

Reply to Governmental Advisory Committee Re: EPDP Phase 2 Minority Statement

10 September 2020

Manal Ismail
Chair, Governmental Advisory Committee

RE: Governmental Advisory Committee Minority Statement on the Final Report of Phase 2 of the EPDP on gTLD Registration Data

Dear Manal,

I am writing with respect to the Governmental Advisory Committee's [minority statement](#) on the EPDP Phase 2 Final Report, which provided a useful window into the GAC's views on the team's recommendations. I am hopeful that we can leverage our next CEO-GAC information call (early next week) as an initial venue where we might discuss aspects of the minority statement in the context of a series of clarifying questions set forth in this letter.

Reasonable minds may disagree about how the law, including the European Union General Data Protection Regulation, applies to various aspects of the System for Standardized Access/Disclosure (SSAD) recommended by the EPDP Phase 2 Team. We want to better understand the rationale underlying the GAC minority statement, given GAC members' unique position as governments tasked with implementing and enforcing the law. In the same context, we believe that additional information from the GAC about the legal basis underlying your points will help ensure compliance of the SSAD with data protection laws, should the GNSO Council adopt these recommendations and the ICANN Board approve them for implementation.

While most of the topics raised below are GDPR-related, we are well aware that the GDPR is not the only relevant privacy legal framework to be considered in the development of the SSAD. As the GDPR is, however, arguably the strictest legal framework in this regard, ensuring GDPR compliance will also help to ensure the SSAD may be globally compliant with privacy laws.

Data Accuracy

The GAC noted in the statement that the accuracy of registration data is an essential requirement of GDPR, and that “[d]isclosure of inaccurate data would defeat the purpose of the SSAD and risk violating data protection rules.”

ICANN org acknowledges the GDPR's emphasis on data accuracy and the right of data subjects to request the rectification of inaccurate personal data concerning them, including the right to have incomplete personal data completed. ICANN org also notes that there is currently a level of uncertainty surrounding potential liability related to the inaccuracy of personal data that is being processed. For example, in the SSAD context, it is unclear whether non-compliance with this

right will result in liability only *vis-à-vis* data subjects, or even toward third parties relying on the accuracy of the data disclosed (such as requestors for nonpublic data). **What data protection rules would be violated if a registrar otherwise lawfully discloses the data that the registrant has provided and has asserted is accurate, where the registrar has conducted the verification steps required by the RAA and any applicable law?**

We are keen to discuss the GAC's views on this topic.

Controllership

The GAC urged the GNSO Council to ask the EPDP to further address the issue of controllership.

The issue of controllership of the processing of personal data cannot be determined as a matter of policy: This is determined by the application of the law to the facts of a given processing operation. In ICANN org's view, this must be assessed after we know the specifics of the processing: who performs what processing, by what means, and for which specific purposes. In the SSAD, for example, we don't yet know exactly how/where/when/and by whom personal data will be processed (or even what personal data will be processed) because the system hasn't been designed yet. ICANN org would like more information from the GAC regarding the scope of its recommended policy work in this area, including how the EPDP might conduct policy development in this area without knowing these implementation details. **Did the GAC mean that ICANN org should not implement the Phase 2 recommendations until the recommended Phase 3 provides policy advice on this topic?**

Review of Contracted Parties' Disclosure Decisions

The EPDP Team recommended that discretion concerning whether or not to disclose requested data should, in most cases, lie with the contracted party. Because of this, ICANN Compliance will not be in a position to evaluate the substance of a contracted party's decision in response to a specific request. The EPDP Team took this approach in light of uncertainty about whether shifting the decision-making away from the contracted parties would remove associated liability for the results of that decision. In short, if the contracted parties are liable for the decision, it was recommended by the EPDP that the contracted parties should be the ones making that decision.

The GAC noted in its statement that granting contracted parties full discretion in reviewing disclosure requests "may undermine the obligation to ensure the continued viability of domain name registration data as a tool to vindicate the rights and interests of the public, agencies tasked with protecting the public, and commercial and intellectual property constituencies."

Could the GAC share more information about the legal basis for this "obligation" (obligation on who, based on which laws)?

In light of the uncertainties surrounding how shifting decision-making would impact liability of the contracted parties (if at all), ICANN org would like to better understand what would have been a preferable result for the GAC. Given the GAC’s acknowledgement “that under applicable data protection rules, including the GDPR, contracted parties would likely remain responsible for the decision whether to disclose domain name registration data, and they may face certain liability risks related to that decision[.]” **Is it the view of the GAC that contracted parties should face liability for this decision even if another party, such as ICANN Compliance, has a say in that decision, or is even solely responsible for making this decision? Or does the GAC believe that there is some other solution to this liability question, even if only internally between ICANN and the contracted parties rather than in relation to data subjects and data protection supervisory authorities?**

Prioritization of Requests

Could the GAC please share more information with respect to the legal basis for its recommendation that contracted parties should be required to prioritize consumer protection requests over other valid requests?

Legal/Natural

The GAC proposed that “distinguishing legal from natural persons during the registration process could include assigning legal persons into the category of persons whose data should be automatically processed” given that “[i]nformation concerning legal persons is not considered personal data under personal data protection regulations, including the GDPR[.]”

With regard to the availability of data, ICANN org agrees in principle with such an approach, while emphasizing existing residual risks arising from scenarios where the official title of legal persons bears the full or partial name of natural persons (*e.g.*, “John Doe & Sons Ltd”) who could thus be identified by the mere official title of the legal person.

ICANN org therefore kindly solicits the GAC’s opinion on whether a mechanism could be implemented as part of the registration process to check the official title of legal person entries for elements of real names belonging to natural persons.

With testing and appropriate sign-off from focus groups and regulatory bodies, this could perhaps be done automatically by matching the other name fields and/or through a user-selected checkbox, which the registrant can tick to indicate personal data components in the official title of the legal person.

In addition to the registrant name, there is also a possibility that a legal person’s registration data could include personal data, such as the email address or telephone number of a person who is the registrant’s contact. **Can the GAC provide more information on its views about how this scenario could be addressed?**

Regarding the GAC’s request that the EPDP team “focus upon the legal guidance provided to develop reasonable policies to permit the information of legal entities to remain public[.]” **Could the GAC explain what is envisioned here?**

The EPDP Phase 1 and Phase 2 recommendations do not prohibit the information of legal entities from being published. When the GAC said that it “believes that resolving the legal versus natural issue is critical for the entire SSAD model to meet its purpose and, at the same time, be compliant with applicable data protection laws,” **did the GAC mean that the information of legal persons must be required to be published in order to be compliant with applicable data protection laws, or merely that this would have been a preferable result?**

Anonymized Email

ICANN org notes the GAC’s suggestion that further feasibility analysis should be conducted concerning the use of anonymized email. **Can the GAC elaborate on what it means by “anonymized” in this context?** The statement notes the Priority 2 item, “feasibility of unique contacts to have a uniform anonymized email address.” As ICANN org understands it, requiring the use of a domain name uniquely relating to an individual registrant would not meet the definition of “anonymized” as contemplated under applicable data protection law.

ICANN org appreciates the willingness of the GAC to engage in this dialogue, as we all work together to implement a mechanism to provide access to registration data to meet the legitimate needs of law enforcement and other stakeholders and to promote consumer trust.

Best Regards,



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