

ICANN | GAC

Governmental Advisory Committee

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Governmental Advisory Committee Input on the Phase 2A Initial Report of the Expedited Policy Development Process (EPDP) on gTLD Registration Data

This document is a compilation of the GAC's Input in response to the [Public Comment Proceeding](#) (closing on 19 July 2021) regarding the [Initial Report of Phase 2A](#) of the Expedited Policy Development Process (EPDP) on gTLD Registration Data, which was required to be submitted through a [specific 8-pages form](#)..

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Introduction and Overall Comment

The GAC appreciates the efforts over the past 6 months and acknowledges the considerable time and commitment by the EPDP Phase 2A team leadership and ICANN support staff to develop these complex and important policy recommendations.

The scope of the work under EPDP Phase 2A was to focus on two specific topics, namely: 1) the differentiation of legal vs. natural persons' registration data, and 2) the feasibility of unique contacts to have a uniform anonymized email address.

Under the first topic, the questions to be addressed were as follows:

- i. Whether any updates are required to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”);¹
- ii. What guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.

Under the second topic “feasibility of unique contacts to have a uniform anonymized email address”, the EPDP Team was supposed to address the questions of:

- i. Whether or not unique contacts to have a uniform anonymized email address is feasible, and if feasible, whether it should be a requirement; and,
- ii. If feasible, but not a requirement, what guidance, if any, can be provided to Contracted Parties who may want to implement uniform anonymized email addresses.

Regarding the differentiation of legal vs. natural persons' registration data, the GAC believes that Phase 2A has yet to achieve satisfactory results in assessing whether the recommendations from Phase 1 needed an update and this is reflected also in the way the Recommendations of the Initial Report in Phase 2A are phrased.

In **summary**, we maintain that a process of differentiation, by the Contracted Parties between data of legal persons and data of natural persons needs to be made mandatory. The GAC finds that further focus should now be placed on discussing the public interests and benefits of such differentiation against the known risks.

The Initial Report does not fully reflect the various interests at stake in the discussion on differentiation and the subsequent publication of non-protected information. It is necessary to balance commercial interests with the public interest, including the benefits that publicly available information would have for the stability, security and resilience of the DNS. Future Phase 2A discussions must clearly outline these different interests in order to arrive at an appropriate policy outcome

From the GAC's perspective, it is essential to recall that the GDPR does not protect the contact information of legal persons. The GAC notes that there has not been an objective and acceptable justification provided so far as to why such unprotected information has been redacted by Contracted Parties in RDS/WHOIS outputs. The GAC believes that further information is needed as Phase 2A discussions continue to assess the benefits to law enforcement and other parties of properly differentiating between data of legal persons and data of natural persons in light of the different risks and costs for Contracted Parties. Based on the legal advice received by Bird & Bird², risks for Contracted Parties would be low so redaction of data not covered by data protection should have suitable justification..

¹ See Recommendation 17 in the Final Report of EPDP Phase 1 at:

<https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>

² See in particular the discussion of “Legal vs. natural personhood” in the [6 April 2021 Bird & Bird Memorandum](#)

The GAC does not support the phrasing of Recommendation #1:

“No changes are recommended, at this stage, to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”).”

The GAC had asked for this Recommendation to be rephrased to capture the reality that no consensus was achieved on this point. The Phase 2A Initial Report should reflect the fact that the majority of stakeholder groups were actually recommending changes and that it was mainly the Contracted Parties and the Non-Commercial Stakeholder Group (NCSG) opposing such changes. Having said that, the GAC nonetheless believes that any final recommendations need to be implementable.

Regarding unique contacts and anonymized emails addresses, the GAC welcomes steps to provide guidance on publishing an email address through the data protection method of anonymization and notes the reduced levels of risk this provides to publication as highlighted in the legal memos received by the EPDP team. However, the GAC calls for further consideration of a recommendation for publication of a uniform anonymized email address in light of the benefits that publication of such emails would provide, and considering the little to no impact experienced by many data subjects when such techniques are used in privacy/proxy services.

Preliminary Recommendation #1 (Phase 1 Recommendation 17)

Question 1 - New Information or inputs not yet considered

Is there new information or inputs that the Phase 2A team has not considered in assessing whether to make changes to the recommendation that Registrars and Registry Operators may, but are not obligated to, differentiate between legal and natural persons?

The GAC has concerns that the statement ‘*No changes are required*’ is not representative of both the substance of the discussion and the positions of the different stakeholders participating in Phase 2A.

During the Phase 2A deliberations to date, the GAC presented relevant statistics and information demonstrating the advantages of having publicly available registration data, in particular data that concerns legal persons. This input included legal considerations on the redaction of registration data that is not personal data (and thus not protected by GDPR) and, inter alia, complaints received from law enforcement authorities and data protection authorities on the unavailability of important information that is essential for these entities to perform their investigative and law enforcement responsibilities, including efforts to combat cybercrime. These considerations have not been properly assessed and accounted for in the EPDP Phase 2A Initial Report and should be included in the Final Report.

Preliminary Recommendation #2 (GNSO Monitoring of relevant developments)

Question 2 - Is this recommendation necessary, how will it help

Is this recommendation necessary for the GNSO council in considering future policy work in this area? If yes, in what ways does this monitoring assist the Council?

The GAC understands the responsibility of the GNSO but finds that current processes should capture the need for additional policy scoping should new laws or regulations require it. To the extent there is further guidance and legislation that impacts topics within the EPDP the GNSO should be able to act via the existing processes.

Preliminary Recommendation #3 (Addition to Phase 1 Rec. 5 of Optional Data Element)

Question 3 - Standardized Data Element

Should a standardized data element be available for a Contracted Party to use? If yes, why? If no, why not? Why is harmonization of practices beneficial or problematic?

Yes, the final recommendation should require a standardized data element that allows for consistent identification and recording of the nature of the registrant (i.e. natural or legal). The use of this data element would comprise a necessary first step to inform how data should be treated by the Contracted Parties and provides the data subject and all other Contracted Parties processing the data the understanding of how the data is handled or the ability to handle the data in an appropriate manner. Providing this harmonized approach ensures that relevant protection for personal data is considered and applied consistently across all parties responsible for complying with this policy.

Question 4 - What Field and Values for the Standardized Data Element

If yes, what field or fields should be used and what possible values should be included, if different from the ones identified above? Aspects of the recommendation that the EPDP Team is looking for specific input on having been marked above with an asterisk (), indicating the options that are under consideration*

The GAC understands the vast amount of data held by the Contracted Parties and has proposed³ dealing with new registration data first, and then existing data second, to avoid unduly burdening the Contracted Parties.

As such, before all data has been assessed there is the need for a third value to be used in a new Standardized Data Element and 'Unspecified' as proposed in the report would be acceptable. Allowing the value 'Unspecified' for this data element as envisioned in the report is a method for qualifying existing data that would not have been subject to a designation of natural or legal person, and the GAC would highlight the need for a timeline so that large proportions of registration data categorised as 'Unspecified' do not remain so indefinitely.

Question 5 - Mandatory Use of Standardized Data Element

If such a standardized data element is available, MUST a Contracted Party who decides to differentiate use this standardized data element or should it remain optional for how a Contracted Party implements this differentiation?

The GAC supports the requirement being a MUST. Allowing contracted parties to decide, on a voluntary basis, which data protection measures to apply to registration data leads to variations in how data protections are handled across all the contracted parties. Voluntary use of the Standardised Data Element is inconsistent with the decisions in the previous phases of the EPDP where measures such as redactions of data were applied to the whole system rather than relying on the contracted parties to interpret which measures to take on data protection.

³ See the EPDP Team Working Document dated 21 February 2021 on "Proposal #1a" at:
<https://docs.google.com/document/d/1Je23419t1xv70FgD32-DmBrYknUqtOt4wktPEj3pko/edit>

Preliminary Recommendation #4 (Guidance for CPs Who Choose to Differentiate)

Question 6 - Is the guidance sufficient?

Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to differentiate? If not, what is missing and why?

Notwithstanding our view concerning Recommendation 1, the GAC welcomes this Recommendation but believes that the information contained in the recommendation should be referred to as “best practice” rather than mere “guidance”.

The output of the EPDP Phase 2A contains important elements of technically- and legally-sound means to ensure the publication of non-personal data. The output would thus effectively support Contracted Parties when implementing the differentiation between legal and natural registrants. Contracted Parties should be encouraged to make use of it.

The GAC considers that the guidance should be used as best practices (for Contracted Parties for differentiating between legal and natural registrants), and that it should be recognised as such.

The GAC has already maintained that the title ‘Best Practices’ would be more appropriate for the outcome of the work carried out under EPDP Phase 2A. The denomination of “Best practices” would also give more weight and visibility to the guidance while increasing the chances of its adoption.

Question 7 - Additions to Guidance

Are there additional elements that should be included in the guidance?

The Guidance should recognize more explicitly that the differentiation between legal and natural persons is not contrary to the EU GDPR, and indeed in general with data protection legislation, but actually in conformity with such legislation.

It should be highlighted that the protection afforded by the GDPR only applies to natural persons in relation to the processing of their personal data. It does not govern data about companies or any other legal entities. The GDPR protection only applies in cases where that data related to legal persons contain personal data (for example, information in relation to one-person companies may constitute personal data where it allows the identification of a natural person) or for the processing of personal data relating to natural persons in the course of a professional activity, such as the employees of a company/organization. The Guidance should state the benefits of differentiating between data of legal persons and data of natural persons, in addition to the risks.

Question 8 - Additional Legal and Regulatory Considerations Not Yet Considered

Are there legal and regulatory considerations not yet considered in this Initial Report, that may inform Registries and Registrars in deciding whether and how to differentiate, and if so, how?

The GAC notes that there is no legal requirement under the GDPR to protect the data of legal persons and there are benefits for releasing this data to the public.

Question 9 - Enforcement of Guidance

If a Registrar or Registry Operator decides to differentiate, should this guidance become a requirement that can be enforced if not followed (“MUST, if Contracted Party decides to differentiate”)?

This Guidance has been generated to help reduce the risk to Contracted Parties who choose to differentiate. It is not a requirement to follow every item which then can be enforced. The GAC supports EPDP Phase 2A to require differentiation which could then be enforced.

Preliminary Recommendation #5 (registrant-based or registration-based email address)

Question 10 - Is The Guidance Sufficient?

Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to publish a registrant-based or registration-based email address? If not, what is missing and why?

The guidance is a helpful first step for providing information to Contracted Parties, however more could be added to provide best practices better supporting those who do wish to publish an anonymized registrant-based or registration-based email address.

Other Comments

Question 11 - Any Other Comments

Are there any other comments or issues you would like to raise pertaining to the EPDP Phase 2A Initial Report? If yes, please enter your comments here. If applicable, please specify the section or page number in the Initial Report to which your comments refer.

The GAC looks forward to further engagement on whether Phase 2A has the potential to restore access to registration data that is not subject to GDPR.

Some analysis shows that a considerably larger set of registration information was redacted as compared to what is required by GDPR, i.e. “perhaps five times as much as is necessary”⁴. Indeed, available data suggest that only around 11.5% of domains may belong to natural persons who are subject to GDPR, while contact data from 57.3% of all domains was redacted. The GAC believes that the publication of non-public domain name registration data concerning legal entities could increase the wealth of information available to the public and those entities tasked with protecting the public.

The GAC looks forward to engaging in further discussions, including the recently proposed mediation efforts to arrive at a consensus solution.

⁴ See Executive Summary of the [WHOIS Contact Data Availability and Registrant Classification Study](#) (25 January 2021)