WHOIS and Data Protection Policy

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ICANN68 - Session 6
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Agenda

1. **Background** (Per [Pre-ICANN68 GAC Webinar](#) on 18 June)
   - Status of Policy Development Process (EPDP)
   - Timeline

2. **Assessment of Likely Outcome of EPDP Phase 2**

3. **Next Steps for the GAC**
Status of Policy Development Process

Expedited Policy Development Process (EPDP) on gTLD Registration Data

- Launched as part of emergency measures, to replace the Temporary Specification (17 May 2018) now incorporated as the Interim gTLD Registration Data Policy

- **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 still uncertain (ICANN org letter to the GAC, 6 Jan. 2020)

- **Phase 2** (To conclude by July 2020)
  - Focus on System for Standardized Access/Disclosure (SSAD) and pending legal issues
  - Initial Report published on 7 February 2020 and Addendum on 26 March 2020
  - GAC Small Group circulated to the GAC a Summary of the Initial Report (17 Feb. 2020)
  - GAC provided Input on the Initial Report (24 March 2020) and Comment on the Addendum (5 May 2020)
Process Issue: Implementation Timeline

ICANN Policy
- Temp. Spec.
- Interim Policy
- Final Policy
- UAM / SSAD

Evolution Mechanism

EPDP
- EPDP Phase 1
- Phase 1 Policy Implementation
- EPDP Phase 2
- Phase 2 Implementation
- Phase 3 / Other PDP?

ICANN Org / DPAs
- TSG
- DPA Input to ICANN

May 2018
- GAC Representation in EPDP Team

May 2019
- Initial Report

Feb. 2020
- Final Report

July 2020?
- Formal GAC Input

GAC Representation?
High Level Assessment of Likely Outcome of EPDP

- The System for Standardized Access/Disclosure (SSAD) originally proposed by the EPDP in its Phase 2 Initial Report (before ICANN67) seemed to reflect the extent of consensus that could be achieved given the current state of understanding, legal guidance, and analysis of the GDPR.

- From a public policy perspective, this imperfect consensus may be acceptable, provided that:
  - An effective evolution mechanism for the SSAD was in place to ensure that future legal guidance and newly available information could improve its effectiveness.
  - Pending key policy issues were addressed, including WHOIS Accuracy, the distinction in treatment of data from Legal vs. Natural entities, and Privacy/Proxy.
  - ICANN Contractual compliance could be able to take effective enforcement action.

- However, it has become clear from EPDP deliberations, and developments in the GNSO and ICANN org since ICANN67 that:
  - The balance previously achieved on the SSAD is at risk and may conclude adversely to public policy interests.
  - There is currently no agreement on an effective evolution mechanism for the SSAD.
  - Key policy issues will not be addressed in Phase 2 and there currently is no clear alternative path.
  - It is uncertain whether any SSAD policy can evolve (during implementation or later) towards ICANN’s original UAM proposal which was more favorable to several public policy interests.
Likely Outcome on Key Policy Issues for the GAC

Aligned with GAC Expectations

- Accreditation of Public Authorities into the SSAD following the GAC principles
- Centralization of requests for disclosure for non-public registration data
- Confidentiality of Law Enforcement requests
- Need for SSAD to meet applicable Data Protection legislation around the world

At Risk or Not Aligned with GAC Expectations

- Accuracy of Registration Data for the purpose for which they are processed
- Publication of Legal Entities Registration Data
- Centralization and Automation of Disclosures
- Evolution Mechanism towards increasing centralization, automation and standardization of disclosures, as experience is gained and application of the law becomes clearer
- Ability for Compliance Enforcement against Wrongful Disclosure Denials
- Preventing Double Privacy Shield for Privacy Proxy Services

Outcomes v. GAC Expectations: Aligned | At Risk | Misaligned
Focus on Automation and Evolution Mechanism

Need for SSAD to move from the current fragmented system wherein there may be 2500+ approaches to assess requests to disclose non-public registration data.

- **Challenge**: GDPR is new, complicated, and current legal guidance will increase over time as law is tested through legal challenges and court decisions
- **How to preserve flexibility** to permit SSAD to adapt to future legal guidance and increase categories for automation (DPA guidance supports automation under certain circumstances)

→ Agreement that EPDP team would recommend that disclosure decisions MUST be automated *where technically and commercially feasible and legally permissible*. . . . EPDP Team recommends that any categories of disclosure decisions that do not currently meet these criteria will not be foreclosed from consideration of automated disclosure in the future, subject to the processes detailed in Recommendation #19 [Evolution Mechanism].

- **Current Issue**: whether additional automation categories (currently only two) would constitute implementation of existing policy (above) or require new policy → new PDP
- **Threat**: Persistent Disagreement on scope of Automation and Evolution threatens to undermine fragile support for Phase 2 Recs by multiple EPDP stakeholders.
# Next Steps for the GAC

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Maturity of Policy Issues for GAC Action: [Mature](#) | [Partly](#) | Still being Discussed in EPDP