
Agenda Items 11, 20, 33: WHOIS Compliance with GDPR

Note: This brief has been prepared by ICANN GAC Support Staff, in collaboration with relevant GAC and PSWG Leaders. It is intended to provide relevant background for Agenda Item 11, 20 and 33.

Issues

During the ICANN63 meeting in Barcelona the GAC will review progress of various ICANN initiatives aiming at ensuring WHOIS compliance with the EU's General Data Protection Regulation (GDPR) in light of previous GAC Advice and Input provided on this matter since the ICANN60 meeting (Abu Dhabi, November 2017).

Key issues to be addressed by the GAC are as follows:

- The [Temporary Specification for gTLD Registration Data](#)¹ has substantially affected the ability of legitimate third parties² to access WHOIS registration data over what some consider a fragmented WHOIS³.
- The ongoing [Expedited Policy Development Process](#) (EPDP) to replace ICANN's Temporary Specification has been making some progress towards multi-stakeholder agreements (albeit limited⁴). However, GAC representatives in the EPDP are concerned that decisive outcome on access to non-public data may not occur in a time frame compatible with the public interests at stake⁵.
- It is still unclear how pending GAC Advice⁶ is going to be addressed by the ICANN Board⁷. The Temporary Specification [references in Annex](#) several key pieces of pending Advice as "Important Issues for Further Community Action" which the EPDP Charter does not prioritize.
- It is important for the GAC to be able to provide timely input in response to ongoing efforts by ICANN to explore lawful avenues for a potential Unified Access Model (UAM) which would ensure continued access to full WHOIS data, as was done on 16 October (see attached "GAC Initial Comments on the Draft Framework for a Possible UAM").

¹ [adopted](#) by the ICANN Board on 17 May 2018, [reaffirmed](#) on 21 August 2018

² Third Parties pursuing a legitimate public interest goal include law enforcement and consumer protection agencies, public authorities, intellectual property rights holders and cybersecurity researchers

³ because most of the registration data is now redacted, because mechanisms for requesting access to redacted data are unknown to most interested parties, and because the mechanisms offered by an estimated 2500 contracted parties for access to such data are disparate and discretionary

⁴ mostly on legitimate and lawful purposes for collecting gTLD registration data at the time of this writing

⁵ based on current pace of discussions, strong opposition by interests groups and the structure of the charter. The EPDP Team Charter, in particular, conditions any discussion of a "system for providing accredited access to non-public Registration Data" on consensus definitions of both purposes for processing data and related processing activities (including collection, transfer and publication).

⁶ See §1.a.IV to §1.a.VII of the ICANN61 San Juan GAC Advice and response by the Board in the relevant [Scorecard](#) (30 May 2018)

⁷ The ICANN Board [adopted](#) on 16 September 2018 its GAC Advice [Scorecard](#) stating that it "will continue to take steps to address these in cooperation with the GAC, and in accordance to any guidance or clarification ICANN org might receive from the DPAs and the European Data Protection Board. Any guidance and clarification will inform ICANN org's continued work on a possible unified access model and will also be provided to the GNSO EPDP team to inform its work on a legally sound consensus policy for a gTLD registration data and access model [...]"

GAC Action Required

The GAC should consider as a matter of high priority during the ICANN63 meeting:

1. Agreeing on substantive policy objectives for the next stages of ongoing work, in line with guidance provided by Data Protection Authorities to ICANN, and past GAC Advice, including items in the [ICANN61 San Juan Communiqué](#) for which the ICANN Board has [yet to provide a response](#)⁸:
 - a. *Ensuring continued access to WHOIS data, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties.*
 - b. *Ensuring that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs.*
 - c. *Ensuring confidentiality of WHOIS queries by law enforcement agencies.*
 - d. *Distinguishing between legal and natural persons, allowing for public access to WHOIS data of legal entities which are not in the remit of the GDPR.*
2. Preparing for providing consensus public policy guidance and defending public interests objectives, regularly in the coming months, in several fast-moving processes, including:
 - a. the Expedited Policy Development Process on gTLD Registration Data (EPDP), and
 - b. the exploration of a potential Unified Access Model for Continued Access to Full WHOIS Data
3. Responding to the ICANN CEO [letter](#) of 4 September 2018 seeking guidance from the GAC and EU Member States on how the legal risk on data controllers could be reduced in relation to the design and implementation of a Unified Access Model.
4. Engaging in relevant sessions during ICANN63 to argue, and get community support, for the GAC's policy objectives;
 - a. GAC meetings with the ICANN Board, the GNSO, its Intellectual Property Constituency (IPC) and Non-Commercial Stakeholders Group (NCSG), the At-Large Advisory Committee (ALAC),
 - b. [EPDP High Interest Topic Session](#) and [GDPR Cross Community Session](#)

⁸ In response to §1.a.IV to §1.a.VII of the ICANN61 San Juan GAC Advice, the Board indicated: "As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. "

Recent Developments (since ICANN62)

- **The European Data Protection Board (EDPB) issued new guidance** in a [letter](#) to ICANN (5 July 2018) noting that It "will enable ICANN to develop a GDPR-compliant model for access to personal data processed in the context of WHOIS".
 - The letter addressed several areas on which GAC Advised or provided input to ICANN, including purpose specification, lawfulness of processing, collection of full WHOIS data, registration of legal persons, logging of access to non-public WHOIS data, data retention and accreditation.
 - In an [assessment](#) of the letter (13 July 2018), the ICANN Organization highlighted the EDPB's expectation that ICANN develops "a WHOIS model which will enable legitimate uses by relevant stakeholders, such as law enforcement".
- **The Expedited Policy Development Process (EPDP) on gTLD Registration Data was launched** with an aggressive [timeline](#) in order to replace ICANN's Temporary Specification before it expires on 25 May 2019. Under the terms of its [charter](#) (19 July 2018), the EPDP Team will only consider access to non public data at an ultimate phase of its work, subject to consensus of the group on answers to numerous charter questions pertaining to the definition of purposes for processing data and the related processing activities (including collection, transfer and publication).
 - GAC Representatives in the EPDP⁹ have been working daily to coordinate their views and represent the interests of the GAC in EPDP deliberations. A [GAC Early Input](#) (7 September 2018) was formally submitted after consultation of the GAC Membership. It summarizes the key issues identified in the [Temporary Specification](#).
 - To date, the 20+ [conference calls](#), 3 days of [face to face meetings](#) (24-26 September 2018), and an [estimated](#) 20% of effort completed, have led to the delivery of:
 - a [Triage Report](#) of the Temporary Specification (11 September 2018) which recognizes that there are "there are very few areas where the [...] EPDP Team agrees with the [...] Temporary Specification" and illustrate the diversity of [views](#) represented in the EPDP Team.
 - a tentative set of [purposes for processing of Registration Data](#) with their associated data elements, processing and relevant legal justifications. It is not yet clear whether consensus is attainable on a set of purposes that is consistent with previous GAC Advice ([ICANN60 Abu Dhabi Communiqué](#))
 - The EPDP is expected to issue a first initial Report, currently being [drafted](#), shortly after ICANN63. It will not include consideration of an access model, which, per EPDP Charter, would be a matter for a subsequent additional Initial Report, not yet factored in the [EPDP Timeline](#). The EPDP's Initial Report may only propose clarifications to the requirement of "reasonable access"¹⁰ contained in the [Temporary Specification](#).

⁹ Full Members of the EPDP Team: Georgios Tselentis (European Commission), Kavouss Arasteh (Iran), Ashley Heineman (United States). Alternate Members: Rahul Gosain (India), Laureen Kapin (United States), Christopher Lewis-Evans (United Kingdom)

¹⁰ Section 4.1. Annex A of the Temporary Specifications states: "Registrar and Registry Operator MUST provide reasonable access to Personal Data in Registration Data to third parties on the basis of a legitimate interests" pursued by the third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject pursuant to Article 6(1)(f) GDPR."

- **Unified Access Model: the ICANN Organization is continuing its exploration of possibilities**
 - ICANN reported recently in a [blog](#) (24 September 2018), in a [presentation](#) by ICANN's CEO during the EPDP Team Face to Face meeting (25 September 2018), during a subsequent [webinar](#) (8 October 2018), and in [Status Report](#) to the GAC (8 October 2018), on its work seeking legal clarity on a possible unified access model, and its exploration of legal and technical avenues in order to shift the liability from Contracted Parties to ICANN for providing access to non-public registration data while establishing a globally scalable unified solution for access to such data.
 - ICANN is reporting currently considering the following avenues:
 - Setting ICANN as the gateway for approving third party requests to access non-public WHOIS data, which it would in turn request from relevant Registries and Registrars through the new Registration Data Access Protocol (RDAP),
 - Developing a WHOIS Code of Conduct with relevant bodies, in line with Article 40 of the GDPR,
 - Researching whether existing documentation adopted in the EU regarding the public interest role of the WHOIS meet the requirement of the GDPR for justifying related data processing.
 - To date, ICANN provided two iterations of its framing documentation regarding a Unified Access Model: the [Framework Elements for a Unified Access Model](#) (18 June 2018) and subsequent [Draft Framework for a Possible Unified Access Model](#) (20 August 2018).
 - The GAC membership was consulted on a proposed draft comment in response to the original proposal (from 26 July to 20 August 2018) while ICANN was working on and then released its revised document. This led to the drafting of a new set of comments, circulated to the GAC on 1 October 2018 and published on 16 October 2016 (attached to this briefing).
 - It is important to note that while ICANN Org *"prepared the Framework document to determine whether there is a legal foundation based on the GDPR upon which a unified access model may be implemented"*, *"[u]ltimately, whether such a model ought to be implemented is a policy question for the community's multistakeholder community"* ([Status Report](#) to the GAC, 8 October 2018)
 - Additionally, a public comment period on [RDAP Specifications](#) was initiated on 31 August 2018 and close on 13 October 2018. Although ICANN org had provided input to the contracted parties in the development of the related documents, not all the issues raised by ICANN org were addressed. Hence ICANN included [additional considerations](#) related to: handling of contact email, registrant opt-in, privacy/proxy and reasonable access.
ICANN anticipates that implementation of the final specification (expected before the end of 2018) would be required for implementation by contracted parties in the April-May 2019 timeframe.

- **Representatives from Contracted Parties and Law Enforcement agencies**, in the meantime, have been discussing the development of a voluntary mechanism designed to serve as an interim stop-gap solution to ensure access to non-public WHOIS data for specific law enforcement authorities until the EPDP process concludes and a functional Unified Access Model can be made fully operational.

Current Positions

Regarding the Unified Access Model, the GAC Advised the ICANN Board, in the [ICANN62 Panama Communiqué](#):

The GAC considers that a unified access model is central to providing access to non-public WHOIS data for users with a legitimate purpose and this should continue to be addressed as a matter of urgency. Therefore,

- a. *the GAC advises the ICANN Board to:*
 - i. *Take all steps necessary to ensure the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability, and applies to all contracted parties, as quickly as possible; and*
 - ii. *Publish a status report four weeks prior to ICANN 63.*

The GAC provided Advice to the ICANN Board and Input to the ICANN Org on several public policy aspects of Whois compliance with GDPR, in particular:

- Purpose and uses of WHOIS
 - GAC [Principles Regarding gTLD WHOIS services](#) (27 March 2007)
 - GAC [ICANN60 Abu Dhabi Communiqué](#) (1 November 2017)
- Scope of GDPR and distinction between legal and natural persons
 - GAC [ICANN61 San Juan Communiqué](#) (15 March 2018)
 - GAC [Feedback on Proposed Interim Model](#) (8 March 2018)
 - GAC [Feedback on Proposed Interim Models](#) (28 January 2018)
- Publication of Email Addresses
 - GAC [ICANN61 San Juan Communiqué](#) (15 March 2018)
 - GAC [Feedback on Proposed Interim Model](#) (8 March 2018)
 - GAC [Feedback on Proposed Interim Models](#) (28 January 2018)
- Logging and confidentiality of Law Enforcement Requests
 - GAC [ICANN61 San Juan Communiqué](#) (15 March 2018)
 - GAC [Feedback on Proposed Interim Model](#) (8 March 2018)

Further Information

[Whois Compliance with GDPR Reference Page on GAC website](#)

[Data Protection/Privacy page on ICANN.org](#)

[GNSO EPDP on the Temporary Specification for gTLD Registration Data](#)

Document Administration

Title	Agenda Items 11, 20, 33: WHOIS Compliance with GDPR
Distribution	GAC Members
Distribution Date	Version 1.0: 16 October 2018

ICANN | GAC

Governmental Advisory Committee

Distribution	Public
Date	16 October 2018

The Governmental Advisory Committee's Initial Comments on the Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data

ICANN's Governmental Advisory Committee (GAC) appreciates the ICANN organization's 20 August 2018 Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data ("Draft Framework") that is intended to further discussions about such a Unified Access Model (UAM).

The GAC also welcomes ICANN's recognition that the European Data Protection Board (EDPB) (formerly the Article 29 Working Group), the European Commission, and the GAC all support the development of a unified access model.

The GAC believes that ICANN and the community should strive to develop a comprehensive, harmonized, reliable, and scalable model that allows access to non-public WHOIS data for authenticated users with a legitimate purpose in a manner that is consistent with the EU's General Data Protection Regulation (GDPR).

The GAC considers the development and implementation of such a unified and reliable access model to be of the utmost importance. Existing requirements in the Temporary Specification for contracted parties to provide "reasonable access" to non-public information are insufficient and at best, encourage a fragmented system potentially consisting of thousands of distinct procedures and policies depending upon the registrar involved. The public policy aspects of the Domain Name System (DNS) cannot rely on the individualized policies of 2,500 gTLD registrars and registries. Furthermore, while the GAC appreciates the reference to the GAC's Panama Communique that highlights the "negative impact that the lack of timely access to non-public WHOIS data is having" the GAC urges ICANN to set forth a specific timeline for adopting and implementing the UAM.

ICANN | GAC

Governmental Advisory Committee

Community Views About High-Level Elements of a Unified Access Model

Regarding the Community's views about high-level elements of a UAM (Draft Framework at 7-8), the GAC supports:

- Using a Registration Data Access Protocol (RDAP) as a technical method for accessing data
- Strong safeguards to guide access to WHOIS data in order to prevent and deter abuse or misuse of WHOIS data
- Decentralized authentication methods/bodies for each type of legitimate user of WHOIS data, including law enforcement authorities and other public enforcement authorities (e.g. consumer protection and public safety agencies); Cybersecurity organisations; and intellectual property rights holders.

The GAC expresses the following views on the Community's "competing views on the legal requirements of the GDPR as they relate to a unified access model" (*Id.* at 7):

1. While the GAC recognizes the need for authenticated users to show a legitimate interest or other legal basis under the GDPR in order to access WHOIS data, the GAC believes that the specifics of how authenticated users demonstrate the requirements of the applicable legal basis should depend on the user group. Law enforcement, for example, would likely operate on the same legal basis (e.g. public interest) for each query of the WHOIS data. In addition, law enforcement often needs to be able to conduct multiple queries at once, for example to combat large botnets. Requiring law enforcement users to specify the legal basis for each individual query would create a burden. Instead, possible alternatives should be considered, such as asking law enforcement users to identify the legal basis for each session¹, as a more efficient method which would allow law enforcement to continue to protect individual users in cyberspace at the pace demanded by the growth and use of the internet.²
2. The GAC believes that providing logs of query activities to registrants has the potential to compromise law enforcement and national security investigations. Such a compromise could result in the target of the investigation fleeing the jurisdiction, destroying evidence, and possibly even harming potential witnesses. Therefore appropriate safeguards need to be incorporated in the system, with a view to protect the confidentiality of investigations.

¹ A session is understood to consist of a sequence of WHOIS queries made by a single end-user during the span of a single connection to a WHOIS database or an access portal. A session may consist of a series of queries with a consistent underlying user need.

² Other users of WHOIS data might also potentially benefit from the ability of conducting multiple queries at once in order, for example, to assess whether a pattern of bad faith infringements existed.

ICANN | GAC

Governmental Advisory Committee

3. The GAC believes that both registry and registrar operators should be required to provide access to non-public registration data to the greatest extent possible in accordance with the applicable legal basis.
4. The GAC would have concerns about assigning fees and creating unnecessary barriers to entities that may have limited resources. Many entities with important public policy and public safety mandates have small budgets and costs could deter or prevent them from accessing information necessary to protect the public interest.
5. The GAC would support a single user interface provided by ICANN that would allow users to perform queries of non-public WHOIS data on the basis of an authentication provided by ICANN. Such an interface could be easier to implement, minimize confusion among authenticated users, and provide reassurances to the contracted parties. The GAC would be encouraged to see ICANN take on this role, which is consistent with ICANN's role as a (joint) data controller of WHOIS data as articulated in its bylaws. We also note that ICANN is particularly well placed to assume this role because it is the only joint controller of the whole data set (each contracting party only being a joint controller for the subset on their portfolio of DNS).

While the GAC sees value in ICANN providing an interface allowing authenticated users to perform queries of non-public WHOIS data, more details need to be provided on whether ICANN's role would only consist of validating third parties and their requests or also of actually transmitting the data from the relevant databases maintained by the registries and the registrars. In the latter case, an in-depth analysis of the data flows would be required to better assess the feasibility of this option under the GDPR. The GAC would appreciate more information on evaluation of these options and their positive and negative implications for interested parties.

The GAC also encourages ICANN to continue exploring all possible methods for ICANN to be acknowledged as the "coordinating authority of the WHOIS system" given its role as a controller (*Id.* at 6) and would appreciate more information on what steps ICANN could take.

ICANN | GAC

Governmental Advisory Committee

Eligibility (Questions 1-3)

Regarding eligibility issues under the Summary Description of a Framework for a Possible Unified Access Model (*Id.* at 8-10), the GAC supports the approach of identifying relevant “user groups” or categories, because different needs and legal requirements should be considered and recognized for the different types of users seeking access to the redacted WHOIS data³.

The GAC believes that in addition to defined user groups, the UAM should contain procedures for the public at large because they too may have legitimate interests in seeking data.

The GAC believes that all governments represented in the GAC should be involved in identifying eligible user groups at the same time. Potential harms that arise from lack of access to nonpublic WHOIS data is risk for countries both within and outside of the EU.

A UAM must be built with sufficient accountability and liability where appropriate. However, the issues surrounding accountability and liability are complex and require careful assessment and balancing. The GAC encourages further reflection on the role and tasks of authenticating bodies, criteria for selection of authenticating bodies, redress and complaint mechanisms, as all these aspects are not being addressed in the UAM. It is also important to ensure that, within any authenticating body, no conflicts of interest arise between their current mandate and their role as an authenticating body and that appropriate consideration is given to the specific tasks, required technical infrastructure and resources that the authenticating bodies will have to provide. In addition, authentication bodies should not be unfairly made an exclusive provider of these services.

Finally, the GAC believes that a decentralized model for determining authentication requirements for a specific user group makes sense. However, ICANN should provide clear guidance to the authenticating bodies. And such authenticating bodies should be part of a timely ICANN-led process to establish such guidance.

³ For instance, intellectual property rights holders may have a legitimate interest in getting access to non-public WHOIS data, notably enforcing their rights against illegal website content or bad faith domain registration.

ICANN | GAC

Governmental Advisory Committee

Process Details (Questions 4-10)

Regarding process details under the Summary Description of a Framework for a Possible Unified Access Model (*Id.* at 10-13), the GAC supports both registry and registrar operators being required to provide access within the UAM.

As mentioned above, while the GAC recognizes the need to show a legitimate interest or other legal basis under the GDPR when accessing WHOIS data, the GAC believes that the specifics of how the requirements of the applicable legal basis are demonstrated should depend on the user group. In particular, law enforcement agents often have a legitimate need to conduct multiple queries, such as when identifying or mitigating a large-scale botnet threat. Therefore, requiring law enforcement users to specify a legal basis for every individual query would be a significant operational impediment to legitimate investigations with serious negative public safety consequences. Other legitimate users of WHOIS data share similar concerns on specifying a legitimate interest for every query as it would impede their ability to ascertain the identities of responsible parties engaged in widespread online infringing activity.

The GAC therefore encourages ICANN to continue seeking clarification from the EDPB to ensure that access is proportionate to authenticated users' needs, not limited to individual lookups, and that access to WHOIS data for authenticated users is available in accordance with the specified purposes of the particular user group.

The GAC welcomes ICANN's acknowledgement that, under the UAM, Contracted Parties would be required to provide data for authenticated users. ICANN should train and resource their compliance team to ensure that the Contracted Parties are granting access in line with the UAM.

The GAC believes that, in line with the EDPB letter referenced on page 12, any logging and audit practices needed for transparency should come with appropriate safeguards to ensure non-disclosure of legitimate law enforcement activities. Confidentiality is needed not just in disclosure to the registrant, as discussed above, but also in sharing any logs with any outside parties, including ICANN. The UAM must balance data subjects' rights with legitimate law enforcement needs for confidentiality.

Regarding the searchability of non-public WHOIS records (i.e., cross-referencing of records), the GAC reiterates the public safety importance of this feature in identifying and mitigating DNS abuse. Since this is already a possible feature in RDAP, it deserves inclusion in the UAM, at least for certain user groups, subject to appropriate data protection safeguards, including measures to ensure a sufficient degree of compliance assurance.

Given the public interest and public safety use of WHOIS data, the GAC does not recommend requiring fees and thereby restricting access to public safety organizations. This is of particular concern in low-income countries and small, local law enforcement agencies.

ICANN | GAC

Governmental Advisory Committee

Technical Details (Questions 11-13)

Regarding technical details under the Summary Description of a Framework for a Possible Unified Access Model (*Id.* at 13-14), the GAC welcomes the consideration given to ways of making the model more user-friendly, such as through a centralized lookup portal.

The GAC calls for further consideration of what these options would imply in terms of (international) data flows, how the system would work, and of what the potential technical, security and legal implications for such a system would be, noting that a central repository would imply a major shift with respect to the current system.

The current fractured nature of access to non-public WHOIS data amongst all registrar and registry operators creates confusion, increases the burden on investigators, slows investigations, and is technically harder for the Contracted Parties to maintain and operate.

Terms of Use (Questions 14-19)

Regarding the terms of use for accessing non-public WHOIS data under the Summary Description of a Framework for a Possible Unified Access Model (*Id.* at 14-16), the GAC believes that any common safeguards developed by ICANN that are common across all Terms of Use should not supersede legal requirements or obligations in each respective country.

The GAC recognizes that law enforcement agents often need to conduct multiple queries, such as when identifying or mitigating a large-scale botnet threat. In that view, the GAC acknowledges that rate limiting could be a significant operational impediment to legitimate investigations.