

# ICANN | GAC

Governmental Advisory Committee

6 October 2021

Mr. Maarten Botterman, ICANN Board Chairman

**Subject: ICANN Board Clarifying Questions on ICANN70 GAC Communiqué Advice regarding Phase 2 of the Expedited Policy Development Process (EPDP) on gTLD Registration Data**

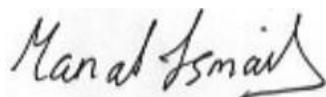
Dear Maarten,

Following our recent [GAC Communiqué Clarification Call](#) (29 July 2021) in the context of which the ICANN Board reiterated its Clarifying Questions regarding the GAC ICANN70 Communiqué Advice<sup>1</sup> pertaining to the [GAC Minority Statement on the Final Report of EPDP Phase 2](#) (24 August 2020), the GAC wishes to provide the attached response.

The GAC would like to grasp this opportunity to highlight its role to provide input on public policy issues, and that in so doing, the GAC does consistently take into account, inter alia, relevant laws and legal opinions. This applies to any PDP to which the GAC contributes.

The GAC hopes that these answers can help focus the attention of all ICANN stakeholders towards the timely delivery of gTLD registration data services that comply with applicable laws and effectively address the important public policy issues laid out in the [GAC Principles Regarding WHOIS Services](#) (28 March 2007) as recalled in the [GAC Abu Dhabi Communiqué](#) (1 November 2017).

Best regards,



Manal Ismail  
Chair, Governmental Advisory Committee (GAC)  
ICANN

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<sup>1</sup> See page 10 at <https://gac.icann.org/activity-inputs/public/FINALIZED+ICANN71-Virtual-Communique-CO-Scorecard.pdf>

## **Preamble to the GAC’s Responses**

As a general matter, the GAC highlights its role to provide input on public policy issues. Both ICANN and the Board have paths to seek legal advice and have sought such legal advice throughout the policy development process with regard to gTLD registration data. As discussed further below, the GAC has considered that legal advice and such advice has informed the GAC’s public policy inputs.

## **GAC Responses**

### **ICANN Board’s Introduction to its Clarifying Questions<sup>2</sup>**

*During its previous ICANN70 clarifying dialogue on this topic with the GAC (21 April 2021) the Board presented several clarifying questions regarding the GAC Minority Statement on Recommendations contained in the Final Report of Phase 2 of the EPDP on gTLD Registration Data, which appeared to help form the GAC’s advice on the EPDP Phase 2 Final Report. A number of those questions appear to be still relevant regarding the GNSO EPDP generally. They are re-produced here and the GAC is asked to re-consider them as part of this ongoing dialogue on this issue. Based on this, the Board wishes to re-ask the following clarifying questions.*

### **Board Clarifying Question 1**

***Can the GAC provide more information on the legal risks associated with the possibility that a legal person’s registration data could include personal data? In addition, has the GAC taken into account the recent legal advice from Bird & Bird on this topic to the EPDP Phase 2A team?***

#### **GAC Response:**

This question was analyzed and discussed extensively during EPDP Phase 2A. The EPDP Phase 2A Final Report, including the GAC Minority Statement, provides insight and guidance on the question of handling personal data as part of a legal person’s registration data. As part of the EPDP policy development process Phase 2 and Phase 2A PDP, ICANN sought legal advice on the issue of the treatment of domain name registration data from legal entities and the GAC assumes such advice was shared with the Board. The GAC has taken into account the advice contained in both legal memos provided by ICANN’s counsel (Bird & Bird legal memos dated January 25, 2019 and April 6, 2021). Moreover, the GAC cited this legal advice during the EPDP team meetings and in the GAC’s Phase 2 and Phase 2A Minority Statements. As referenced in the GAC’s Phase 2a Minority Statement, the “legal guidance received underscores the low risks associated with registration data from legal entities. To the extent that personal information is included in a legal entities’ registration data, it is likely to be “low sensitivity” because it relates to an employee’s work details rather than their private life. Moreover, if the proper safeguards are followed, the legal risks associated with such publication, even in the event of inadvertent mistakes, seem low.” See 6 April 2021 Bird & Bird Memorandum.

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<sup>2</sup> See ICANN Board document [GAC Advice – ICANN71 Virtual Policy Forum Communiqué: Clarifying Questions and Updates – for 29 July 2021 Board-GAC Meeting](#), Section “Board Follow-Up on Previous Clarifying Questions” on Page 10:

## Board Clarifying Question 2

***In the SSAD context, can the GAC confirm whether inaccuracy will result in liability only vis-à-vis data subjects, or even toward third parties relying on the accuracy of the data disclosed? As with the topic of legal vs. natural, the EPDP Phase 2A team has also recently received advice from Bird & Bird on this topic. The Board is interested to hear the GAC's input on this advice.***

### GAC Response:

As noted in the preamble to this response, the mission of the GAC is to provide input on public policy issues. The GAC is not in a position to provide legal advice to the Board.

The GAC highlighted in its Phase 2 Minority Statement that the Charter for the EPDP tasked the team with assessing “framework(s) for disclosure [...] to address (i) issues involving abuse of domain name registrations, including but not limited to consumer protection, investigation of cybercrime, DNS abuse and intellectual property protection, [and] (ii) addressing appropriate law enforcement needs . . .” The effectiveness of Domain Name Registration data for these purposes (indeed for any purpose, including the ability of contracted parties to reach their customers) is contingent upon the data’s accuracy. The GAC also indicated that consistent with the GDPR, it is essential that data accuracy and quality is ensured in relation “to the purpose for which they [the data] are processed” and that disclosure of inaccurate data would defeat the purpose of SSAD and would risk violating data protection rules. The GAC considered the legal advice received from Bird&Bird on this topic and noted its reference to the UK Information Commissioner’s guidance: *“The more important it is that the personal data is accurate, the greater the effort you should put into ensuring its accuracy. So if you are using the data to make decisions that may significantly affect the individual concerned or others, you need to put more effort into ensuring accuracy.”*

Moreover, accuracy of gTLD registration data is both an obligation under ICANN contractual agreements, and a general data protection principle under the GDPR that the controllers should respect, in order to guarantee the protection of individual rights. It is therefore important to ensure accuracy and an effective way to do so is to enforce ICANN contractual obligations. The Board’s response to the GAC (annex to the Board’s scorecard<sup>3</sup>) suggests that ICANN contractual obligations guarantee a high level of accuracy of gTLD registration data. The GAC has expressed on several occasions that it has a different perception as to the level of accuracy achieved so far. Notwithstanding the forthcoming scoping exercise on accuracy, the GAC is looking forward to the consideration the Board will give to its accuracy-related concerns.

## Board Clarifying Question 3

***Given that contracted parties are responsible and liable for disclosure, how did the GAC expect the EPDP to have concluded with a centralized rather than a fragmented disclosure system? Does the GAC believe that the law supports a centralized system? If so, what is the source for this interpretation of the law? How does the GAC envisage ICANN compliance being able to be in a position to evaluate the substance of a contracted party’s decision and compel possibly a different disclosure decision than the one taken by a contracted party, when the contracted party is legally responsible and liable for that decision?***

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<sup>3</sup> See on page 5 at <https://www.icann.org/en/system/files/files/resolutions-icann70-gac-advice-scorecard-12may21-en.pdf>

GAC Response:

This question appears to misunderstand the GAC's concerns. The GAC expressed three related concerns in its Minority Statement: 1) the extent of fragmentation reflected in the Phase 2 Recommendations (the disclosure recommendations: "rely almost entirely upon the individual assessments and decisions of the more than 2000 ICANN accredited registrars"), 2) the sparse recommendations related to automated disclosure (only two categories of automated responses and insufficient mechanisms to expand the categories of requests appropriate for automated disclosures in response to future legal guidance or even changes in applicable privacy law) and 3) the lack of enforceable standards to review disclosure decisions. The GAC has highlighted the challenges caused by fragmentation in many of its prior inputs noting that the "lack of consistent policies to access non-public information causes delays" which may "impede investigations and may permit potentially injurious conduct to continue to harm the public." Further, as this question recognizes, the lack of clear standards regarding disclosure decisions results in a scenario in which the contracted parties' disclosure decisions are largely unreviewable by ICANN Compliance. The combination of a fragmented system with insufficient mechanisms to evolve via increased automation and a lack of clear standards to permit challenges and review of disclosure decisions, raises questions about how well the system will be able to meet the needs of its users.

**Board Clarifying Question 4**

***Does the GAC feel that ICANN org should continue to pursue clarity regarding the question whether shifting decision-making would impact liability of the contracted parties /the Strawberry model with the European DPAs***

GAC Response:

It is not within the remit of the GAC to determine the nature of the interactions between ICANN and the competent data protection authorities. The GAC would like to note that the SSAD is the model developed by the ICANN multi-stakeholder community and, while assessing other models that could serve the purpose of identifying best practices and possible improvements, we believe the work of ICANN and the ICANN community should focus on the SSAD and its implementation.

**Board Clarifying Question 5**

***The issue of controllership of the processing of personal data cannot be determined as a matter of policy. It is determined by the application of the law to the facts of a given processing operation. Did the GAC take this into consideration when formulating its advice?***

GAC Response:

The GAC would like to reiterate that it would see benefit in exploring further the question of joint controllership between ICANN and the contracted parties, with a view to bringing more clarity on the status and role of each of the data controllers and processors for what concerns the processing of gTLD registration data. Should ICANN and the contracted parties be found to be joint controllers on specific data protection activities, ICANN could set a joint controllership agreement, and determine together with the Contracted Parties their respective obligations to comply with the GDPR and other similar data protection regimes. Legal advice provided during EPDP Phase 2, as well as

previous correspondence with European DPAs<sup>4</sup> would encourage exploring this important question as a matter of priority in the ICANN policy development cycle.

## Board Clarifying Question 6

***In the SSAD, 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. How does the GAC envisage policy development in this area without knowing these implementation details?***

### GAC Response:

ICANN's Bylaws (Annex A) for expedited policy development recognize that the typical sequence for policy development involves setting policy to the extent possible, and if the policy recommendations receive approval, implementation follows.

The policy development process envisions this sequence and the entire community has to deal with the challenges of developing policy without knowing the full details of implementation. The EPDP related to gTLD Registration Data has concluded its Phases 1, 2, and 2A policy development deliberations and should now move to policy implementation (therefore the reference to further policy development, contingent on awareness of implementation details, is unclear).

As expressed by the GAC on several occasions, it is essential that ICANN develops and now implements a revised policy on gTLD registration data as a matter of urgency, in order to comply with its mission to ensure the security, stability and resilience of the internet.

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<sup>4</sup> See <https://www.icann.org/en/system/files/correspondence/stevens-to-marby-04dec19-en.pdf> and <https://www.icann.org/en/system/files/correspondence/falque-pierrotin-to-chalaby-marby-06Dec17-en.pdf>