Review our Expected Standards of Behavior when participating in ICANN Meetings.

Go to: http://go.icann.org/expected-standards

Review the ICANN Community Anti-Harassment Policy when participating in ICANN Meetings.

Go to: http://go.icann.org/anti-harassment

Do you have a question or concern for the ICANN Ombudsman?

Email ombudsman@icann.org to set up a meeting.
WHOIS and Data Protection Policy

10 March 2020

Speakers:
Laureen Kapin, United States
Chris Lewis-Evans, United Kingdom
Georgios Tsellentis, European Commission

ICANN67 - Agenda Item 5
1. Reminder: ICANN67 Leadership Proposal for GAC Action

2. Background

3. Overview of EPDP Phase 2 Initial Report
   - Proposed System for Access/Disclosure (SSAD) of non-public registration data
   - Key Proposals
   - Open Issues
   - Timeline to Delivery of SSAD

3. Proposed GAC Input on EPDP Phase 2 Initial Report

4. Next Steps for the GAC and GAC Members
   - Effectiveness of Interim Arrangements
   - Preparation for Accreditation of Public Authorities at National/Territory Level
1. **Review the proposed access model for access to non-public gTLD registration data** as laid out in the EPDP Phase 2 *Initial Report* [...] and **advocate for maximum automation of disclosure** to law enforcement and other legitimate public authorities, where legally permissible.

2. **Provide input** on a proposed GAC Comment on the EPDP Phase 2 *Initial Report*

3. **Discuss GAC expectations regarding the timely deployment and operation** of a Standardized System for Access and Disclosure to gTLD Registration Data (SSAD)
   
   a. GAC Members may wish to consider how the GAC Accreditation Principles together with the EPDP-proposed SSAD would translate at the country/territory level
   
   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

4. **Ensure that interim arrangements for access to non-public data are effective**
Background: Key Developments

- **GAC Whois Principles Regarding gTLD WHOIS Services** (28 March 2007)
  - Recalled in GAC Abu Dhabi Communiqué (1 November 2017)

- **ICANN Community Discussion of a Unified Access Model**
  - Various proposals put forward by ICANN for Community Input
  - Legal Advice received by European law firm Hamilton Advokatbyrå
  - Public policy concerns in GAC Advice and input from GAC and GAC Members
  - Guidance provided by Data Protection Authorities

- **ICANN Temporary Specification on gTLD Registration Data** (17 May 2018)
  - Emergency Temporary Policy under ICANN Contracts
  - Objective:
    - Comply with GDPR and existing ICANN Contracts
    - Maintain WHOIS to the greatest extent possible

- **Impact of Temporary Specification:**
  - Redaction of most gTLD domain name registrants’ personal data
  - Unspecified requirement of “Reasonable Access” to non-public data by legitimate parties leading to “fragmentation” and “failing to meeting the needs of Law enforcement [and other 3rd parties]” (GAC Barcelona Communiqué, 25 October 2018)
  - Launch of Policy Development Process
Expedited Policy Development Process (EPDP) on gTLD Registration Data

- Launched as part of emergency measures, to replace the Temporary Specification
- **Phase 1** (Aug. 2018 - Feb. 2019)
  - Laid out foundation of new policy framework (purposes, data elements, etc.)
  - Sufficient basis to proceed (GAC letter to ICANN Board, 24 April 2019)
- **Phase 1 Implementation** (ongoing)
  - Interim Registration Data Policy (20 May 2019) extended Temporary Specification
  - Completion date of implementation uncertain (ICANN org letter to the GAC, 6 Jan. 2020)
- **Phase 2** (ongoing)
  - Focus on System for Standardized Access/Disclosure and pending issues
  - Final recommendations expected in June 2020
ICANN Engagement with Data Protection Authorities

- ICANN org sought formal guidance from the EU Data Protection Authorities (25 October 2019)
- The Belgian DPA responded (4 December 2019) as reported in an ICANN blog (17 Dec. 2019)
- ICANN org and the EPDP Chair subsequently met with the Belgian DPA (14 Feb. 2020)

- Per the ICANN CEO blog (19 Feb. 2020), the Belgian DPA clarified its letter:

  *With respect to the possibility of developing a centralized model* that is GDPR-compliant, the representatives said that *the letter from the Belgian DPA was intended as encouragement to continue efforts to develop a comprehensive system for access*. They said that *the letter was not meant to deter the development of a centralized model*. Rather, the Belgian DPA’s representatives said *a centralized model is worth exploring and it seems to be a better, “common sense” option in terms of security and for data subjects*. They cautioned, however, that the Belgian DPA is not in the position to give a definitive opinion on the question of controllership of such model.

  *With respect to automation*, the Belgian DPA’s representatives noted that *the GDPR would not prohibit the automation of various functions in an access model*. It is not how the disclosure decision is made that matters, but to be able to demonstrate that any algorithm automating decision-making considers the criteria required for such a decision to be compliant with the GDPR.
Initial Report: Overview of Proposed SSAD

Automated Disclosure (in limited cases)

Requestor
- Submits request
- Receives data in response

Accreditation
- Identity Provider
  • Confirms identity
- Authorization Provider
  • Confirms purpose

Central Gateway
- Validates request vs. Criteria for Automated Disclosure
- Requests data elements on behalf of requestor
- Receives data elements from contracted parties
- Discloses data to requestor

Data Holder
- Contracted Parties
  • Receives and processes request
  • Accesses requested data
  • Provides data elements to deciding entity

Registrant Data
Initial Report: Overview of Proposed SSAD

Decentralized Disclosure (in all other cases)

**Requestor**
- Submits request
- Receives data in response

**Accreditation**
- Identity Provider
  - Confirms identity

- Authorization Provider
  - Confirms purpose

**Central Gateway**
- Validates request vs. Criteria for Automated Disclosure
  - Passes request to relevant Contracted Party with a recommended action
  - Receives data elements from contracted parties
  - Discloses data to requestor

**Data Holder**
- Contracted Parties
  - Receives and processes request
  - Conducts balancing test
  - Accesses requested data
  - Provides Response to Requestor

**Registrant Data**
Initial Report: Key Proposals

**Standardized System for Access Disclosure (SSAD)** to non-public gTLD Registration Data

- **Centralization of requests** and **decentralization of responses**
- **Continuous evolution** of the model, towards **increasing automation and standardization**, as experience is gained
- **Mechanism to be established to advise** on evolution and continuous improvement
- **Accreditation** of Public Authorities into the SSAD **to follow the GAC principles**, with oversight roles for ICANN org
- **Automated disclosure for Law Enforcement Requests in Jurisdiction**, and harmonization of responses in other cases
- **Urgent requests**: disclosure within **1 business day** expected in most cases
- **Confidentiality** of law enforcement requests
- The EPDP Phase 2 recommendations **recognize the need** for the SSAD to **meet applicable** Data Protection **legislation around the world**, not just GDPR.
Initial Report: Open Issues

- **Details of Data Controllership** for key data processing activities such as disclosure to third parties. ICANN and Contracted parties still negotiating Data Protection Agreements.

- **Definition of mechanism to advise on continuous improvement** of SSAD policy.

- **Extended scope of automatic disclosure and jurisdiction criteria** for automatic disclosure in response to LEA requests.

- **Distinction between Legal and Natural person** for the redaction of contact data.

- **Ensuring Accuracy of WHOIS data for purposes for which it is processed**, including disclosure in response to lawful requests by third parties with a legitimate purpose.

- **Impact on use and accreditation of Privacy/Proxy Services**.

- **Replacing data subject email address by Pseudonymized Emails** (Resolved recently).

- **Preserving the possibility to deliver Reverse Lookup capabilities in future, for law enforcement agencies and other legitimate interests**.

- **Cost to public authorities** requesting non-public data.

- **Implementation timeline**
Timeline to delivery of SSAD

ICANN Policy
- Temp. Spec.
- Interim Policy
- Final Policy
- UAM / SSAD
  - Continuous Improvement Mechanism

EPDP
- EPDP Phase 1
- Phase 1 Policy Implementation
- EPDP Phase 2
- Phase 2 Implementation

ICANN Org / DPAs
- TSG
- BE DPA Input

May 2018
- GAC Representation in EPDP Team
- Formal GAC Input Expected:

May 2019
- Initial Report Feb. 2019
- Final Report June 2020
- GAC Representation?

Final Report June 2020
- ?
- ?

GAC Representation in EPDP Team
- GAC Representation?
Proposed GAC Input on Initial Report

**Highlights of Draft GAC Input** to be proposed for GAC Members’ review (10 March 2020)

- **Mechanism for evolution of SSAD** (Rec. 19):
  - Needed to benefit from experience and new info. on data protection law applicability, in a swift and efficient manner (vs. lengthy PDP)
  - Requires adequate representation of all relevant stakeholders

- **Service Level Agreement for response to Urgent Requests** (Rec. 9):
  - 24 hours (vs. 1 business day which can mean 72-hours or more for holiday week-ends)
  - Aim for 100% compliance (vs. phasing of SLAs over 18 months)

- **Automated Disclosure Requests** (Rec. 7): clarification of responsibility and jurisdiction criteria

- **Cost to Public Authorities** (Rec. 15): equitable fee structure, not cost-prohibitive to governments

- **Other Items** (Questions 54, 55 and 56)
  - **Timeline for Implementation of SSAD**: held to strict timeline while reasonable access is more effective and efficient
  - **Legal vs. Natural Persons**: Legal persons are not in scope of the GDPR
  - **Privacy/Proxy Services**: policy to prevent creating a double privacy shield
  - **Data Transfers** across jurisdictions: thorough analysis needed
  - **Transparency**: Quarterly **reporting of detailed SSAD activity** and related complaints
Proposed GAC Input on Initial Report

**Timeline for finalization of GAC Input**

- **Tuesday 10 March:** Draft GAC Input circulated for GAC Review
- **Monday 16 March:** GAC Members to provide comments and edits
- **Thursday 19 March:** Final Draft GAC Input circulated to Membership for final review
- **Monday 23 March:** Publication of GAC Input - *No extension possible*
Next Steps

Effectiveness of Interim Arrangements to Provide Reasonable Access

- **Interim Registration Data Policy** (20 May 2019) extended **Temporary Specification** (17 May 2018)

  Unspecified requirement of “Reasonable Access” to non-public data by legitimate parties leading to “fragmentation” and “failing to meeting the needs of Law enforcement [and other 3rd parties]”

  *(GAC Barcelona Communiqué, 25 October 2018)*

- **GAC Montréal Communiqué** Advice (6 Nov. 2019) and ICANN Board **response** (20 January 2020)

  V.2.b. The GAC advises the Board to:

  i. **Instruct the ICANN organization to ensure that the current system that requires “reasonable access” to non-public domain name registration is operating effectively. [...]**

     * [...] the Board accepts the GAC’s advise [...] by instructing the ICANN org to educating key stakeholder groups [...] the Board directs ICANN org to collaborate with the Registry and Registrar Stakeholder Groups to develop a voluntary standard request form [...] and actively making [it] available.*

  ii. **Instruct ICANN Compliance to create a specific process to address complaints regarding failure to respond to, and unreasonable denial of requests for non-public domain name registration data [...].**

     * [...] the Board accepts the GAC’s advice and instructs ICANN org as part of the roll out of [a new ticketing system expected to occur in 3Q2020] to publish clear instructions on the ICANN Compliance web page describing how to submit a complaint concerning a third-party access request. Additionally, the Board instructs ICANN org to compile and publish monthly metrics [...] in the new ticketing system [...]*
Effectiveness of Interim Arrangements to Provide Reasonable Access

Consider a GAC Statement:

The GAC recognized in its Barcelona Communiqué (25 October 2018) that:

- *Existing requirements in the Temporary Specification governing gTLD Registration Data are failing to meet the needs of the law enforcement and cyber-security investigators.*

- *Survey results show a clear trend that, since its implementation, the Temporary Specification has significantly affected law enforcement and cyber-security professionals’ ability to investigate and mitigate crime using information that was publicly available in the WHOIS system previously:*  
  - the current WHOIS system’s ability to meet law enforcement needs has been drastically reduced;  
  - investigations are delayed or discontinued;  
  - many cyber-security professionals do not know how to request access for non-public information;  
  - and many of those seeking access have been denied access.

A recent question from EU Parliament to EU Commission noted that ““approximately 75%” of requests for access remain unanswered” (11 Feb. 2020)

In light of these concerns, and recognizing that EPDP Phase 2 Recommendations already include consensus agreement on the *Criteria and Content of Requests for Access to Non-public Data*, the GAC should:

→ Strongly urge ICANN and contracted parties to swiftly develop and implement standardized form for these requests to improve efficiency of current interim system
Next Steps: Accreditation of Public Authorities

Future Accreditation of Public Authorities

- **GAC Accreditation Principles** (21 January 2020) adopted as Recommendation 2 in EPDP Phase 2 Initial Report
  - Each country/territory to appoint its own identity provider.
  - Each country/territory to set its own eligibility requirements to gain credentials.
  - Oversight Role for ICANN org as ultimate accreditation authority
  - National/Territory accreditation authorities expected to coordinate with ICANN org in order to facilitate appropriate delivery and interoperability of credentials into the SSAD

- In preparation for future implementation, **GAC Members** may wish to:
  - Consider how the GAC Accreditation Principles together with the EPDP-proposed SSAD would translate at the country/territory level
  - Encourage their governments to identify public authorities requiring access to non-public gTLD registration data
  - Review the European Commission [contribution](#) (GAC Mailing List, 9 March 2020)