provide policy recommendations to the ICANN Board with a view to permanently replacing its Temporary Specification upon expiration
- **ICANN Org’s engagement with European Data Protection Authorities** aimed at seeking guidance and clarity for a possible unified access model for third parties with legitimate interests to request and receive non-public registration data, as well as for diminishing the legal risks associated with the GDPR for ICANN’s contracted parties.
- **The Technical Study Group on Access to Non-Public Registration Data** was formed after the ICANN63 meeting to explore how to operationalize a possible access model.

In addition, **Representatives from Contracted Parties and Law Enforcement agencies**, have been discussing the development of a voluntary mechanism designed to serve as an interim stop-gap solution to ensure access to non-public WHOIS data for specific law enforcement authorities until the EPDP process concludes and a functional Unified Access Model can be made fully operational.

Details of Recent Developments (incl. relevant GAC Positions)

Temporary Specification for gTLD Registration Data

- The [Temporary Specification](#) was [adopted](#) by the ICANN Board 17 May 2018 as a temporary policy to preserve the security and stability of registry services, registrar services and the DNS (see [Advisory Statement](#) for further rationale)
- The Temporary Specification became effective on 25 May 2018, when the EU GDPR took full effect. It has been reaffirmed every 90 days by the ICANN Board pursuant to requirements of the [Registry Agreement](#) and [Registrar Accreditation Agreement](#).
- The **GAC Public Safety Working Group noted** during its [meeting](#) in Barcelona (23 October 2018):
 - The serious impact of ICANN's Temporary Specification for gTLD Registration Data on Law Enforcement investigations and on that of their cybersecurity partners as evidences in surveys conducted by the Registration Directory Services 2 Review Team (see section section 5.3.1 in the [Draft Report](#), 31 August 2018) and jointly [by the Anti-Phishing and Messaging Malware and Mobile Anti-Abuse Working Groups](#) (18 October 2018)
 - The lack of details regarding what constitutes a “reasonable access” to redacted WHOIS data (see [Appendix A Section 4 of Temporary Specification](#)) continues to further hamper investigations and prolong the exposure of victims to crime and abuse.
 - Participants in the Working Group agree that effective investigations to determine identifying information for criminal acts and the protection of victims require an access model providing centralized, lawful direct access to non public WHOIS data.
 - Capabilities to support critical investigative techniques such as reverse lookup and historical queries should be explored
- The **GAC noted** in the [GAC Barcelona Communiqué](#) that:
 - The current Temporary Specification has created a fragmented system for providing access consisting of potentially 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.

EPDP on gTLD Registration Data

Summary of EPDP Deliberations

- **GAC representatives from the European Commission, India, Iran, UK, US** participated in the [substantial deliberations](#) of the EPDP Team (an estimated 4300 person.hours over 44 conference calls, 3 multi-day face-to-face meetings and 1600+ emails) since the EPDP Team was [chartered](#) (19 July 2018)
- **The work of the EPDP** has been conducted under strict [time pressure](#) imposed on the delivery of its recommendation for approval by GNSO Council and ICANN Board before expiry of the Temporary Specification on 25 May 2019 (as [discussed](#) by ICANN's CEO to the GNSO Leadership on 4 January 2019)
- The **diverse and often divergent views** of [stakeholders involved](#) in the deliberations (contracted parties, non-commercial stakeholders, intellectual property and business interests, representatives of end-users at large, etc) required intensive consensus building efforts, including with independent facilitation services. This was illustrated early in the work of the EPDP [Triage Report](#) of the Temporary Specification (11 September 2018) which recognizes that *"there are very few areas where the [...] EPDP Team agrees with the [...] Temporary Specification"* consistent with the diversity of [views](#) expressed on this occasion.
- In the course of its deliberations on [public comments](#) it received on its [Initial Report](#) the **EPDP Team sought and obtained independent legal opinion** from the law firm [Bird&Bird](#), including:
 - [Advice on Interpretation of Article 6\(1\)\(b\) of the GDPR](#)
 - [Advice on liability in connection with a registrant's self-identification as a natural or non-natural person](#)
 - [Advice on providing notice to technical contacts as part of the domain name registration process](#)
 - [Advice on the meaning of the accuracy principle](#)
 - [Advice on the inclusion of "city" in publicly available Whois data](#)
- On 20 February 2019, the **EPDP is concluded Phase 1 of its work** by releasing its [Final Report](#) to the GNSO Council. The report provides 29 policy recommendations to eventually replace the terms of the current Temporary Specification, and responds to a set of charter questions (see [EPDP Team Charter](#)) a number of which were identified as prerequisite to the EPDP discussing a "standardized access model", now envisioned for a Phase 2 of the Team's work.
- On 4 March 2019, the **GNSO Council adopted** the EPDP Final Report as part of a [motion](#) which in effect set in motion:
 - **The launch of an ultimate [Public Comment period](#)** (closing on 17 April 2019) seeking community input for Board consideration prior to its actions on the GNSO recommendations

- **An eventual vote by the ICANN Board before 25 May 2019** (expected by the April/May timeframe) on the adoption of the 29 recommendations in the EPDP Final Report, unless it is determined not to be *“in the best interest of the ICANN Community or ICANN”* by more than two-third of the ICANN Board (see Section 6 of Annex A-1 of the [ICANN Bylaws](#))
- **The confirmation of an effective date for the New Policy for gTLD Registration Data to be set to 29 February 2020** (If/when approved by the ICANN Board). The provisions of the Temporary Specifications would in effect be maintained until 29 February 2020, by which ICANN and all contracted parties would be ready to effectively implement the new policy recommendations.
- **The immediate formation of an implementation review team** for planning and eventual completion (when approved by the ICANN Board) of the work needed by all contracted parties in order to implement the new Policy by the effective date of 29 February 2020
- **The immediate initiation of Phase 2 of the EPDP’s work**, set to commence work on the System for Standardized Access to Non-Public Registration Data as well as other topics identified during Phase 1 as requiring more deliberations.

GAC Input on EPDP Deliberations and Reports

- **GAC views on substantive issues** deliberated in the EPDP Team were formulated as [GAC Early Input](#) (7 September 2018) and [GAC Comment on the EPDP Initial Report](#) (21 December 2018). The issues of importance to the GAC were identified, building on prior GAC deliberations and Advice, as follows:
 - Purposes for data processing²
 - Accuracy of Registration Data
 - Redaction of Registration Data
 - Non-redaction of Organization and City fields
 - Provision of Email Address
 - Tech Fields: Still to be considered
 - Allowing distinction of Legal vs. Natural Persons
 - Reasonable Access to non-public data
- In the [GAC Input on the EPDP Final Report](#) (attached to the EPDP Final Report), **GAC Representatives to the EPDP noted** that most issues of concern to the GAC needed further work in Phase 2 of the EPDP, for which no timeline or work plan are available yet.

² In particular the so called “Purpose 2” supporting data disclosure to 3rd parties; the so-called “Purpose O” supporting research activities by ICANN Office of the CTO on matters such as DNS Abuse; and how the balancing of interest per Art. 6.1 (f) of the GDPR should be made consistent and predictable across the industry

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:
 - a [ICANN GDPR and Data Protection/Privacy Update](#) blog (24 September 2018),
 - a [presentation](#) by ICANN's CEO during the EPDP Team Face 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).
- It is important to note that while ICANN Org "*prepared the Framework document to determine whether there is a legal foundation based on the GDPR upon which a unified access model may be implemented*", "*[u]ltimately, whether such a model ought to be implemented is a policy question for the community's multistakeholder community*" ([Status Report](#) to the GAC, 8 October 2018)
- The GAC submitted [Initial Comments](#) (16 October 2018) on the Draft Framework for a Possible Unified Access Model that was [published](#) by ICANN on 20 August 2019.

Technical Study Group on Access to Non-Public Registration Data

- Following [discussions](#) during the ICANN63 meeting, ICANN [initiated](#) (14 December 2018) a Technical Study Group (TSG) to explore a technical solution that would have the ICANN organization serve as the sole entity receiving authorized queries for non-public registration data, obtaining such data from generic top-level domain (gTLD) registries and registrars, and then passing it to third-party requesters.
- The TSG's aim is to develop a technical design and specification (see first [draft requirements](#)) that could be used to determine whether a unified access model would be possible under the GDPR
- The TSG's work is not meant to replace the multistakeholder policy development process, including the ongoing EPDP on gTLD Registration Data, nor the development of an RDAP Operational Profile in ICANN's [RDAP Pilot Program](#) the last significant development of which was the publication of the [report of public comments](#) (14 December 2018) indicating continuing work with the group of gTLD registries and registrars to finalize the gTLD RDAP profile incorporating the input received in this [public comment period](#).
- The TSG's work is expected to conclude in April and its work product handed off to others processes engaged on the policy aspects. The work of the TSG can be followed via its [mailing list](#) and the [recording](#) of its meetings.
- On 7 March 2019, the TSG introduced a [Draft Technical Model for Non-Public Registration Data](#), in addition to its previously released [Unified Requirements](#) document and a updated [charter](#).
- During ICANN64, the GAC PSWG is expected to receive a briefing from this group.

Current Positions (for Reference, in reverse chronological order)

- GAC [Input](#) on EPDP Final Report (20 February 2019)
- GAC [Comment](#) on EDPP Initial Report (21 Decembre 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 Panama Communiqué](#) (28 June 2018)
- GAC [Advice](#) in the [ICANN61 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 defers 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)

Further Information

GAC Reference Page on WHOIS and Data Protection Legislation

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

ICANN's Temporary Specification for gTLD Registration Data

<https://www.icann.org/resources/pages/gtld-registration-data-specs-en>

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>

ICANN's Technical Study Group on Access to Non-Public Registration Data

<https://www.icann.org/resources/pages/tsg-access-non-public-registration-data-2018-12-14-en>

Document Administration

Meeting	ICANN64 Kobe, March 2019
Title	WHOIS and Data Protection Policy
Distribution	GAC Members
Distribution Date	Version 2.0: 8 March 2019