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## RDS/WHOIS and Data Protection Policy

### Session #4

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#### Contents

Background	2
Issues	2
Leadership Proposal for GAC Action	3
Relevant Developments	5
Overview of Current Status	5
Focus: Interim gTLD Registration Data Policy and EPDP Phase 1 Implementation	9
Focus: EPDP Phase 2	11
Focus: Priority 2 Policy Issues Discussed in EPDP Phase 2A and Scoping Team on Accuracy	13
Focus: ICANN Org Engagement with European Data Protection Authorities	14
Current Positions	18
Key Reference Documents	20

#### Session Objective

Review the latest developments regarding efforts to bring Whois into compliance with applicable Data Protection Law, in particular challenges in the implementation of EPDP Phase 1 Policy Recommendations, expected next steps following the adoption by the GNSO of the EPDP Phase 2 Policy Recommendations and the launch of EPDP Phase 2A deliberations on the distinction of legal vs. natural person in the publication of gTLD Registration Data as well as the feasibility of using unique and anonymized emails for contacts.

## Background

Over the past decades, information pertaining to the individuals or entities holding a domain name (domain registration data) made available publicly through the WHOIS protocol and related WHOIS services<sup>1</sup>, grew to become an indispensable tool for attributing content, services and crime on the Internet.

Consequently, WHOIS has been the subject of long-standing attention for the ICANN Community, including the GAC, particularly in relation to challenging issues such as concerns about the lack of protection of personal data, and the inaccuracy of registration data.

While various new data protection legal frameworks have emerged or will emerge across the world, the entry into force of the EU General Data Protection Regulation (GDPR) on 25 May 2018 spurred the ICANN Organization, Contracted Parties and the ICANN Community to bring WHOIS into compliance with applicable law.

## Issues

Defining the right policies for WHOIS - or as alternatively known, Registration Directory Services (RDS) - requires taking into account the important issues of data protection and the legitimate and lawful practices associated with protecting the public, including to combat illegal conduct such as cybercrime, fraud and infringement of intellectual property, to ensure cybersecurity, promote user confidence and consumer trust in the Internet, and protect consumers and businesses. Prior GAC Advice<sup>2</sup> and the ICANN Bylaws recognize these vital interests.

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 redacted with no real process or mechanism for accessing the information for legitimate use. Namely, law enforcement, data protection authorities, cybersecurity experts, and intellectual property rights holders no longer can rely upon access to information that is critical to protecting the public interest<sup>3</sup>.

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<sup>1</sup> See ICANN's [WHOIS High-Level Technical Brief](#) (20 April 2018)

<sup>2</sup> See in particular the [GAC Whois Principles Regarding gTLD WHOIS Services](#) (28 March 2007)

<sup>3</sup> For further discussion, see “Importance of a Unified Access to Non-Public gTLD Registration Data” in the [GAC Webinar Discussion Paper](#) (23 September 2019)

## Leadership Proposal for GAC Action

1. **Determine potential public policy concerns** to be relayed to the ICANN Board<sup>4</sup> prior to its consideration of the [GNSO Policy Recommendations regarding the Standardized System for Access/Disclosure of Registration Data \(SSAD\)](#), including through GAC Advice (as needed), consistent with the [GAC Minority Statement](#) (24 August 2020).
2. Follow and **consider GAC input to the expected Operational Design Phase (ODP)** to be launched by the ICANN Board prior to its consideration of the GNSO Recommendations<sup>5</sup>, **taking into account the GNSO's requested consultation<sup>6</sup> with the ICANN Board** to discuss *"questions surrounding the financial sustainability of SSAD and some of the concerns expressed within the different minority statements [...] including whether a further cost-benefit analysis should be conducted before the ICANN Board considers all SSAD-related recommendations for adoption"*.
3. **Assess the public interest impacts** of the conflicts between the EPDP Policy Recommendations and the **suspended implementations** of the **Thick WHOIS Transition Policy<sup>7</sup>**, as recently [determined](#) by the GNSO (29 January 2021), and of the **Privacy/Proxy Accreditation Policy** Recommendations, as [reported](#) by ICANN org (12 January 2021).
4. **Consider GAC Positions, policy proposals and engagement of relevant parties** (Data Protection Authorities, the ICANN Board, ICANN org and GNSO Council) as appropriate, **to resolve pending policy and implementation issues** of public interest concern, including:
  - a. Distinguishing the treatment and level of data protection required for **legal (versus natural) entities** (as currently discussed in EPDP Phase 2A)
  - b. Exploring the feasibility of **unique contacts** and **uniform anonymized email addresses** (as currently discussed in EPDP Phase 2A)
  - c. Ensuring **accuracy of registration data** in view of the purposes for which such data is processed (While the GNSO Council is due to initiate a scoping effort on this matter, it will not formally be addressed until the launch of a new specific Policy Development Process, either by a vote of the GNSO Council or a resolution of the ICANN Board)
  - d. Clarify personal data **disclosure responsibilities between ICANN and Contracted Parties**, as well as the issue of **controllership**
  - e. Address **international data transfers**, when registration data disclosure crosses different jurisdictions
  - f. Implement the GNSO **policy related to domain registration using Privacy and Proxy services** which have demonstrated to host a significant amount of abuse registrations, which may leverage a double privacy shield under the SSAD policy.

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<sup>4</sup> Per [ICANN Bylaws](#) Article 3, Section 6.a-iii

<sup>5</sup> See p.22 of ICANN's [presentation](#) during the Operational Design Phase [webinar](#) (13 January 2021)

<sup>6</sup> See Resolved clause 1.b of the [GNSO Council resolution](#) adopting the EPDP Phase 2 Final Report (24 September 2020)

<sup>7</sup> See <https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en>

5. **Discuss GAC expectations regarding the timely deployment and operation** of a Standardized System for Access and Disclosure to gTLD Registration Data (SSAD) in light of the expected launch by the ICANN Board of a first-ever Operational Design Phase to inform its consideration of the GNSO Recommendations
- a. GAC Members may wish to consider **how the GAC Accreditation Principles together with the EPDP-proposed Standardized System for Access and Disclosure (SSAD)**, of which they are an integral part, **would translate at the country/territory level** into organization of accreditation and access for its users from identified public authorities
  - b. GAC Members may also wish to report on initiatives in their governments to gather the list of public authorities requiring access to non-public gTLD registration data (See Action Points in section 2.1 of the [ICANN65](#) and [ICANN66](#) Minutes, and section 2.3 of the [ICANN67](#) Minutes)
6. **Continue to assess the effectiveness of interim arrangements for access to non-public data** consistent with [Advice](#) in the [GAC Montréal Communiqué](#) (6 November 2019) and the ICANN Board's [acceptance](#) of this advice (26 January 2020), including:
- a. **Development of a voluntary standard request form** between ICANN org and both Registry and Registrar Stakeholder Groups
  - b. **Documentation of contracted parties obligations and points of contacts** regarding their providing reasonable access to non-public registration data
  - c. **Clear Instructions on how to submit complaints and reporting on such complaints** as part of the evolution of ICANN's Compliance systems expected by Q3 2020
  - d. **The ability of ICANN to enforce the requirement for Contracted Parties to provide reasonable access** when such access is denied to public authorities and other legitimate third parties

## Relevant Developments

### Overview of Current Status

- **The current interim policy regime** applicable to gTLD Registration Data **is expected to remain in place for the foreseeable future, but may not guarantee access** to non-public data for public authorities and other legitimate third parties
  - Following GAC [input](#) to the ICANN Board (24 April 2019), on 15 May 2019, **the ICANN Board took action** (detailed in a [scorecard](#)) on the EPDP Phase 1 Recommendations which laid the foundation for the future policy regime regarding gTLD Registration Data. On 20 May 2019, the [Temporary Specification on gTLD Registration Data](#) expired and was 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**, while [implementation](#) of the EPDP Phase 1 policy recommendations is ongoing.
  - In the [Montréal Communiqué](#) (6 November 2019), the GAC [advised](#) the ICANN Board to “*ensure that the current system that requires ‘reasonable access’ to non-public domain name registration is operating effectively*”. In its [Scorecard of GAC Advice](#) (26 January 2020), the ICANN Board accepted this Advice and instructed ICANN org to take several actions documented further in this briefing, including “*to collaborate with the Registry and Registrar Stakeholder Groups to develop a voluntary standard request form that can be used by stakeholders to request access*”
  - As part of implementation of the Montréal GAC Advice, ICANN Contractual Compliance has deployed new [complaint forms](#) and is now reporting data<sup>8</sup> for alleged violations of the Temporary Specification on gTLD Registration Data.
- In the meantime, **implementation of the EPDP Phase 1 Policy Recommendations** ([adopted](#) by the ICANN Board on 15 May 2019) has revealed significant impacts, with possible public policy implications, on two existing ICANN Policies for which implementation had effectively been suspended concurrently with the entry into force of the GDPR:
  - **Thick WHOIS Policy** - The GNSO Council [informed](#) the ICANN Board (29 January 2021), after substantial [debates](#) among affected stakeholders, that “*notwithstanding the absence of a clear statement*” the intent of EPDP Phase 1 Recommendation 7 “*is to modify the Thick Whois Transition Policy*”, therefore potentially affecting its expected outcomes<sup>9</sup>.

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<sup>8</sup> See ICANN’s monthly [Contractual Compliance Dashboard Reports](#) which now include a granular report on “*Registrar Complaints Processed [...] Related to Requirements Under the Temporary Specification for gTLD Registration Data*”

<sup>9</sup> The ICANN Board [adopted](#) the Thick WHOIS Policy on 7 February 2014 given community consensus on its benefits and despite concerns including in terms of data protection. Implementation of the Thick WHOIS policy eventually ran into legal issues, as described in a [correspondence](#) by Verisign to ICANN (20 June 2017). Following the entry into force of the GDPR, the ICANN Board [resolved](#) (7 November 2019) to defer compliance enforcement until PDP Phase 1 Implementation is complete and the GNSO determines whether to take action regarding potential impact on its original recommendations

- **Privacy/Proxy Accreditation Policy** - ICANN org estimates that the Privacy/Proxy Service Accreditation Issues (PPSAI) Policy and Implementation is “*substantively impacted by the new Registration Data Policy requirements, indicating a need for significant changes in the proposed implementation of PPSAI*”, and noted that “*The GNSO may also wish to undertake policy work*” in relation to these impacts.
- **Policy Development in Phase 2 of the EPDP** which aimed to propose a Standardized System for Access/Disclosure (SSAD) to gTLD Registration Data **concluded** with the publication of the [Final Report](#) (31 July 2020). A significant level of divergence expressed by various stakeholders are documented in the Consensus Designations (Annex D) and Minority Statements (Annex E), including the [GAC Minority Statement](#) (24 August 2020). Despite these significant levels of reservation and opposition, **the GNSO Council adopted the EPDP Phase 2 recommendations** for consideration by the **ICANN Board, which is expected to launch an Operational Design Phase (ODP)** prior to its formal consideration of the recommendations.
  - **Consensus was achieved on** aspects of the SSAD relating to **accreditation of requestors and centralization of requests** (recommendations 1-4, 11, 13 and 15-17). Once implemented these recommendations should improve the current fragmented systems by providing a central entry point to request access to registration data, according to clearly defined standards, and providing guarantees of appropriate processing (including safeguards for data subjects and requestor).
  - **Stakeholders could not agree on** the policy recommendations necessary to provide for a **standardized system of disclosure** that meets the needs of all stakeholders involved, including public authorities (recommendations 5-10 and 12).
  - While an **evolution mechanism** was to ensure that the SSAD could evolve towards more centralization and more automation of disclosure decisions (recommendation 18) as part of an EPDP Team compromise, **stakeholders were not able to agree** on the scope of evolution recommendations that would not require an entirely new GNSO Policy Development Process, in particular when it comes to automation and centralization of disclosure decisions.
  - The GNSO [resolution](#) (24 September 2020) **adopted the 18 EPDP Phase 2 recommendation that seek to establish an SSAD**, despite the Business and Intellectual Property Constituencies voting against this motion<sup>10</sup>. The resolution also includes a **request to the ICANN Board for a consultation** prior to its consideration of the policy recommendations **to discuss “questions surrounding the financial sustainability of SSAD and some of the concerns expressed within the different minority statements [...] including whether a further cost-benefit analysis should be**

<sup>10</sup> See rationale of these votes against the adoption of the EPDP Phase 2 recommendations in the [BC Statement](#) and the [IPC Statement](#). The [RySG](#) and [RrSG](#) also released a statement supporting their votes in favor of the recommendations.

*conducted before the ICANN Board considers all SSAD-related recommendations for adoption”<sup>11</sup>.*

- Prior to considering the GNSO’s SSAD Policy Recommendations, **the ICANN Board is expected to launch the first** instance of the newly proposed **Operational Design Phase (ODP)**, initially discussed during ICANN69, to “allow the Board to obtain relevant information about any operational and resourcing issues associated with certain policy implementation efforts [...] prior to Board action on GNSO-approved policy recommendations” noting that *this would “likely only be needed for complex, costly or other large-scale implementation efforts.”* following [Community input](#) received on an [updated proposal](#) (18 December 2020), which was discussed during an [ICANN org webinar](#) (13 January 2021), following which the [GAC submitted input](#) (22 January 2021).
- **The latest GAC discussions regarding Access to gTLD Registration Data with the ICANN CEO** covered various concerns and implementation matters. During the [GAC Discussion with ICANN CEO: WHOIS/GDPR Policy and Implementation Matters](#) (28 May 2020):
  - The GAC Chair and GAC topic leads highlighted **ongoing challenges for public authorities to access registration data** and concerns with the **ability for ICANN Compliance to challenge wrongful denials of access** by Contracted Parties following ICANN’s recent [letter to the EDPB](#) (22 May 2020).
  - The ICANN CEO discussed the [differences](#) between the proposed SSAD and ICANN’s UAM, the **SSAD making it easier for requests to be processed by Contracted Parties in a decentralized manner, but not affording more responsibility to ICANN for data disclosure decisions**, despite the organization’s willingness (and that of the ICANN Board) to take on such responsibility as laid out in the UAM.
  - The ICANN CEO emphasized that **ICANN org continues to work toward finding a way to take on more responsibility to facilitate disclosure of registration data to third parties where appropriate in the public interest.**

During the [GAC Dialogue with the ICANN CEO](#) (14 September 2020), following the [ICANN CEO letter to the GAC Chair](#) (10 September 2020) in response to the [GAC Minority Statement](#) (24 August 2020):

- The ICANN CEO called on relevant legislators to provide their assistance in **facilitating interpretation of applicable data protection law**
- GAC representatives reiterated the GAC’s view that there is a risk of non-compliance with the GDPR if the reasonable **steps to be taken by data controllers to achieve data accuracy** are not clarified
- On the topic of **controllership**, European Commission representatives suggested that the System for Standardized Access and Disclosure of gTLD Registration Data (SSAD)

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<sup>11</sup> During a recent GAC/GNSO Leadership call (29 September 2020) and during the pre-ICANN69 [Joint GAC/GNSO Call](#) (1 October 2020), The GNSO leadership clarified that it intends to focus this consultation on the issue of financial sustainability and that it was not expected to change its policy recommendations to the ICANN Board.



should provide clarity on the roles and responsibilities of various parties, and called on ICANN to establish controllership agreements as part of the elaboration of the SSAD to avoid creating uncertainty.

- Regarding **disclosure decisions**, the ICANN CEO shared ICANN's view that Contracted Parties have the legal responsibility to make these decisions and reiterated the request for the GAC to clarify the basis for its statement that granting contracted parties full discretion in reviewing disclosure requests *"may undermine the obligation to ensure the continued viability of domain name registration data as a tool to vindicate the rights and interests of the public, agencies tasked with protecting the public, and commercial and intellectual property constituencies"*.

On 2 October 2020, the ICANN CEO sent a [letter](#) to the European Commission seeking its assistance in obtaining greater legal clarity on the issues of controllership, accuracy of Registration Data and international data transfers. With respect to the issue of accuracy, the ICANN CEO sought clarity on whether non-compliance with the data accuracy obligation will result in liability only vis-à-vis data subjects, or even toward third parties relying on the accuracy of the data disclosed (such as requestors for non-public registration data), in light of the GAC's view that there is a risk of non-compliance with the GDPR if the reasonable steps to be taken by data controllers to achieve data accuracy are not clarified.

The European Commission [responded](#) (18 December 2020) stressing the relevance of ICANN's policy and implementation process to address these complex issues and the need to proceed toward delivering an SSAD as a matter of priority.

- **The so-called "Priority 2" policy issues not addressed during phase 2 of the EPDP** are currently the subject of further discussions as part of:
  - A new **Phase 2A of the EPDP** addressing the issues of **legal vs. natural persons** and the **feasibility of unique contacts** to have a **uniform anonymized email address**, which convened in December 2020 and is due to report to the GNSO Council on its prospect of reaching consensus recommendations before ICANN71.
  - A **GNSO Scoping Team** consisting of volunteers from GNSO Stakeholder Groups and Constituencies, as well as interested Advisory Committees, is due to consider an introductory [ICANN.org briefing](#) (26 February 2021) and aim to facilitate understanding of the issue of **Accuracy of Registration Data** and issues associated with **the WHOIS Accuracy Reporting System**, before potential further policy work is considered.



## Focus: Interim gTLD Registration Data Policy and EPDP Phase 1 Implementation

- 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](#) 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 per EPDP Phase 1 recommendations.
- ICANN org and Community representatives in the [Implementation Review Team](#) (IRT), who are drafting language to eventually become contractually-enforceable ICANN [Consensus Policy](#), delivered a [3-stage plan](#) for **the implementation of the final Registration Data Policy**, consistent with the principles set out in EPDP Phase 1 Recommendation 28.
- However, as [reported](#) to the GNSO Council (2 October 2019), **the IRT deemed the deadline for implementation of 29 February 2020 to be “not feasible”**, due to the large scope of work and complexity, **and is not providing any timeline for completion** at this point.
- 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) and referenced in GAC [input](#) to the ICANN Board (24 April 2019), **will not be addressed in the short term**. Concerns include:
  - The Temporary Specification has fragmented access to registration data, now ruled by thousands of distinct policies depending upon the registrar involved
  - Existing requirements in the Temporary Specification 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”*
- In its [Advice](#) in the ICANN66 [GAC Montréal Communiqué](#) (6 November 2019), the GAC advised the ICANN Board to: *“take all possible steps to ensure that the ICANN org and the EPDP Phase 1 Implementation Review team generate a detailed work plan identifying an updated realistic schedule to complete its work and provide and inform the GAC on the status of its progress by January 3, 2020;”* In response, in a [letter to the GAC Chair](#) (6 January 2020), the ICANN CEO described the current status and challenges of the effort.

- Further GAC Advice in the [GAC Montréal Communiqué](#) (6 November 2019) to “ensure that the current system that requires ‘reasonable access’ to non-public domain name registration is operating effectively” was [accepted](#) by the ICANN Board (26 January 2020). Accordingly, the Board instructed ICANN to:
  - educate stakeholders on contracted parties obligation to address requests for non-public data and make available links to registrar and registry information and points of contact on this topic
  - collaborate with the Registry and Registrar Stakeholder Groups to develop and make available a voluntary standard request form to request access based upon the current Consensus Policy
  - publish clear instructions on the ICANN Compliance web page describing how to submit a complaint concerning a third-party access request.
  - compile and publish monthly metrics data related to third-party access complaints once such forms are available in the new Compliance ticketing system
- Following initial interim steps in implementation of the Board resolution, as [reported](#) to the GAC by its PSWG during ICANN67, as of ICANN69, ICANN org reported on the availability of a new [complaint forms](#) along with **ICANN Compliance reporting data**<sup>12</sup> for alleged violations of the Temporary Specification on gTLD Registration Data. In the meantime, Contracted parties presented their [Practical Insights on Data Disclosure for Contracted Parties](#) (22 September 2020).
- Following complaints by a Data Protection Authority to ICANN regarding registrars denial of its requests for “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”, [the ICANN CEO requested guidance from the European Data Protection Board](#) (22 May 2020) on “how to balance legitimate interests in access to data with the interests of the data subject concerned” in order to help ICANN org “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”. The letter further stated that “[a]bsent 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.”

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<sup>12</sup> See [ICANN Contractual Compliance Dashboard for August 2020](#) under headers “[Registry/Registrar] Complaints with Evidence of Alleged Violation of the Temporary Specification - 1 February 2020 to Date” and “[Registry/Registrar] Inquiries/Notices Related to Temporary Specification Sent and Closed in August 2020”

## Focus: EPDP Phase 2

- As highlighted during the [GAC Webinar on EPDP](#) (25 September 2019) and its associated [Discussion Paper](#): GAC representatives in the EPDP shared the expectation that *“the EPDP policy recommendations are likely to consist of high level assumptions, principles and guidelines which will require substantial implementation work before any centralized or standardized system may be put in place”*.
- **The scope of work<sup>13</sup> in Phase 2 of the EPDP** was to focus on 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)**, and also include addressing so-called [“Priority 2” Items](#) or **issues not fully addressed in Phase 1** including: the distinction between legal and natural persons; registration data accuracy; and the feasibility of unique contacts to have a uniform anonymized email address. However, it became clear that this would not be the case, as evidenced in the [Addendum](#) to the Phase 2 Initial Report (26 March 2020), in light of legal advice received by the EPDP Team and timeline pressures which have supported contracted parties’ and non-commercial stakeholders **objections’ to further consider these issues as part of the critical path for completing Phase 2.**
- The **System for Standardized Access/Disclosure of Non-Public Registration Data (SSAD)** as proposed in the EPDP Phase 2 [Initial Report](#) (7 February 2020), described in the [GAC Summary](#) (17 February 2020) and discussed during the related [ICANN67 GAC plenary session](#) (10 March 2020), initially envisioned :
  - Centralization of requests and decentralization of responses, with continuous evolution of the model, towards increasing automation and standardization
  - Establishing a mechanism to advise ICANN Org and Contracted parties on evolution and continuous improvement of the SSAD
  - Automation of disclosure in response to some public authorities’ requests
  - Meeting applicable Data Protection Laws worldwide, not just GDPR
- However, following deliberations of the EPDP Team since the release of the Phase 2 Initial Report, including the consideration of public comments, **the final SSAD policy recommendation**, as reflected in the EPDP Phase 2 Final Report (31 July 2020) and its Consensus Designations (Annex D), **did not prove entirely satisfactory to the GAC and other stakeholders** who submitted Minority Statements (Annex E).
- In particular, **the GAC submitted**, along with those of the ALAC, SSAC, BC and IPC, and with the support of most of them, a [Minority Statement](#) (24 August 2020) which noted that the EPDP Phase 2 Final Recommendations:
  - Concluded with a fragmented rather than centralized disclosure system;
  - Do not contain enforceable standards to review disclosure decisions;
  - Do not sufficiently address consumer protection and consumer trust concerns;

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<sup>13</sup> which the GAC [advised](#) should be clearly defined (14 March 2019)

- Do not contain reliable mechanisms for the System for Standardized Access/Disclosure (SSAD) to evolve in response to increased legal clarity; and
  - May impose financial conditions that risk an SSAD that calls for disproportionate costs for its users including those that detect and act on cyber security threats;
  - Do not address key issues, most notably data accuracy, the masking of data from legal entities not protected under the GDPR, and the use of anonymised emails.
  - Would benefit from further clarifying the status and role of each of the data controllers and processors.
  - The GAC requested the GNSO Council to ensure that these key data issues are promptly addressed in the next and final Phase of the EPDP.
- Despite this level of reservation and opposition, **the GNSO Council adopted the EPDP Phase 2 recommendations for consideration by the ICANN Board** in a [resolution](#) (24 September 2020) against which the Business and Intellectual Property Constituencies voted. They offered a rationale for their opposition in respective statements: see [BC Statement](#) and the [IPC Statement](#)<sup>14</sup>.
  - The GAC requested that the GNSO ensures that the **“Priority 2” policy issues be promptly addressed in the EPDP final Phase.**

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<sup>14</sup> See rationale of these votes against the adoption of the EPDP Phase 2 recommendations in the [BC Statement](#) and the [IPC Statement](#). The [RySG](#) and [RrSG](#) also released a statement supporting their votes in favor of the recommendations.

## Focus: Priority 2 Policy Issues Discussed in EPDP Phase 2A and Scoping Team on Accuracy

- Following the deprioritization of the so called “Priority 2 Issues” at the conclusion of EPDP Phase 2, **the GNSO considered [proposals](#)** to further discuss:
  - Distinguishing between data from legal vs. natural persons
  - Feasibility of unique contacts to have a uniform anonymized email address.
  - Accuracy of gTLD Registration Data
- During ICANN69, the GNSO [resolved](#) to:
  - Reconvene the EPDP for an initial duration of 3 months (later [extended](#) to 6 months) in a new Phase 2A to address the issue of **legal vs. natural persons** and the **feasibility of unique contacts** to have a uniform anonymized email address.
  - Form a Scoping Team consisting of volunteers from GNSO Stakeholder Groups and Constituencies as well as interested Advisory Committees to facilitate understanding of the issue of **Accuracy of gTLD Registration** before further policy work can be considered.
- Representatives from the European Commission, the United Kingdom and the United States regularly participate in [meetings](#) of the **EPDP Team Phase 2A**, as well in the [meetings of its Legal Sub-Committee](#). Various policy proposals and feasibility issues are currently being discussed, in particular:
  - A process to provide registrants the opportunity to identify as a natural or legal person, and the necessary mechanism to confirm, verify and possibly correct designations, for new as well as existing domain name registrations
  - The legal and technical feasibility of generating an email registered by a unique registrant, which is intended to be anonymous data when processed by non-contracted parties.
- The GAC is expected to be represented by the European Commission, Iran and the United States when the **GNSO Scoping Team to address the topic of accuracy of gTLD Registration Data** is convened. One of their first task is expected to be a review of the [ICANN Org briefing](#) (26 February 2021) which reviews existing accuracy requirements and programs, and the impact that GDPR has had on their implementation and enforcement.

## Focus: ICANN Org Engagement with European Data Protection Authorities

- **Between September and November 2018, ICANN reported on its work<sup>15</sup>** with European DPAs seeking legal clarity on a possible unified access model, and its exploration of legal and technical avenues in order to consolidate responsibility for providing access to non-public registration data while establishing a globally scalable unified solution for access to data.
- In relation to these efforts, ICANN had 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).
- Between November 2018 and May 2019, work was undertaken in the [Technical Study Group \(TSGS\) on Access to Non-Public Registration Data](#) 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, and indicated it would be used in discussions with the European Commission and the European Data Protection Board.
- On 25 October 2019, the ICANN org CEO [announced](#) that it was now [officially seeking](#) clarity from the European Data Protection Board as to whether a UAM based on the TSG Technical Model would comply with the GDPR, on the basis of a new paper [Exploring a Unified Access Model for gTLD Registration Data](#). The 21-pages paper includes a set of 5 questions (section 8 p. 19) which the GAC [discussed](#) in plenary during ICANN66 (3 November 2019).
- On 4 December 2019, in its [response](#) to the ICANN CEO, **the Belgian DPA encouraged ICANN to continue its efforts to design a comprehensive system for access control** that takes into account the requirements of security, data minimization, and accountability. The response did not provide any definitive opinions regarding the questions that ICANN org included in the paper. The letter states that the policy and relevant safeguards that the community will develop to be applied in a UAM will be extremely important to assess whether a centralized model increases or decreases the level of protection enjoyed by natural persons. With respect to the roles and responsibilities, the letter states that parties to a processing activity cannot simply designate which party should be deemed to act as a controller or joint controller; a factual case-by-case is needed to that end. A previous [communication](#) by the Article 29 Working Party is further referenced, which contained the statement that, *"At first glance it would seem that...ICANN and the registries are joint controllers"*.
- **In a follow-up meeting with the Belgian DPA** (14 February 2020), representatives from the ICANN org, the European Commission and the , EPDP Team Chair Janis Karklins discussed

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<sup>15</sup> 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](#) and a [Data protection/privacy issues: ICANN63 wrap-up and next step blog](#) (8 Nov. 2018).



the UAM paper, the EPDP Phase 2 Initial Report and the ICANN Board's consideration of the EPDP Phase 1 recommendations:

- **With respect to the possibility of developing a centralized model that is GDPR-compliant**, the DPA representatives indicated their letter was intended as encouragement to continue efforts to develop a comprehensive system for access, and not meant to deter the development of a centralized model. Rather, it was noted that a centralized model is worth exploring and seems to be a better, “common sense” option in terms of security and for data subjects. They cautioned, however, that the Belgian DPA was not in the position to give a definitive opinion on the question of controllership in such a model.
- **With respect to automation of disclosure in response to third-party requests**, the DPA representatives noted that the GDPR would not prohibit the automation of various functions in an access model, provided it could demonstrate that any algorithm automating decision-making considers the relevant criteria required by the GDPR for such decisions.
- In a [letter](#) on 22 May 2020, the ICANN CEO sought to bring to the attention of the EDPB that even authorities charged with enforcing the GDPR are facing challenges in obtaining access to non-public registration data due to uncertainties surrounding the assessment of legitimate interests per Art. 6.1(f) of the GDPR. **The ICANN CEO welcomed a more explicit recognition of the importance of certain legitimate interests, including the relevant public interests**, combined with clearer guidelines on balancing legitimate interests in access to data with the interest of the data subjects, **in the context of anticipated guidelines from the EDPB on the topic of legitimate interest of the data controller** according to the [the EDPB 2019/2020 Work Program](#).
- Following the [GAC/ICANN CEO Dialogue](#) (14 September 2020), and referring the [GAC Minority Statement on the EPDP Phase 2 Final Report](#) (24 August 2020), the ICANN CEO [sought the support of the European Commission](#) (2 October 2020) to **“obtain greater legal clarity and certainty with respect to the application of the GDPR”** in particular regarding the issues of **Controllership, Accuracy of Registration Data and international data transfers**. The letter highlighted that *“ICANN and the ICANN community have embarked on an effort to ensure the rights of data subjects are protected without sacrificing the critical efforts of other stakeholders, including public authorities worldwide”,* in keeping with Public authorities’ (including the EU Member States) persistent ask for *“a stable, predictable, and workable method for accessing non-public WHOIS data for users with a legitimate interest or other legal basis as provided for in the GDPR.”* He pointed out that *“[t]he ICANN community develops policies for gTLDs within the boundaries of the law. The community policy development process cannot, nor should it be able to, define, interpret, or change applicable law. The recommendations developed by the ICANN community with respect to the SSAD are therefore greatly impacted by the legal uncertainty and lack of clarity that exists under the GDPR with respect to a number of issues”*. The letter stated that *“further dialogue with the Data Protection Authorities is necessary [...] to ensure that ICANN can implement a*



*mechanism for access to non-public gTLD registration data that is predictable, transparent, accountable, protects the rights of data subjects, and also meets the needs of parties who have a legitimate interest in accessing gTLD registration data as advised by ICANN's Governmental Advisory Committee [...]*". With respect to the issue of accuracy of registration data the ICANN CEO sought clarity on whether non-compliance with the data accuracy obligation will result in liability only vis-à-vis data subjects, or even toward third parties relying on the accuracy of the data disclosed (such as requestors for non-public registration data), in light of the GAC's view that there is a risk of non-compliance with the GDPR if the reasonable steps to be taken by data controllers to achieve data accuracy are not clarified.

- **The European Commission**, in its [response](#) to the ICANN CEO (18 December 2020) **stressed the relevance of ICANN's policy and implementation process to address the complex issues** Controllershship, Accuracy of Registration Data and international data transfers, starting in particular:
  - *[...] We think these questions are primarily a matter of ICANN policy and should be addressed within the EPDP according to the established procedures. [...]*
  - *Regarding Data Controllershship, "[...] we consider that the details of the processing activity involved in the SSAD and in particular the disclosure of registration data have to be determined in the policy. The role of data controller requires implementing the necessary technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with the requirements of the data protection legal framework. When a group of controllers decide jointly on the purposes and means of the processing (joint controllers), they have to determine their respective responsibilities in a transparent way, normally by means of an arrangement between them as well as by making available information on such agreements to the data subject. To this end, we believe that controllership agreements are essential to clarifying further their respective roles and responsibilities, also in the context of a future centralized decision-making system."*
  - *"On the issue of data accuracy, the Commission has repeatedly underlined that the accuracy of domain name registration data is of prime importance for the purpose of maintaining a secure and resilient DNS – a purpose that is also stated in ICANN's bylaws. This is now also explicitly recognised in our recent proposal for a revised [Directive on Security of Network and Information Systems](#) (NIS2 Directive). The Commission proposal introduces new obligations for TLD registries and registrars providing services in the European Union, namely to: i) collect and maintain accurate and complete domain name registration data; ii) publish non-personal domain name registration data (i.e. concerning legal entities), iii) provide access to specific personal domain name registration data upon lawful and duly justified requests of legitimate access seekers, and iv) reply without undue delay to all requests for access. The*

*proposal leaves open the possibility to use an interface, portal or other technical tool to provide an efficient system for requesting and accessing registration data.”<sup>16</sup>*

- *“On the issue of international transfers, we can confirm that the Commission, as indicated in its Communication of June 2020, is actively working on the development of standard contractual clauses both for international transfers and the controller/processor relationship. In that regard, the public consultation on the draft published on 12 November 2020 has been recently completed.”*
- *“[...] While it is not within our remit to effectuate a data protection assessment, we remain committed to facilitate the interactions on the matter with the European DPAs [...]”*

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<sup>16</sup> The obligation to publish non-personal data under the NIS2 Directive Proposal (as described under (ii)) relates to registration data which concern legal entities and are not personal data.

## Current Positions

- [GAC ICANN69 Communiqué](#) (23 October 2020) reiterating its previous advice in the San Juan Communiqué (legal vs. natural, public access to registration data) as well as previous statements on accuracy of registration data (GAC Minority Statement on EPDP Phase 2 Final Report) and the imperative for WHOIS to meet the needs of safeguarding interests of the public (GAC Abu Dhabi Communiqué).
- [GAC Minority Statement](#) on the Final Report of Phase 2 of the EPDP on gTLD Registration Data (24 August 2020)
- [GAC ICANN68 Communiqué](#) (27 June 2020) stressing the Need for Evolution of any Proposed SSAD, Legal vs. Natural, Data Accuracy, Data Controllership, Anonymized Emails
- [GAC Comment](#) on the Addendum to the EPDP Phase 2 Initial Report (5 May 2020)
- [GAC Input](#) on EPDP Phase 2 Initial Report (24 March 2020)
- [GAC ICANN67 Communiqué](#) (14 March 2020) following up on the implementation of GAC Advice in the GAC Montréal Communiqué.
- [GAC Accreditation Principles](#) (21 January 2020) now incorporated into the EPDP Phase 2 Initial Report
- [GAC Comments](#) (23 December 2019) on the RDS-WHOIS2 Review Recommendations
- GAC [Advice](#) in the ICANN66 [Montréal Communiqué](#) (6 November 2019) regarding the EPDP Phase 1 Implementation timeline and the interim requirement for “reasonable access” to non-public gTLD Registration Data. [Follow on previous GAC Advice](#) was also provided regarding implementation of the Privacy Proxy Services Accreditation policy.
- GAC [Early Input into Phase 2 of the EPDP](#) (19 July 2019) focused on the GAC’s understanding of key working definitions of the EPDP
- [GAC Marrakech Communiqué](#) (27 June 2019) recalling the [GAC Kobé Communiqué](#) Advice
- GAC [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 in which the GAC deemed the EPDP Phase 1 policy recommendations to be a sufficient basis for the ICANN Community and organization to proceed, and highlighted public policy concerns, including “*existing requirements in the Temporary Specification governing gTLD Registration Data [...] failing to meet the needs of the law enforcement and cyber-security*”
- GAC [Advice](#) in the ICANN64 [GAC Kobe Communiqué](#) (14 March 2019) focused on ensuring appropriate continuation of work in EPDP Phase 2 and implementation of Phase 1 policy.
- [GAC/ALAC Statement on EPDP](#) (13 March 2019)
- GAC [Input](#) on EPDP Phase 1 Final Report (20 February 2019)
- GAC [Input](#) on EPDP Phase 1 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 [Initial Comments](#) (16 October 2018) on the Draft Framework for a Possible Unified Access Model that was [published](#) by ICANN on 20 August 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 2018) on the Proposed Interim Model for GDPR Compliance
- GAC [Comments](#) (29 January 2018) on the interim models for compliance with GDPR
- GAC [Advice](#) in the [ICANN60 Abu Dhabi Communiqué](#) (1 November 2017) accepted per the ICANN Board's [scorecard](#) (4 February 2018)
- [GAC Principles regarding gTLD WHOIS Services](#) (28 March 2007)

## Key Reference Documents

- GAC Documentation
  - ICANN69 GAC Session [material](#) (20 October 2020) including [slides](#) providing an overview of the the EPDP Phase 2 Recommendations, GAC and other stakeholders concerns related to them and an over timeline of next steps
  - Summary Notes of [GAC/CEO Dialogue](#) (14 September 2020) following the [ICANN CEO Letter to the GAC Chair](#) (10 September 2020) in response to the GAC Minority Statement on the EPDP Phase 2 Final Report
  - [GAC Summary of EPDP Phase 2 Initial Report](#) (7 February 2020)
  - [GAC Webinar Discussion Paper on EPDP on gTLD Registration Data](#) (23 Sept. 2019)
- Government Positions
  - European Commission [letter](#) to the ICANN CEO (18 December 2020) in response to the ICANN CEO follow-up [letter](#) (2 October 2020) regarding the [GAC Minority Statement](#) on the Final Report of Phase 2 of the EPDP on gTLD Registration Data (24 August 2020)
  - European Commission [public comment](#) (17 April 2019), and subsequent [clarification](#) (3 May 2019) regarding EPDP Phase 1 Recommendations
  - US Department of Commerce Assistant Secretary for Communication and Information [letter](#) (4 April 2019) and [response](#) by the ICANN CEO (22 April 2019)
  - European Commission [Technical Input on proposed WHOIS Models on behalf of the European Union](#) and [Cover Letter](#) (7 February 2018)
- Data Protection Authorities Correspondence
  - [Letter from the Belgian DPA](#) (4 December 2019)
  - [Letter from the European Data Protection Board](#) (5 July 2018)
  - [Statement of the European Data Protection Board on ICANN/WHOIS](#) (27 May 2018)
  - [Letter from the Article 29 Working Party](#) (11 April 2018)
  - [Letter from the Article 29 Working Party](#) to ICANN (6 December 2017)
- Current Policy and Output of Ongoing Policy Development
  - EPDP Phase 2 [Final Report](#) (31 July 2020)
  - [Addendum](#) to the EPDP Phase 2 Initial Report (26 March 2020)
  - EPDP Phase 2 [Initial Report](#) (7 February 2020)
  - [Interim Registration Data Policy for gTLDs](#) (20 May 2019) replacing the [Temporary Specification on gTLD Registration Data](#) (17 May 2018)
  - EPDP Phase 1 [Final Report](#) (20 February 2019)
- ICANN Board Resolutions

- ICANN Board [resolutions](#) (25 February 2020) regarding [Board Action](#) on the RDS-WHOIS2 Review Team recommendations
- ICANN Board [resolution](#) (7 November 2019) on Deferral of Compliance Enforcement of the Thick WHOIS Consensus Policy
- ICANN Board [Scorecard on EPDP Phase 1 Recommendations](#) (15 May 2019)
- ICANN Board [resolution](#) (17 May 2018) adopting the [Temporary Specification](#)
- ICANN Org and Technical Study Group Input
  - ICANN org Analysis of Registration Data Policy Impact on existing ICANN Policies per EPDP Phase 1 Recommendation 27:
    - [Wave 1 Report](#) regarding impacts on ICANN policies in effect, including the Thick WHOIS Transition Policy (14 February 2020)
    - [Wave 1.5 Report](#) regarding impacts on ICANN policies under implementation, addressing Privacy/Proxy Accreditation (11 January 2021)
  - ICANN Study on the [Differentiation between Legal and Natural Persons in Domain Name Registration Data Directory Services](#) (8 July 2020) prepared per recommendation 17.2 of the Final Report of EPDP Phase 1 and [presented to the EPDP Team](#) at the initiation of Phase 2A (26 January 2021)
  - [Exploring a Unified Access Model for gTLD Registration Data](#) (25 October 2019), a paper which served as a basis for ICANN org's seeking clarity from the EDPB as to the compliance of a UAM with the GDPR
  - [Technical Model for Access to Non-Public Registration Data](#) (30 April 2019)
- Legal Advice provided by Bird & Bird to the EPDP Team during [Phase 1](#) and [Phase 2](#)
  - [Use cases for automation of disclosure](#) (23 April 2020)
  - [Follow-up on Accuracy Principle and Legal vs. Natural](#) (9 April 2020)
  - [Consent options for the purpose of making personal data public](#) (13 March 2020)
  - [Questions regarding a System for Standardized Access/Disclosure \("SSAD"\), Privacy/Proxy and Pseudonymized Emails](#) (4 February 2020)
  - [Legitimate interests and automated submissions and/or disclosures](#) (10 September 2019)
  - [Lawful basis for disclosure to law enforcement authorities outside the controller's jurisdiction](#) (9 September 2019)
  - [Liability, Safeguards, Controller & Processor](#) (9 September 2019)
  - [Legal Basis for transferring Thick WHOIS](#) (8 March 2019)
  - [Inclusion of "city" in publicly available Whois data](#) (13 February 2019)
  - [Meaning of the accuracy principle pursuant to the GDPR](#) (8 February 2019)
  - [Application of the GDPR to ICANN](#) (7 February 2019)

- [Liability in connection with a registrant's self-identification as a natural or non-natural person](#) (25 January 2019)
- [Interpretation of GDPR Article 6\(1\)\(b\)](#) (23 January 2019)
- [Notice to technical contacts](#) (22 January 2019)

## Further Information

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://gnso.icann.org/en/group-activities/active/gtld-registration-data-epdp> (Phase 1)

<https://gnso.icann.org/en/group-activities/active/gtld-registration-data-epdp-phase-2>

## Document Administration

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