

WHOIS and Data Protection Policy (incl. Accuracy)

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Agenda

- 1. Background on WHOIS and Data Protection**
- 2. Proposed gTLD Registration Data Policy**
- 3. Registration Data Request Service (RDRS)**
- 4. Privacy/Proxy Services**
- 5. Registration Data Accuracy**
- 6. Considerations for Washington D.C. Communiqué**

WHOIS and Data Protection: Importance to the GAC

Why this is important for the GAC

Per the [GAC Principles Regarding gTLD WHOIS Services](#) (28 March 2007), recalled in the [GAC Abu Dhabi Communiqué](#) (1 Nov. 2017), the GAC noted they “continue to reflect the important public policy issues associated with WHOIS services” including that “WHOIS data [...] is used for a number of legitimate activities, including:

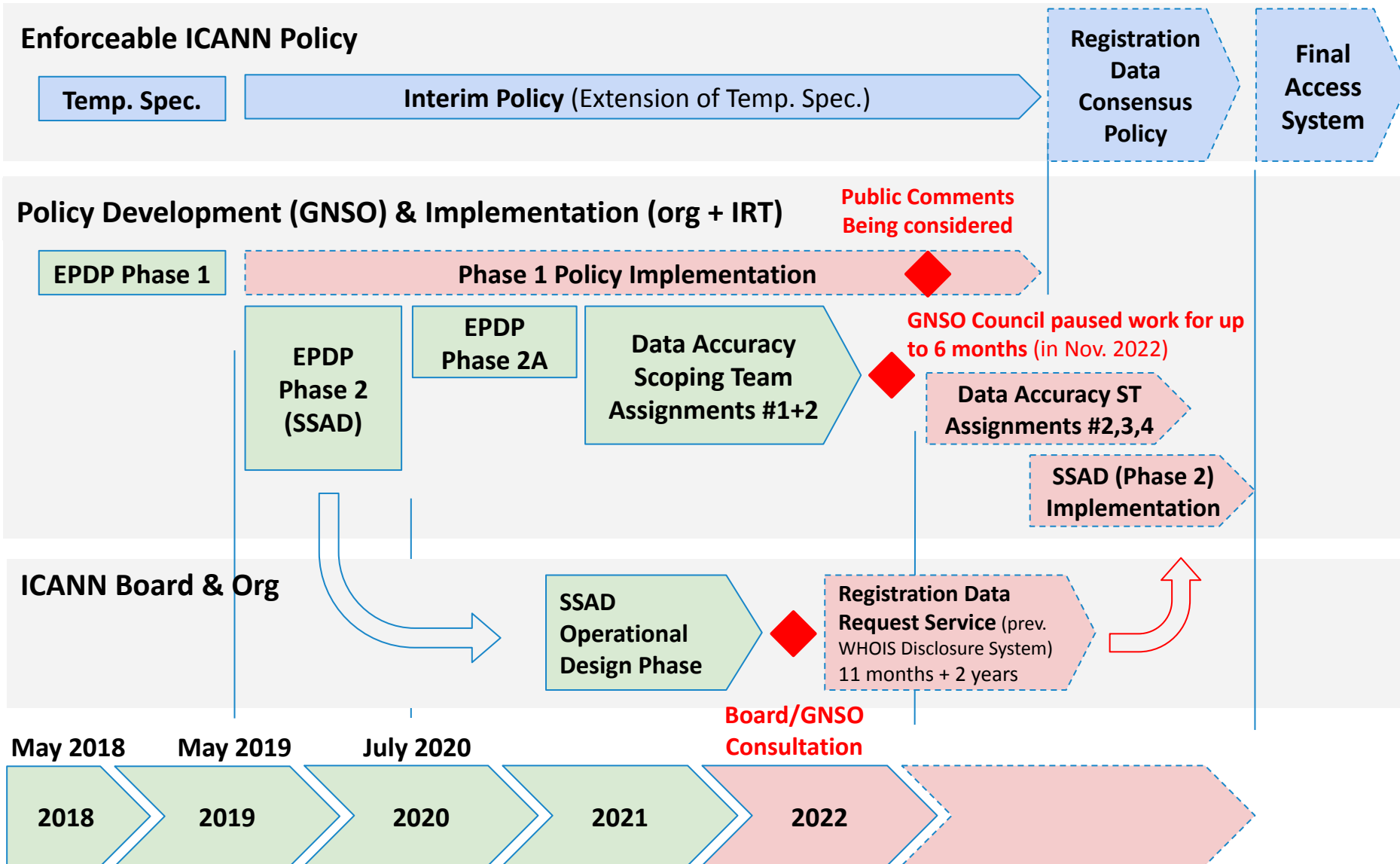
1. *Assisting law enforcement authorities in **investigations and in enforcing national and international laws**, assisting in **combating against abusive use** of internet communication technologies;*
2. *Assisting businesses, other organizations, and users in **combating fraud, complying with relevant laws, and safeguarding the interests of the public**;*
3. *Combatting **infringement and misuse of intellectual property**; and*
4. ***Contributing to user confidence in the Internet** as a reliable and efficient means of information and communication by helping users identify persons or entities responsible for content and services online.”*

And still relevant when considering compliance with Data Protection Law

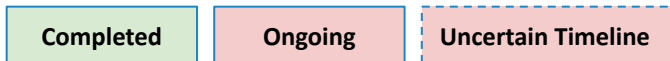
The GAC advised the ICANN Board “it should use its best efforts to create a system that continues to facilitate the legitimate activities recognized in the 2007 Principles, including by:

1. ***Keeping WHOIS quickly accessible for security and stability purposes**, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action.*
2. ***Keeping WHOIS quickly accessible to the public** (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and misuse of intellectual property, and to engage in due diligence for online transactions and communications”*

WHOIS and Data Protection: Timeline to New Framework



Legend:



Draft Registration Data Consensus Policy (EPDP Phase 1)

GAC Public Policy Concerns (per [GAC Comments](#), 21 Nov. 2022)

- The GAC raised the following concerns with respect to the [proposed implementation](#) (24 Aug. 2022) of the Phase 1 recommendations, including:
 - **The definition and proposed timelines to respond to urgent requests:** while the GAC acknowledged the importance of maintaining a narrowly tailored set of circumstances warranting “urgent requests for lawful disclosure,” it recommended that this include “imminent or ongoing cybersecurity incidents.”
 - **The collection and publication of reseller data:** The GAC supported inclusion of the “reseller” data element, noting its view that under the 2013 RAA, the definition of “reseller” could include privacy and/or proxy services. The GAC also sought clarification as to which entities should or should not be considered resellers under the policy.
 - **The collection/publication of registration information related to legal entities:** while not strictly within the scope of Phase 1 implementation, the GAC noted that required data elements under the Consensus Policy may change as a result of pending policy recommendations (e.g. Phase 2A).
 - **Qualifiers related to “commercial feasibility” in connection with redacted data:** The noted concern regarding the option to redact data (including legal person data) where it is not technically or commercially feasible to limit such application.

Draft Registration Data Consensus Policy (EPDP Phase 1)

GAC Public Policy Concerns, cont.

- The GAC also noted:
 - **A need for greater clarity**, including regarding the obligation to enter into data protection agreements;
 - **The reasoning behind the conclusion that certain policies are deemed “superseded”** by the Phase 1 implementation; and
 - The need for ICANN Compliance to assess **whether Registrars are providing links on to how to make a disclosure request.**
- Other Big Picture concerns:
 - **Lack of clear standards** in terms of implementation and enforcement
 - Implementation of a **Partial System Resulting in a Policy Gap**

Draft Registration Data Consensus Policy (EPDP Phase 1)

ICANN Org Response to Public Comments

ICANN issued a [Report of Public Comments](#) (20 January 2023) which now includes the ICANN org Review of Public Comments (28 April 2023)

- Regarding the timeline for response to Urgent Requests
 - *“the 24-hour response time accurately reflects the intent of the EPDP policy recommendations”*
 - definition of urgent requests not extended to include “imminent or ongoing cybersecurity incidents”
- Regarding the collection and publication of reseller data,
 - *“making any recommended changes is beyond the scope of the policy as it would create additional changes that are not required by the EPDP Phase 1 recommendations.”*
- Regarding the policy’s impact on Thick WHOIS
 - *“ICANN org could enforce a transfer requirement only if the relevant contracted parties agree that a legal basis exists for the transfer and a data protection agreement is in place”*
- Regarding the Phase 1/Phase 2A policy gap, ICANN org clarified that:
 - *The functionality of distinguishing between legal and natural persons is beyond the scope of the EPDP Phase 1 IRT*
 - *During the EPDP Phase 2A deliberations, the EPDP Phase 2A Working Group made a policy decision not to mandate the contracted parties to change their practices with regard to data of legal and natural persons*

The IRT is currently discussing ICANN’s response, including during ICANN77.

Registration Data Request Service - Background

- **EPDP Phase 2 recommended a Standardized System for Access and Disclosure (SSAD)** after several years of deliberations. **Significant concerns remained** as the GNSO Council recommended it to the ICANN Board. The GAC provided a [GAC Minority Statement](#) (24 August 2020) as did many stakeholder groups.
- ICANN's [Operational Design Assessment](#) of the SSAD recommendations (24 January 2022), requested by the ICANN Board, **concluded that a complex set of systems and processes would be required, with a wide range of costs and fees** due to uncertain demand
- **The GNSO Council** had requested a consultation with the ICANN Board, upon delivery of the SSAD recommendations, to discuss *“the financial sustainability of SSAD and some of the concerns expressed within the different minority statements”*. It **requested the Board pauses consideration of the recommendations to allow work to continue on a proof of concept** given *“the ODA does not provide enough information to confidently determine the cost / benefit of the SSAD recommendations”* ([GNSO Council correspondence](#) to ICANN Board, 27 April 2022)
- Following the suggestion of an [SSAD-light Concept](#) (April 2022), the proposal of a [WHOIS Disclosure System Design](#) (Sep. 2022), **the ICANN Board approved the development of the WHOIS Disclosure System** (Board [resolution](#), Feb. 2023),
- This system is **now called the Registration Data Request Service (RDRS)**

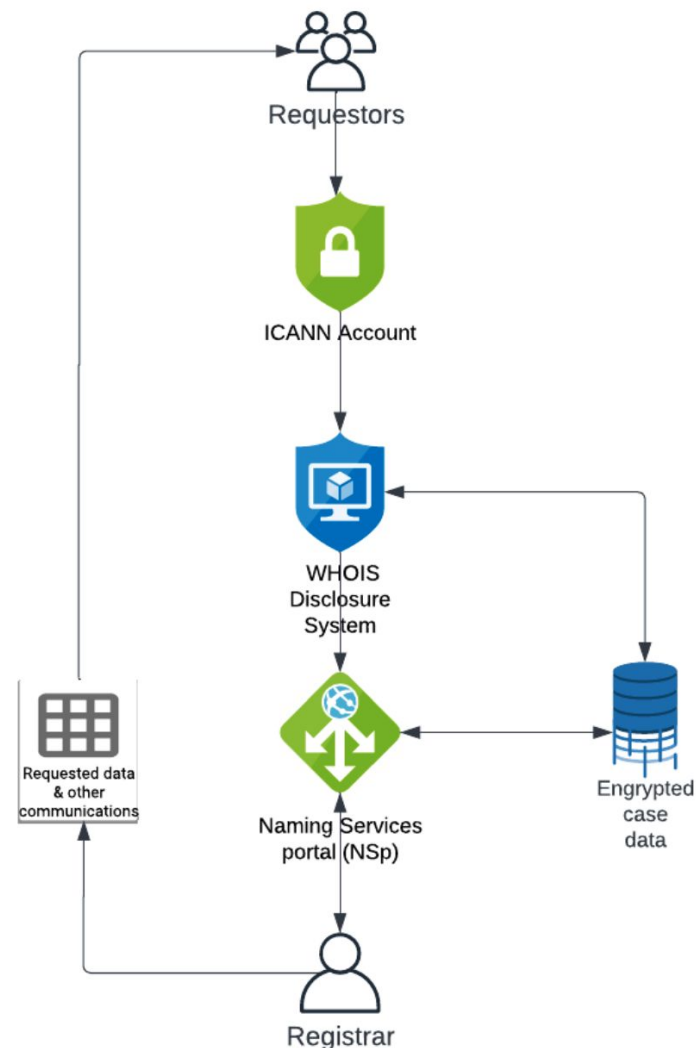
Registration Data Request Service - Features

Timeline (per Board [resolution](#) on 27 Feb.):

- Development and launch over the next 11 months (in consultation with Community)
- Operation for up to 2 years (once launched)
- Reporting on usage data “at a regular cadence”
- No later than 2 years of operation, re-initiate discussions regarding next steps on SSAD recommendations

Reminder of Key Features per ICANN org [Design Document](#)

- Central portal for intake of requests
- No cost to requestors
- No authentication / identify verification of requestors
- Only Registrars to respond to requests for disclosure of data (does not include requests directed at Registries)
- Requests are automatically routed to the appropriate registrar’s Naming Services portal (in use for other services)
- All requestor/registrar communications (including disclosure of data) to take place outside of the system



GAC Kuala Lumpur Communiqué: *This system is a useful first step towards building a more comprehensive solution [...]. It should facilitate the collection of useful data [...] in a quicker and more cost-effective manner*

Registration Data Request Service - Usage Data

Usage Data as recommended by the GNSO Small Team [addendum](#) (7 Nov. 2022) and as most recently updated, to include:

- Number of registrars participating (total) and new participating registrars (current period)
- Number of requestors (total) and new requestors (current reporting period)
- Number of disclosure requests
- Number of times the data request form for non-participating registrars has been used
- Number of disclosure requests by priority
- Number of disclosure requests by requestor type (LEA, IP, Cybersecurity, etc)
- *Number of disclosure requests by requestor (x% of users generate xx% of requests)*
- Number of disclosure requests broken out by participating and non-participating registrars
- Number of open disclosure requests
- Number of closed disclosure requests
- Number of closed disclosure requests by type (approved, partial approval, rejected, etc)
- Average disclosure request response time (approved, partial approved and denied responses)
- Response time distribution (mean, median, histogram by timeframe), including time from the request until the request is addressed, differentiating between approved and denied responses.

Registration Data Request Service - Success Criteria

The **GNSO Small Team** delivered [RDRS Proposed Success Criteria](#) (15 May 2023) which were sent by the GNSO Council for [ICANN Board consideration](#) (1 June 2023):

- The main and overarching success criteria of the RDRS is:

Has the experience with the RDRS sufficiently informed the GNSO Council and ICANN Board to make a decision with regards to the SSAD recommendations?

- At a minimum the following criteria would need to be met in order to be able to provide the relevant information to the GNSO Council and ICANN Board:
 1. The RDRS should be available to all possible requestors to submit their data requests
 2. The RDRS should be available to all interested ICANN-accredited registrars to participate in
 3. The RDRS should track all relevant data points as identified by the Small Team
 4. Sufficient number of registrars participate reflecting a sufficient number of domain name registrations under management so that statistically significant data can be obtained;
 5. Sufficient number of requests are made by requestors so that statistically significant data can be obtained
 6. Registrar and requestor user satisfaction with the service should be measured (this should not focus on the outcome of requests but on experience with the service itself)

Registration Data Request Service - GAC Consideration

Reminder: Risks and related concerns (discussed by the GAC during ICANN75 and ICANN76)

- Uncertainty as to adoption by Registrars (participation is voluntary)
- Lack of awareness, misconceptions about guaranteed data disclosure may lower/deter usage
- May not produce actionable data for consideration of SSAD (due to lack of use)

Relevant GAC Statements in the [Kuala Lumpur Communiqué](#) (26 Sept. 2022) and [Cancún Communiqué](#) (20 March 2023) :

- *The GAC highlights the **importance of engaging in education and outreach** with potential requesters so that these requesters learn of the WHOIS Disclosure System's availability.*
- *The GAC invites ICANN to consider the participation in the System of registry operators, as well as exploring **incentives for both registries and registrars to participate***
- *The GAC finds it very important to **log [approvals or denials of requests, timing of the response, and reasons for denial] in a proper manner** as this will help to ensure the system is generating robust and useful data to inform future work*
- *The GAC advises the Board to direct ICANN org to promptly engage with the PSWG to identify and advance solutions for confidentiality of law enforcement requests so as not to preclude participation by law enforcement requesters when measuring usage of the WHOIS Disclosure System*
- *The GAC recommends ICANN org engages with the GAC PSWG to further discuss the issue of [...] how the **(meta) data** of all the requests of law enforcement agencies will be handled.*

Registration Data Request Service - Next Steps / Open Questions

Per Meetings with ICANN org and GNSO small team

ICANN org have created a tick box to inform the registrar that confidentiality is requested and then to either provide the information or to cancel the request.

Per ICANN Board Resolution (27 February 2023):

- ICANN to work with the GNSO to **encourage comprehensive System usage by data requestors and by ICANN-accredited registrars** throughout the development and operation of the System.
- The ICANN Board urges the GNSO Council to **consider a Policy Development Process or other means to require registrars to use the System**
- The ICANN Board will engage with the GNSO Council together with the Small Team and ICANN org to **establish success criteria for this System**, which should include analysis of relevant usage data
- **Usage statistics** will inform periodic check-in discussions

Privacy/Proxy Services

Significance to Registration Data Access

- Definition (per <https://www.icann.org/en/icann-acronyms-and-terms>)
 - **Proxy services** shield the identity of a customer by becoming the domain name's holder of record. When the domain name is queried in WHOIS, the identity and contact information for the proxy service is shown.
 - **Privacy services** prevents certain contact information for a registrant from appearing in Registration Directory Services such as WHOIS. A privacy service allows a registrant to appear as the domain name holder of record, but it provides alternate contact information for that registrant.
- Prevalence: 65% of sample of COVID-19 domains reported to law enforcement involved privacy proxy service preventing access to registration data for investigation
- RDRS provides a framework that allows registration data to be processed in a manner that ensures appropriate security of the personal data, compliant to relevant data protection laws
- During the [Board/GAC ICANN76 Communiqué Clarification Call](#) (11 April 2023) the ICANN Board discussed:
 - the increasing use of privacy/proxy services in gTLD Registration Data services
 - the need to consider privacy/proxy services as part of ensuring meaningful access to registration data
 - considerations to leverage RDRS to reinvigorate the implementation of the 2015 GNSO policy recommendations regarding accreditation of Privacy/Proxy services

Privacy/Proxy Services

Policy Implementation suspended since 2018

- Implementation of the GNSO policy recommendations was [launched](#) in 2016 to deliver, *inter alia*:
 - Detailed **frameworks for responses to requests for disclosure from law enforcement authorities** and intellectual property holders
 - Standardized requirements for **relay of communications from third parties to registrants**
 - A new WHOIS label to identify registrations involving a privacy/proxy service
- In the [Helsinki Communiqué](#) (30 June 2016) the GAC advised the ICANN Board:
 - that the GNSO policy recommendations raise important public policy issues
 - to ensure that GAC concerns (incl. confidentiality of LEA requests) are effectively addressed during implementation, with participation of the GAC PSWG
- In March 2019, ICANN org [shared with the GNSO Council](#) its belief that ***“it is prudent to wait before proceeding to [...] implementation of [Privacy Proxy Services Accreditation Issues Policy (PPSAI)] until the EPDP is complete. This is because the same issues that need to be resolved [...] are under active discussion in the EPDP, such as [...] providing access to non-public personal contact details consistent with GDPR [...]”***
- In the [Kobe Communiqué](#) (14 March 2019), the GAC advised the ICANN Board to ***“Consider re-starting implementation processes for relevant existing policies, such as the Privacy Proxy Services Accreditation Issues Policy”*** noting that PPSAI ***“remains highly relevant and implementation efforts should continue as appropriate, in parallel with the ongoing policy development work”***

Privacy/Proxy Services

Latest Developments and Next Steps

- Per the [ICANN Specific Reviews Q4 2022 Quarterly Report](#) (21 February 2023), **RDS-WHOIS2 Review Recommendation R10.1** (low priority, currently pending Board consideration) for the ICANN Board to **monitor the implementation of the Privacy Proxy Services Accreditation (PPSAI) policy** recommendations is **expected to be subject to an assessment in Q1 2023** to inform Board action.
- In the [Cancún Communiqué](#) (20 March 2023), the GAC advised the ICANN Board:
 - i. To prioritize the assessment related to the pending RDS-WHOIS2 Review Recommendation R10.1 which called for the Board to monitor the implementation of the PPSAI policy recommendations, and all necessary steps to resume this implementation, consistent with the intent of the GAC's previous advice.
 - ii. To regularly update the GAC on the status of activities related to privacy and proxy services.
- The ICANN Board accepted this advice per [Scorecard of Board Action](#) (15 May 2023)
- Per the [ICANN Specific Reviews Q1 2023 Quarterly Report](#) (31 March 2023), **ICANN org plans to resume the implementation** of Privacy and Proxy Services Accreditation Implementation (PPSAI) [...] **once the EPDP Phase 1 implementation is completed.**

Registration Data Accuracy (1/3)

GAC Positions to Date

- In the [ICANN73 GAC Communiqué](#), the GAC “*emphasized the importance of holding 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*” while noting that “*maintaining accuracy must be considered along with any policy’s impact on the privacy needs of all registrants, including those registrants with enhanced privacy needs.*”
- In the [ICANN74 GAC Communiqué](#), the GAC called for the Scoping Team to move toward resolution of Assignment 1, stressing that “*contractual requirements are not limited to accurate but also reliable data,*” while welcoming continued work on the development of a Registrar Survey and “*additional and complementary work items, such as testing of accuracy controls in a manner that is not dependent on access to personally identifiable data.*”

Registration Data Accuracy (2/3)

Interim Report to the GNSO Council

- On 6 September 2022, the Scoping Team’s [Interim Report](#) was delivered to the GNSO covering:
 - assignment #1: a “Current Description” of Accuracy
 - assignment #2: Possible ways to measure the current state of accuracy that require or do not require access to registration data.
- The report includes three recommendations in total:
 1. **A Registrar Survey be conducted** on the status of accuracy of their domains under management.
 2. **A Registrar Audit be considered** regarding procedures for determining the accuracy of registration data.
 3. **A pause of the Scoping Team’s work on only those proposals that require access to registration data** until such time when it is sufficiently clear whether proposals that require access to registration data are a viable path to assess the current state of accuracy.

The Scoping Team further recommends the GNSO Council:

- Request ICANN org to proceed with their outreach to the EDPB as a matter of urgency
- Request ICANN org to proceed with a Data Protection Impact Assessment in connection with the scenario(s) in which the processing of data takes place
- Call out the importance of finalizing the Data Processing Agreement between ICANN and Contracted Parties

Registration Data Accuracy (3/3)

ICANN76 Position.

- The GAC reiterated that maintaining accurate and complete domain name registration data is an important element in the prevention and mitigation of DNS abuse. The GAC recognized the importance of revisiting the Scoping Team's recommendations once the DPA negotiations between ICANN org and the Contracted Parties have completed and there is feedback from ICANN org, or after a period of six months, whichever is shorter. The GAC also noted that the recommended registrar survey and a registrar audit would help inform the GAC's consideration of further work on these issues.

Intersessional Update:

- At ICANN76, ICANN org provided an [update to the GNSO Council](#) (14 March 2023) noting the completion of a Data Protection Impact Assessment (DPIA) for an audit focusing on compliance with accuracy requirements under the Registrar Accreditation Agreement (RAA), adding that this audit *would* comply with the GDPR.
- Currently, ICANN org is working on a DPIA for a separate audit that would analyze a representative sample of full registration data.

Considerations for Washington Communiqué

- Draft Registration Data Consensus Policy (EPDP Phase 1):
 - Are there public policy concerns raised in the GAC's Public Comment that GAC would like to highlight under Issues of Importance?
 - Watch for results of IRT discussions on Org's review and determinations in light of public comments (response times for "urgent" requests)
- Further consideration of SSAD dependent on outcomes of RDRS pilot
 - Need for more information on processes to encourage robust participation by Contracted Parties and requesters
 - Follow up on Cancun advice on Privacy Proxy implementation.
 - Are there any other GAC concerns with the pilot as launched by the ICANN Board ?