



**Comment on the Final Report  
of the Temporary  
Specification for gTLD  
Registration Data  
Expedited Policy  
Development Process  
(Phase 1)**

Status: FINAL

Version: 4.0

17-April-2019

**Business Constituency Submission**

**GNSO//CSG//BC**

## BACKGROUND

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants. As defined in our Charter, the mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

## BC COMMENT ON WORK TO DATE

On 20-Feb-2019, the Final Report of the Temporary Specification for gTLD Registration Data was posted for public comment.<sup>1</sup> The GNSO Council approved the policy recommendations on 4-March-2019.

The Business Constituency thanks the members of the EPDP Working Group for their tireless efforts in developing this Final Report. As was the case in the BC's earlier comments on the Initial Report of the EPDP on the Temporary Specification for gTLD Registration Data, the BC applauds the progress made to identify the purposes for the collection, storage, transfer, and disclosure of registrant data.<sup>2</sup>

## IMPORTANCE OF AN IMMEDIATE PHASE 2 START

The BC remains united with the community in its desire to complete the EPDP work and favors an *immediate* start of Phase 2. While the BC recognizes the EPDP team may be fatigued and is experiencing membership turnover, we nonetheless request that the Board endorse an efficient reformation of the EPDP team (including a successor Chair) and prompt commencement of work. The BC points out that the community patiently and persistently dealt with Phase 1 issues while delaying consideration of Phase 2 issues. Now is the time for Phase 2 matters to come to the fore. This is essential to ensure that ICANN is faithfully complying with the GDPR which requires a balance struck between privacy protection and the legitimate interests of third parties.

Because time is of the essence, the BC respectfully suggests that the Board assign the same urgent priority to Phase 2 as it did with Phase 1. As expeditiously as possible, factoring in the important work of the TSG and on the Unified Access Model, ensure access to personal data in domain registration data by parties with a legitimate interest in such data. In parallel, ICANN should continue to explore its ability to assume legal responsibility for purposes of providing access to Whois data.

During Phase 2, the BC believes that it is critical to the security and stability of the domain name system to establish a uniform, reliable and predictable system for accessing non-public registrant data, in part to address the ongoing damage being done to investigatory capabilities. This of course is in line with the findings of and advice from other parts of the community. Specifically:

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<sup>1</sup> See ICANN public comments page at <https://www.icann.org/public-comments/epdp-recs-2019-03-04-en>

<sup>2</sup> 21-Dec-2018, BC comment on the Initial Report of the EPDP on the Temporary Specification for gTLD Registration Data at <https://www.icann.org/public-comments/epdp-gtld-registration-data-specs-initial-2018-11-21-en>

- NTIA statement: “The U.S. government’s position on this is clear: the loss of a public Whois without a predictable and timely mechanism to access redacted information has little benefit for consumer privacy, and major benefits for cyber-criminals.”<sup>3</sup>

and

“...it must be noted, issues remain. Yet to be addressed is development of a technical solution, and policies associated with disclosure and access to non-public WHOIS information. Now it is time to deliberately and swiftly create a system that allow for third parties with legitimate interests, like law enforcement, IP rights holders, and cybersecurity researchers to access non-public data critical to fulfilling their missions. NTIA is expecting this second phase of the discussion to kick off in earnest in the coming weeks, and to achieve substantial progress in advance of ICANN’s meeting in Montreal in November.”

- Impact of change in Whois availability to users: “We have determined that changes to Whois impair blacklisting, and expose users of government and private networks, internet and hosting providers to various online threats that could have been preemptively stopped had Whois contact data remained available.”<sup>4</sup>
- Impact of change in Whois Availability upon security investigators: “From our analysis of over 300 survey responses, we find that the changes to WHOIS access following ICANN’s implementation of the EU GDPR, the Temporary Specification for gTLD Registration Data (“Temp Spec”, adopted in May 2018), is significantly impeding cyber applications and forensic investigations and allowing more harm to victims.”<sup>5</sup>
- Policy process inadequate: “...from the perspective of IP rights holders, law enforcement agents, child protection advocates and cybersecurity experts, the EPDP fell far short of developing policy that conformed to the actual scope of GDPR and that balanced the rights of domain registrants with the global public interest.”<sup>6</sup>
- GAC endorsement: There is endorsement for efficient work from the GAC’s Kobe Communique<sup>7</sup>, where it formally advised the Board that it should:
  - “Take necessary steps to ensure that the GNSO EPDP on the Temporary Specification for gTLD Registration Data institutes concrete milestones, progress reports and an expeditious timeline, similar to Phase 1, for concluding Phase 2 activities;
  - Take necessary steps to ensure that the scope of phase 2 activities is clearly defined with a view to expeditious conclusion and implementation;

<sup>3</sup> <https://www.ntia.doc.gov/speechtestimony/2019/remarks-assistant-secretary-redl-fda-online-opioid-summit>

<sup>4</sup> <https://www.securityskeptic.com/2019/03/facts-figures-whois-policy-changes-impair-blacklisting-defenses.html>

<sup>5</sup> <https://www.m3aawg.org/sites/default/files/m3aawg-apwg-whois-user-survey-report-2018-10.pdf>

<sup>6</sup> <https://www.markmonitor.com/mmblog/epdp-on-domain-registration-data-one-step-forward-two-leaps-back>

<sup>7</sup> <https://gac.icann.org/contentMigrated/icann64-kobe-communique>

- Make available the necessary resources for Phase 2 to expeditiously advance on the complex legal issues deferred from Phase 1;
- Consider instituting additional parallel work efforts on technical implementations, such as that carried out by the Technical Study Group, for purposes of informing and complementing the EPDP's Phase 2 activities;
- Facilitate swift implementation of the new Registration Directory Services policies as they are developed and agreed, including by sending distinct parts to implementation as and when they are agreed, such as the questions deferred from Phase 1;
- Consider re-starting implementation processes for relevant existing policies, such as the Privacy Proxy Services Accreditation Issues Policy.”
- Joint GAC-ALAC statement: The above from the GAC is bolstered by its joint statement with the ALAC<sup>8</sup>, which reads, in part:
 

“The GAC and the ALAC would like to remind the community of the importance of protecting the public interest. GTLD registration data is used by, among others, law enforcement, cybersecurity professionals, CERTs and those enforcing intellectual property rights online including brand protection as well as businesses, organizations and users assisting in combating online fraud.”
- SSAC endorsement: The Security and Stability Advisory Committee (SSAC) has officially supported rapid Phase 2 movement, and in SAC104<sup>9</sup> detailed the ongoing harms of lack of access.
- Board endorsement: On 12-March-2019, during the Kobe meeting, the ICANN Board, via Board member Chris Disspain, also underlined its desire to see rapid progress: “The Board is very clear, I think, that this needs to be done in a timely manner. And Keith Drazek made a statement in the GNSO Council meeting that the GNSO Council was also very clear that it needed to be done in a timely manner.”<sup>10</sup>

With the above as context, the BC believes it is critical that the Board formally set a “date certain” for the conclusion of Phase 2. Already, and unfortunately, there are calls from corners of the community to migrate Phase 2 into a standard PDP, which as the Board is well aware can take considerable time, or to otherwise delaying progression of Phase 2.

Assuming the Board is fully committed to addressing **all** the issues important to the community, it should provide a deadline for the EPDP team to meet. The Board should also pledge to make resources available for a truly impartial mediator to Chair the EPDP. Further, the Board should instruct the CEO and ICANN Org to provide a timeline to finalize the TSG draft technical model. Finally, in order to negate the potential claim of insufficient resources, the Board must pledge to make adequate and independent legal expertise available to the EPDP team prior to, and concurrent with, Phase 2 work. More

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<sup>8</sup> <https://www.icann.org/en/system/files/correspondence/hilyard-to-chalaby-25mar19-en.pdf>

<sup>9</sup> <https://www.icann.org/en/system/files/files/sac-104-en.pdf>

<sup>10</sup> <https://static.ptbl.co/static/attachments/201526/1552593866.pdf?1552593866>

specifically, ICANN should fund outside counsel to the EPDP, similar to the approach used for the CCWG-Accountability working group.

While the GNSO Council bears primary responsibility for managing the policy development process, Board members are obligated under the Bylaws to act in what they reasonably believe is in the best interest of ICANN. As evidenced amply by the above findings and advice from the community, further delays on access to nonpublic registration data for legitimate purposes are not in the best interests of ICANN.

## **PRIORITIZATION OF SPECIFIC ISSUES IN PHASE 2**

The BC encourages the Board to prioritize specific issues as a way of signaling their importance and setting the expectation that they will be addressed in Phase 2. Namely:

- Identifying the third party legitimate interests that fall under Purpose 2, focusing on the common uses identified by the above-referenced GAC-ALAC statement.
- Examining the models developed by the Technical Study Group (TSG)<sup>11</sup> and the Accreditation and Access Model (AAM)<sup>12</sup> developed by the BC and IPC as a way to develop the Unified Access Model.
- Recognizing the significance and priority of issues raised by the GAC, ALAC and SSAC (particularly in SAC 101<sup>13</sup> (advisory regarding access) and SAC 104<sup>14</sup> (comment on EPDP initial report)) regarding accuracy, access, natural/legal person distinction, scientific research, and technical contacts.
- Securing funding for both a compensated Chair and mediation services at face-to-face meetings, with a view of encouraging consensus and consideration of all stakeholder positions.
- In parallel with the EPDP, expediting the technical and operational implementation of an access model, including securing resources to examine proofs-of-concept developed by the TSG and others.
- Addressing problems with access under the Temp Spec by:
  - Instructing ICANN Org to develop best practices for access to redacted registrant contact data in advance of the completion of the policy process and Phase 2 of the EPDP; and
  - Instructing ICANN Org to enhance its compliance activity with respect to enforcement of the Temp Spec, and/or the new EPDP policy, and produce a report with data on compliance rates with respect to requests for redacted data.

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<sup>11</sup> <https://www.icann.org/en/system/files/files/draft-technical-model-access-non-public-registration-data-06mar19-en.pdf>

<sup>12</sup> <https://mm.icann.org/pipermail/accred-model/attachments/20180720/8d8c713f/DRAFT-WHOISAccreditationandAccessModelv1.7-0001.pdf>

<sup>13</sup> <https://www.icann.org/en/system/files/files/sac-101-v2-en.pdf>

<sup>14</sup> <https://www.icann.org/en/system/files/files/sac-104-en.pdf>

- Instructing ICANN Org to restart stalled community consensus-established initiatives, including cross-field validation, thick Whois and privacy/proxy implementation.

### **THE BC'S MARCH 4, 2019 VOTE ON CONSENSUS**

As noted in the public statement read into the record by our GNSO Councilors at the Council meeting on 4-March-2019, the BC explored at length various potential options for addressing our members' concerns with the EPDP's Phase 1 outcomes; however, we were unable to resolve those concerns in a manner that would allow a vote in favor. As stated in the IPC/BC Consensus Statement:

*[W]hile we welcome progress made by the EPDP team and are thankful for the efforts of our colleagues and ICANN Org, we cannot support certain parts of the Final Report as set forth below. Our hope is that by clarifying our position, consistent with numerous BC and IPC statements on WHOIS, GDPR, and the Interim Report, the EPDP team will redouble its effort to achieve full consensus. We remain committed to working with the community and the EPDP team to develop policy that meets the needs of the full community and honors ICANN's commitment to ensure GDPR compliance while maintaining the existing WHOIS system to the greatest extent possible.*

### **RESTATEMENT OF INPUT REGARDING FINAL REPORT RECOMMENDATIONS**

The BC continues to be concerned about the following recommendations. Though the BC filed a minority statement (see p. 151 of the Final Report) we urge appropriate consideration of our concerns by the Board—especially in view of convergence between our concerns and GAC input and advice to the Board on public policy issues raised by these recommendations:

- Recommendation #1: This recommendation does not address critical security and stability needs for data. Purpose 2 should include consumer protection, cybersecurity, intellectual property, or law enforcement.
- Recommendation #12: This recommendation should support confirmation of the correctness / accuracy of the existing Organization field data. In addition, implementation timelines should be defined and accepted to ensure that the implementation of this policy is completed as efficiently as possible.
- Recommendation #14: It is critical that the PPSAI be implemented within 90 days after the Board adopts the EPDP recommendations. To that end, the Board should instruct the CEO and ICANN Org to immediately recommence paused community consensus initiatives, namely the PPSAI, thick Whois, and cross field validation.
- Recommendation #16: Phase 2 will address the issue of geographic distinction, but the team must rely on the proposed study of geographic distinctions in its deliberations.

- Recommendation #17: Phase 2 work must resolve the differentiation between legal and natural persons.<sup>15</sup>
- Recommendation #18: The BC seeks clarification to make explicit that a Registrar or Registry Operator will reasonably consider a disclosure request.

### **IMPLEMENTATION OF PHASE 1 RECOMMENDATIONS**

To avoid unnecessary delay, the BC recommends consideration of Implementation Review Team (IRT) resources and deadlines now vs. later. In fact, the BC respectfully requests that the Board instruct the CEO and ICANN Org to begin any necessary planning work now for Phase 1 implementation and to monitor Phase 2 progress to ensure there are no barriers or delays to implementation.

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This comment was drafted by Mason Cole, Susan Kawaguchi, Statton Hammock, and David Fares, with edits from Claudia Selli and Andy Abrams.

It was approved in accord with our Charter.

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<sup>15</sup> The BC reminds the Board that many ccTLD registries (including many in Europe) successfully differentiate between natural and legal persons in the registration process. These include: .AT, .BE, .CZ, .DK, .ES, .EU, .FI, .FR, .IE, .IT, .LT, .LV, .LU, .MT, .NL, .PL, .PT, .SI and .SE.