# WHOIS and Data Protection Policy

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# ICANN | GAC

Governmental Advisory Committee

# Agenda

1. **Background** (Per Pre-ICANN68 GAC Webinar on 18 June)

   ○    Status of Policy Development Process (EPDP)

   ○    Timeline

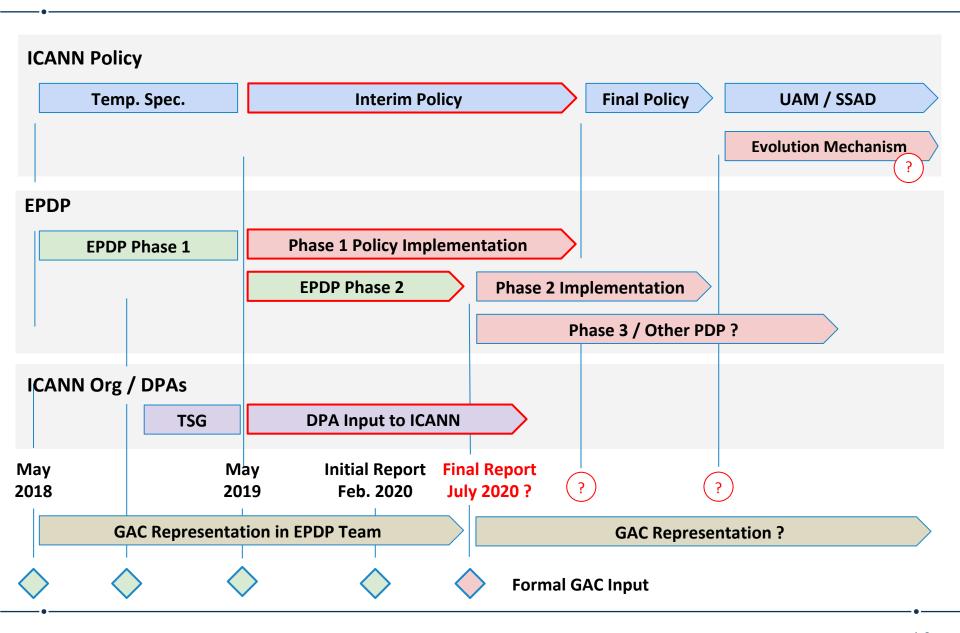2. **Assessment of Likely Outcome of EPDP Phase 2**

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)
  - Most Policy Recommendations adopted by ICANN Board (15 May 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

# 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 curretly 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**

# 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

| Possible GAC Action<br><br>Policy Issues | Question or Input to ICANN Board | Issue for ICANN68 Communiqué | Advice to ICANN Board | Input to GNSO | Input to EPDP Team | Objection to/in EPDP Final Report | Seeking further DPA Guidance |
|---|---|---|---|---|---|---|---|
| Registration Data Accuracy | ICANN68 | ? | ? | 22 June Letter | | | ? |
| Legal Entities Data | ICANN68 | ? | ? | 22 June Letter | | | |
| Centralization & Automation of Disclosures | ICANN68 | | | | Ongoing | ? | ? |
| Evolution Mechanism | ICANN68 | | ? | | Ongoing | ? | |
| Compliance Enforcement | ICANN68 | ? | Follow-up ? | | Ongoing | ? | |
| Privacy/Proxy Services | ICANN68 | Follow-up ? | | | | ? | |