

# ICANN | GAC

Governmental Advisory Committee

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

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*This document is a compilation of the GAC's Input on the [Initial Report](#) Phase 2 of the Expedited Policy Development Process (EPDP) on gTLD Registration Data, which was required to be [submitted](#) through a [specific 16-pages form](#). Questions on this document or any related matter may be sent to [gac-epdp@icann.org](mailto:gac-epdp@icann.org).*

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<b>Executive Summary of GAC Input</b>	

The draft recommendations set forth in the Phase 2 EPDP Initial Report intend to balance the rights of data subjects and those of third parties seeking to access non-public registration data for legitimate purposes. The GAC comments below focus upon those issues which it considers to be important in terms of public policy concerns and reflect areas where the GAC believe the Report could strike a better balance.

While recognizing the progress to date in the development of policy related to a Standardized System for Access and Disclosure (SSAD) for non-public registration data, the GAC emphasizes the need for the EPDP team to consider further:

- Specific accreditation needs of certain public authorities commissioning non-governmental or private entities for public policy tasks (Rec. #2)
- Immediate acknowledgment of receipt of an SSAD request (Rec. #5)
- Responsibility of contracted parties when delegating authorization activity to third parties (Rec. #6)
- Clarification of various aspects of automated disclosures: identification of decision makers, definition of law enforcement, jurisdiction for law enforcement requests, handling of erroneous automated assessments, and possible scope of automation decision by Contracted Parties (Rec. #7)
- Shortened time frame and stricter compliance requirements for response to urgent requests (Rec. #9)
- An Equitable fee structure that does not make it cost-prohibitive for governments to use the SSAD (Rec. #15)
- Logging, auditing and public reporting on data that measure disclosure rates (Rec. #17)
- Adequate representation of all relevant stakeholders in the welcomed “mechanism” to advise on the future evolution of the SSAD, as well as appropriate consensus processes to prevent affording veto power to single constituencies (Rec. #19 and question 49)
- Distinguishing the treatment and level of protection required for legal (versus natural) entities (question 55)
- The double shield of privacy afforded to registration using privacy/proxy services (question 55)
- The threat to the integrity of SSAD and its compliance with the GDPR in absence of assurances for registration data accuracy (question 55)
- Data transfers, in particular when crossing different jurisdictions (question 56)

Finally, the GAC shares two overarching concerns (in response to question 56) regarding its ability to fully assess the model proposed and the timeline for its implementation. In particular, the GAC notes that there are still a significant number of assumptions, ongoing discussions and open issues that prevent a full assessment of whether the EPDP Team’s recommendations do ensure legitimate access to non-public registration data. The GAC therefore emphasizes the public safety imperative for delivering an SSAD that effectively restores access to non-public registration data, while the “reasonable access” requirement of the Interim Policy (per the Temporary Specification) is made more effective and efficient.

## Level of Support of EPDP Phase 2 Preliminary Recommendations

Recommendations	Support as written	Support intent with wording change	Change required to intent and wording	Delete	No Opinion
1. Accreditation	X				
2. Accreditation of governmental entities		X			
3. Criteria and Content of Requests	X				
4. Third Party Purposes/Justifications	X				
5. Acknowledgement of receipt		X			
6. Contracted Party Authorization		X			
7. Authorization for automated disclosure requests		X			
8. Response Requirements	X				
9. Variable SLAs for response times		X			
9. Variable SLAs for response times - SLA matrix		X			
10. Acceptable Use Policy					
11. Disclosure Requirement					
12. Query Policy					
13. Terms of Use					
14. Retention and Destruction of Data					
15. Financial Sustainability		X			
16. Automation	X				
17. Logging		X			
18. Audits					
19. Mechanism for the Evolution of the SSAD		X			
Implementation Guidance					

## Revisions to Specific Recommendations

### Recommendation #2: Accreditation of governmental entities

This recommendation allows for accreditation of governmental authorities. The GAC notes, however, that countries'/territories' chosen accreditation authorities would need to coordinate with ICANN org in order to facilitate appropriate delivery and interoperability of credentials into the SSAD. The level of safeguards are well balanced and recognize both the needs of confidentiality for certain requests, such as those made by law enforcement, and the need for appropriate levels of transparency for non-sensitive requests.

The actual implementation of preliminary recommendation #2, including the arrangement with ICANN, is done by each country/territory according to their governmental and regulatory system. This includes the decision of whether the Accreditation Authority of each country/territory is limited to just one organization or applicable to multiple organizations.

The GAC recognizes that there are non-governmental organizations/private companies commissioned by, or collaborating with governments for pursuing public policy tasks, which should have an appropriate ability to become accredited. The issue of whether, how and when they are permitted to be accredited via a government's accreditation to the SSAD needs further consideration by the EPDP Team.

### Recommendation #5: Acknowledgement of receipt

The GAC recommends IMMEDIATE acknowledgement of receipt of an SSAD request, which could include via an automated system due to the fact that such acknowledgement by the responding party is important, so that the requestor has confirmation that its request has been received.

### Recommendation #6: Contracted Party Authorization

The GAC recommends automation of requests to the fullest extent possible consistent with the GDPR. This may include processing activities delegated to third parties when necessary. Part of Recommendation #6 currently reads: *"2. If deemed desirable, the Contracted Party MAY outsource the authorization responsibility to a third-party provider, but the Contracted Party will remain ultimately responsible for ensuring that the applicable requirements are met."*

The GAC recommends changing this recommendation to the following wording: *"If deemed desirable, the Contracted Party MAY outsource the authorization activity to a third-party provider, but the Contracted Party shall remain ultimately responsible for ensuring that the applicable legal requirements are met"*

The GAC emphasizes that while contracted parties may work with third parties on authorization activities: in terms of controllership, the Contracted Parties remain responsible and accountable for authorising disclosure. Therefore, the degree to which they can outsource this responsibility, by an agreement, to a third-party provider needs to be further examined. According to the latest correspondence from the Belgian DPA (4 December 2019) a controller "...cannot abdicate its responsibilities by virtue of a joint agreement."

## Recommendation #7: Authorization for automated disclosure requests

The GAC supports the intent of this recommendation but would like the EPDP team to clearly define all cases for automation including identification of who is making the decision. Whilst the GAC believes that there are a number of other cases that could be included at the start, the GAC highlights that these cases will need to be specified to avoid any confusion as to what particular use case applies to a specific request.

The GAC observes that the current proposal regarding requests from law enforcement does not provide guidance on what is/are the relevant jurisdictions to take into account in determining whether a law enforcement request takes place in a “local or otherwise applicable jurisdiction” and hence qualifies for an automated disclosure response. The GAC recommends that the location of the law enforcement agency making the request and location of the registrar providing the data constitute an important, though not exclusive criteria to consider. For example, registrars may have offices in multiple jurisdictions and would automate response to requests from law enforcement agencies within those jurisdictions.

In addition, there needs to be more consideration of what happens in case of erroneous automated assessment and recommendations for release by the central gateway, and subsequent release of personal data by relevant contracted parties.

Regarding the following language: “A Contracted Party MAY request the Central Gateway to fully automate all, or certain types of, disclosure requests.” The GAC advises that further clarification is needed as to whether the automation refers to requests to a particular Contracted Party (CP) or is intended for all CPs. It is also unclear whether particular CPs may choose to automate similar requests from particular requesters.

The GAC recommends that the scope of this automation is widened once the appropriate safeguards and procedures are put in place. These procedures should ensure that the multi-jurisdictional needs of law enforcement to protect the public and combat crime are met, whilst maintaining appropriate levels of data protection for the data subject.

For the purposes of the SSAD, Law Enforcement should be defined as including any government authority vested with law enforcement or investigative authority in civil or criminal matters.

## Recommendation #9: Determining Variable SLAs for response times for SSAD

The GAC’s representatives emphasized during EPDP Team deliberations that the currently proposed “1 business day” service level agreement (SLA) for “urgent requests” is too long. Urgent requests are “limited to circumstances that pose an imminent threat to life, serious bodily injury, critical infrastructure (online and offline) or child exploitation.” The current SLA could result in a compliant response time of 72 hours or more if the request falls over a holiday weekend. Moreover, the SLA’s are phased over 18 months and never achieve 100% compliance with this 1-business day response requirement.

The GAC strongly recommends no more than a 24-hour response time for this narrowly defined category of requests requiring expedited responses in order to protect the public from grave harm. The GAC also urges swift implementation of this requirement with as close to 100% compliance as possible.

#### Recommendation #9: Determining Variable SLAs for response times for SSAD - SLA Matrix

The GAC observes that the proposed review times for response and compliance targets (every six months in the first year and annually (depending upon the outcome of the first review) may be insufficient to identify and address potential problems. If there is a significant failure to meet SLA targets, it is important that any review mechanism takes place often enough to identify problems early on, rather than waiting 12 months or more to even begin an assessment. Accordingly, the GAC recommends that the reviews take place quarterly during the first year, with an opportunity to move to every six months if the first assessment indicates widespread and successful compliance.

#### Recommendation #15: Financial Sustainability

The GAC notes that the governmental users of the SSAD are necessarily resource constrained, and by and large have little flexibility in adjusting their budgets to accommodate new financial commitments. Therefore, the GAC welcomes the EPDP team's recognition that "governments may be subject to certain payment restrictions," and that the "fees associated with using the SSAD may differ based on ... user type." The GAC understands that the SSAD must be financially self-sufficient, and looks forward to working in the implementation phase to develop an equitable fee structure that does not make it cost-prohibitive for governments to use the SSAD.

#### Recommendation #17: Logging

The GAC recommends that data to measure disclosure rates **MUST** be logged and archived and that this data **MUST** be audited and publicly reported.

#### Recommendation #19: Mechanism for the Evolution of the SSAD

The GAC welcomes the EPDP team's recognition that the SSAD will likely need to evolve over time. The community is expected to gain more experience with the strengths and weaknesses of the SSAD during its implementation. Also, the GAC anticipates more information and guidance to become available on the applicability of relevant data protection law to the operation and evolution of the SSAD. Issues that are currently complex and uncertain (for example, the degree to which decisions may be made in a centralized and automated manner) may become more clear and predictable with time. This may result in the need to adjust certain policy recommendations in a swift and efficient manner, as opposed to the lengthy and resource intensive process required by a new Policy Development Process. Hence the GAC supports a mechanism for the evolution of the SSAD.

However, in the interest of efficiency and fairness, it is vital that any mechanism or advisory committee tasked with advising on adjustments to the SSAD reflects a balanced cross-section of community stakeholders to weigh on these important issues. The GAC had expressed its concerns early on in the EPDP process that it lacked sufficient representation on the EPDP in light of its mandate to serve the public interest. The GAC therefore recommends that any "mechanism" or advisory team shall include adequate representation of all relevant stakeholders.

The evolving mechanism encompasses a recommendation that increases automation of disclosure. This will likely entail a shift of responsibility from the Contracted Parties to the central gateway with regards to the assessment of the request. As a result, the GAC notes that there needs to be a clear definition of which parties remain responsible for the disclosure decisions.

## Mechanism for the Evolution of the SSAD

Question 49: If no suitable existing processes / procedures can be used, what type of mechanism should be created factoring in: Who should guidance be provided to? How is guidance developed / agreed to? How should it be structured?

Any mechanism must include fair representation of the GAC, the entity tasked with responsibility over ICANN activities that impact upon public policy. The guidance should be developed through a consensus process but should also permit moving forward if there is substantial consensus (i.e., a single constituency should not be able to veto the will of the rest of the constituencies).

## Reporting Requirements

Question 54: What type of reporting should be required as part of SSAD?

For transparency purposes, the number of requests by user group categories (e.g., law enforcement, individuals, IP rights holders, etc.), disposition of those requests, response time, and number and disposition of complaints should be clearly and prominently reported on a quarterly basis on the ICANN website in a section devoted to Domain Name Registration Data issues.

## Other Comments

Question 55: Are there any recommendations the EPDP Team has not considered? If yes, please provide details below.

The GAC encourages the EPDP team to consider and provide guidance on **the need to distinguish the treatment and level of protection required for legal (versus natural) entities**. As the GAC has advised, the GDPR only protects personal data and hence the non-personal data of legal entities should remain available to the public.

The GAC also notes that there is still no policy applicable to domains registrations subject to **privacy or proxy services**. Because these services will, in effect, create a double shield of privacy, it is important for the EPDP to consider and develop policies applicable to domain name registrations using these services. In particular, it is important that the Registration Data record clearly indicates whether the data is protected by a Privacy/Proxy service.

The GAC notes with concern that there is no assurance of **data accuracy**, and this missing concept threatens the integrity of SSAD and its compliance with the GDPR from the outset. As the GAC and ALAC stated in their [Joint Statement on the EPDP](#) (13 March 2019): "In accordance with Article 5 of the GDPR, every reasonable step **MUST** be taken to ensure the accuracy of the data in view of the purposes for which it is processed."

Question 56: Are there any other comments or issues you would like to raise pertaining to the 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 issue of data transfers**, in particular when crossing different jurisdictions, is not addressed in this report. Currently the proposed model foresees transfers from CPs to requestors without examining whether other applicable laws allow this. The GAC recommends that EPDP Team examines and addresses these issues more thoroughly in its Final Report.

**Regarding implementation timeline**, the GAC emphasizes again the urgent need for a standardized system of access to non-public domain registration data. Therefore, implementation must proceed as soon as possible after the Recommendations are approved and the implementation team must be held to a strict timeline. It is a public safety imperative that regular access be restored as soon as possible. In addition, while the new SSAD model is being implemented, the GAC expects that “reasonable access” to non-public registration data, as mandated by the Temporary Specification, must be made more effective and efficient. The GAC noted in its Barcelona Communiqué that the Temporary Specification has “*significantly affected law enforcement and cyber-security professionals’ ability to investigate and mitigate crime using information that was publicly available in the WHOIS system previously.*”

The GAC welcomes the significant progress reflected in the initial report. Nevertheless, the added-value and practical usability of the recommendations to ensure legitimate access still depends on a significant number of assumptions and ongoing discussions, including e.g. the extent to which decisions on the disclosure of registration data can be automated. Taking into account these assumptions and ongoing discussions, as well as the open issues highlighted here, the GAC considers that the **full assessment of the model proposed** can only take place, at the earliest, at the time of the publication of the final report, or at the latest, at the time of the implementation of the proposed policy.