

RDS/WHOIS and Data Protection Policy

Session 6

Contents

Session Objective	p.1	Leadership Proposal for GAC Action	p.2	Current Status and Recent Developments	p.3	Key Reference Documents	p.8
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Session Objective

This session aims to discuss status and consider possible next steps for the GAC in relation to deliberations and implementation efforts aiming to establish a new WHOIS/Registration Data policy regime taking into account relevant Data Protection law. The GAC will be briefed on latest developments and related policy concerns, possibly in connection with EPDP Phase 1 Implementation, the System for Standardized Access and Disclosure (SSAD) proposed as part of EPDP Phase 2, EPDP Phase 2A Policy Recommendations regarding Legal vs. Natural Persons, and scoping of possible future policy work regarding accuracy of registration data.

Leadership Proposal for GAC Action

- 1. Consider providing further input to the ICANN Board** regarding the proposed Standardized System for Access/Disclosure of Registration Data (SSAD), given ICANN org's analysis of costs, benefits and risks in the [SSAD Operational Design Assessment](#) (25 Jan. 2022) and the subsequent [request by the GNSO](#) (27 April 2022) for the ICANN Board to pause consideration of these recommendations to enable the development of a proof of concept or SSAD Light, which ICANN org now also refers to as a "WHOIS Disclosure System"¹.
- 2. Examine prospects of new policy development in relation to accuracy of registration data** in gTLDs given delays and dependencies in the current GNSO Registration Data Accuracy (RDA) scoping effort².
- 3. Assess the public interest impacts of the current interim policy regime** for gTLD registration data, in light of:

¹ See the [Pre-ICANN74 ICANN org's briefing to the GAC](#) on 31 May 2022 (GAC website login required)

² See details on the delayed delivery of the first two assignments, the expected stepping down of the current Chair, and a dependency identified on ICANN's expected outreach to the EDPB, in the RDA Scoping effort [project change request](#) sent to the GNSO Council on 9 May 2022.

- a. **Prospects of implementation of, and community concerns with policy recommendations** in Phase 1, Phase 2 and Phase 2A of the Expedited Policy Development Process (EPDP) on gTLD Registration Data;
- b. **Current experience of parties seeking registration data** for a legitimate purpose which may not align with the GAC's Advice to *"ensure that the current system that requires 'reasonable access' to non-public domain name registration is operating effectively"*
- c. **The continued impact of delayed implementation of the privacy/proxy services accreditation policy recommendations.** Despite GAC Advice to resume implementation of the Privacy/Proxy Accreditation Policy, this is still suspended and continues to delay the delivery of an accreditation program including a law enforcement disclosure framework.

Current Status and Recent Developments

Most Recent Development

- **Feasibility of a System for Standardized Access/Disclosure of Registration Data (SSAD)** continues to be discussed between the GNSO Council, the ICANN Board and ICANN org. A proposal for a Proof of Concept (or SSAD Light Design) is expected by ICANN75 at the earliest.
 - The GNSO [resolution](#) on the EPDP Phase 2 Final Report (24 September 2020) **adopted the 18 recommendations that seek to establish an SSAD, requesting a consultation with the ICANN Board** 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"**³.
 - Prior to considering the GNSO's SSAD Policy Recommendations, **the ICANN Board launched** (25 March 2021) a newly proposed **Operational Design Phase (ODP)**, for an initial duration of 6-months, [to perform an assessment](#) of possible implementation parameters. Several community surveys were launched to this effect, including to assess potential demand for an SSAD. **A specific ICANN org survey for GAC Members**, regarding the accreditation of governments entities and their legitimate users, as well as legal bases for various types of processing of registration data, was [circulated](#) to the GAC on 15 July 2021 and its results reported in a [webinar](#) on 18 November 2021.
 - After presenting design proposals and costs assessments in several [webinars](#) to the GNSO, GAC, and ICANN Community, the GAC [alerted the GNSO](#) (15 December 2021) that ICANN's proposed design of Governmental Accreditation Authorities goes beyond the scope envisioned in [GAC Principles on Accreditation](#) (21 Jan. 2020) which were incorporated in Recommendation 2 of the EPDP Phase 2 Final Report..

³ During a 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.

- A GNSO Small Team has been reviewing ICANN org's [Operational Design Assessment](#) (25 Jan. 2022) with a view to support GNSO Council consultation with the ICANN Board, including addressing questions and concerns expressed in an [ICANN Board letter](#) (24 Jan. 2022).
- In a [letter to the ICANN Board](#) (27 April 2022), the GNSO shared concerns with ICANN's Operational Design Assessment and called for a pause of the Board's consideration of the SSAD recommendations to allow for work to continue on a "proof of concept" in collaboration with ICANN org which suggested it could propose a simplified "SSAD Light Design" in a [Concept Paper](#) (6 April 2022)⁴. The ICANN Board asked the GNSO Council to assist in prioritizing this work over the ODP on Subsequent rounds of New gTLDs. GNSO Stakeholders do not yet agree on a prioritization recommendation.⁵
- **The GNSO Scoping Team on Accuracy of Registration Data** is expected 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.
 - The GNSO Council adopted substantive and procedural [instructions](#) for the Scoping Team (22 July 2021). In the [ICANN72 GAC Communiqué](#) (1 November 2021) the GAC welcomed "the effective start of the accuracy scoping exercise launched by the GNSO" and expressed support for "*all four assignments, namely, i) enforcement and reporting, ii) measurement of accuracy, iii) effectiveness and iv) impact and improvements, for scoping the work on accuracy*" noting that "*assignments iii) and iv) are particularly important for the purpose of assessing possible improvements of accuracy of registration data*" and stressing "*the importance of delivering on all four tasks in a timely and effective manner.*"
 - The GAC has nominated two representatives (European Commission and United States) to participate in these [weekly deliberations](#) which started on 5 October 2021.
 - The work of the scoping team is also being informed by an [ICANN org briefing](#) (26 February 2021), an [ICANN org Memo on the WHOIS Accuracy Reporting System](#) (January 2022) and [ICANN org responses](#) to questions by the Scoping Team.
 - In the [ICANN72 GAC Communiqué](#) (1 November 2021) as part of *Issues of Importance* the GAC reiterated "*that maintaining accurate domain name registration data is an important element in the prevention and mitigation of DNS abuse*". The GAC also noted that it is "*looking forward to exchanging with other constituencies not only on the definition and measurement of accuracy but also on solutions on how to enhance accuracy. The GAC gives particular importance to the verification, validation and correction of all registration data by registrars, and certain registries, in line with their contractual obligations, and supports rigorous monitoring and enforcement of such contractual obligations by ICANN.*"
 - In the [ICANN73 Communiqué](#) (14 March 2022), the GAC highlighted that as part of the work of the scoping team to date, it "*has emphasized the importance of holding*

⁴ The approach proposed by ICANN org in the SSAD Light Concept Paper was presented to the GAC during the [Pre-ICANN74 ICANN org's briefing to the GAC](#) on 31 May 2022 (GAC website login required)

⁵ See [minutes](#) of the GNSO Council meeting on 19 May 2022.

contracted parties accountable for their compliance with the existing accuracy requirements, as well as the importance of increasing transparency about compliance, in order to inform an evidence-based analysis of these issues”

- Prior to ICANN74, the leadership of the Accuracy Scoping Team [reported](#) that an interim report⁶ (deliverables #1 and #2) should be delivered in June 2022, that its Chair would step down by then, and that further work of the scoping team (on assignment #3 and #4) cannot be planned until registration data is gathered and studied to evaluate accuracy.
- The ICANN org shared with the Scoping Team a [set of scenarios](#) for which it plans to consult the European Data Protection Board on whether or not ICANN org has a legitimate purpose that is proportionate (i.e. not outweighed by the privacy rights of the individual data subjects) to request that contracted parties provide access to registration data records.

Status of Policy Development

- **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 regarding EPDP Phase 1 Policy Recommendations (24 April 2019) **the ICANN Board [took action](#)** (15 May 2019) and laid the foundation for the future policy regime regarding gTLD Registration Data. Subsequently, the [Temporary Specification on gTLD Registration Data](#) expired on 20 May 2019 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 EPDP Phase 1 policy 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”. The ICANN Board [accepted](#) this Advice (26 January 2020). The GAC requested an update on these efforts in Follow-up to Previous Advice in the [ICANN72 Communiqué](#) (1 Nov. 2021). In its [response](#) (16 Jan. 2022), the ICANN Board suggested that standardization and centralization of requests would be achieved by an SSAD. It noted however that “data from both Contractual Compliance and Global Support do not indicate this lack of centralized intake system to be a significant issue for Internet users”.
- **Implementation of the EPDP Phase 1 Policy Recommendations** ([adopted](#) by the ICANN Board on 15 May 2019) has revealed significant challenges, with possible public policy implications.
 - The GAC highlighted in the ICANN72 Communiqué (1 Nov. 2021) “with continued concern that the **Phase 1 Implementation Review Team (IRT) lacks a current published implementation timeline**” recall its previous Advice in the [Montréal Communiqué](#) (6 November 2019) and Follow-up since in the [ICANN70 Communiqué](#) (25 March 2021) and

⁶ See Accuracy Scoping Team working documents: [Write-up on Assignment 1 and 2](#), including separate [section C.2.2](#)

[ICANN71 Communiqué](#) (21 June 2021) In its response to the ICANN72 Communiqué (16 Jan. 2022), the ICANN Board listed and discussed several remaining milestones including negotiation of data protection agreement between ICANN org and Contracted Parties. It also urged *“the GAC, as a participant in the processes that yield community recommendations, to work with the respective community groups to achieve clarity and alignment across the community of what recommendations will institute regarding requirements or obligations”*

- In the [GAC ICANN73 Communiqué](#) (14 March 2022), the GAC welcomed *“the [detailed work plan](#) provided by ICANN org to the IRT prior to ICANN73 and notes that the expected Data Protection Agreements (DPAs) between ICANN org and Contracted Parties have been “undergoing time-consuming negotiations” and are part of discussions “which may lead to an impasse”. Since finalized DPAs seem to be on the critical path to completing the implementation of EPDP Phase 1 policy recommendations, the GAC asks the ICANN Board to support the Org in getting this item completed to enable the timely conclusion of the Phase 1 IRT.”*
- As a consequence of the adoption of the EPDP Phase 1 policy recommendations, **the implementation of several pre-existing efforts were suspended**, and in particular the Thick WHOIS Transition Policy⁷, Privacy/Proxy Accreditation Policy⁸ and the WHOIS Accuracy Reporting System (ARS).
- **Policy Development in Phase 2 of the EPDP concluded** with the publication of a [Final Report](#) (31 July 2020), which recommended a System for Standardized Access/Disclosure (SSAD) to gTLD Registration Data with a significant level of divergence among stakeholders as documented in the Consensus Designations (Annex D) and Minority Statements (Annex E), including the [GAC Minority Statement](#) (24 August 2020).
 - **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 **System for Standardized disclosure** that meets the needs of all stakeholders involved, including public authorities (recommendations 5-10 and 12). Neither could stakeholders agree on the possibility to evolve the SSAD towards more centralization and more automation of disclosure decisions in the future. (recommendation 18)
 - In the [ICANN70 GAC Communiqué](#) (25 March 2021), the GAC Advised the ICANN Board *“to consider the [GAC Minority Statement](#) and available options to address the public*

⁷ See <https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en> and the related recent [decision](#) by the GNSO Council (29 January 2021)

⁸ See full analysis of the impact of EPDP Phase 1 on the Privacy/Proxy Services Accreditation policy implementation in a [detailed report](#) by ICANN org (12 January 2021)

policy concerns expressed therein, and take necessary action, as appropriate.” The Board [accepted](#) the advice (12 May 2021) noting that *“standing on its own, the GAC’s Minority Statement does not constitute consensus advice”*, and included a detailed discussion of issues raised in the GAC Minority Statement on EPDP Phase 2.

- The GAC issued a [response](#) (6 October 2021) to the Board’s [clarifying questions](#) on the ICANN70 advice that were re-iterated before and discussed during the [GAC/Board ICANN71 Communiqué clarification call](#) (29 July 2021)
- **Policy Development in Phase 2A of the EPDP** to address the issues of **legal vs. natural persons** and the **feasibility of unique contacts** to have a uniform anonymized email address, **concluded** with the publication of a [Final Report](#) (3 September 2021)
 - The EPDP Team Chair presented the report as *“a **compromise that is the maximum that could be achieved** by the group at this time under our currently allocated time and scope, and it **should not be read as delivering results that were fully satisfactory to everyone**”* and underscored *“the importance of the minority statements in understanding the full context of the Final Report recommendations”*
 - In its [Minority Statement](#) (10 September 2021), the GAC acknowledged *“the usefulness of many components of the Final Recommendations”* including:
 - *the creation of data fields to flag/identify legal registrants and personal data;*
 - *specific guidance on what safeguards should be applied to protect personal information when differentiating between the domain name registrations of legal and natural persons;*
 - *encouragement for the creation of a Code of Conduct that would include the treatment of domain name registration data from legal entities;*
 - *encouragement for the GNSO to follow legislative developments that may require revisions to the current policy recommendations, and*
 - *useful context and guidance for those who wish to publish pseudonymized emails.*
 - **The GAC** noted however that it *“**remains concerned that almost none of the Final Recommendations create enforceable obligations**”* which *“**fall short of the GAC’s expectations** for policies that would require the publication of domain name registration data that is not protected [...] and create an appropriate framework to encourage the publication of pseudonymized email contacts with appropriate safeguards.”*
 - After adoption of these policy recommendations by the GNSO Council, the ICANN Board provided the [bylaw-mandated notification to the GAC](#) (9 Dec. 2021), in [response](#) to which **the GAC requested that the ICANN Board** *“considers [...] the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy concerns expressed therein.”* (9 Feb. 2022).
 - On 10 March 2022, the ICANN Board [adopted](#) the Phase 2A policy recommendations and directed ICANN org to develop and execute an implementation plan for these resolutions.

Key Reference Documents

- Accuracy Scoping Team [Draft Report on Assignment 1 and 2](#), including separate [section C.2.2](#) including recommendations to the GNSO Council (as of 1 June 2022)
- [ICANN org Update to the Accuracy Scoping Team](#) on scenarios for EDPB engagement (9 May 2022)
- ICANN org SSAD [Operational Design Assessment](#) (25 January 2022)
- GAC Advice in the [GAC ICANN72 Communiqué](#) (1 Nov. 2022) and related ICANN Board [Scorecard](#) (16 January 2022)
- GAC Advice in the [GAC ICANN71 Communiqué](#) (21 June 2021) and related ICANN Board [Scorecard](#) (12 September 2021)
- GAC Advice in the [GAC ICANN70 Communiqué](#) (25 March 2021), related ICANN Board [Scorecard](#) (12 May 2021) and [GAC Response to ICANN Board Clarifying Questions](#) (16 Nov. 2021)
- [GAC Minority Statement](#) (24 August 2020) on EPDP Phase 2 [Final Report](#) (31 July 2020)
- [GAC Minority Statement](#) (10 September 2021) on EPDP Phase 2A [Final Report](#) (3 September 2021)
- [GAC Response](#) (6 October 2021) to [ICANN Board Clarifying Questions](#) (21 April 2021) on the ICANN70 GAC Advice regarding the GAC Minority Statement on EPDP Phase 2, as reiterated during the ICANN71 Communiqué clarification discussions.

Further Information

GAC Policy Background Document on WHOIS and Data Protection

<https://gac.icann.org/briefing-materials/public/gac-policy-background-whois-data-protection.pdf>

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