

ICANN Business Constituency

Early Input for Temp Spec EPDP Working Group

31-Aug-2018

Thank you for the opportunity to provide early input into the working group's deliberations on the [Temporary Specification for gTLD Registration Data](#) ("Temp Spec"). As indicated by our previous communications¹²³ to ICANN Org, the ongoing development of policy relating to registration data is critical to the business user community.

The Business Constituency (BC) remains worried about various impacts of the Temp Spec on the ability of stakeholders to prevent or investigate cybercrimes, protect public health, guard against intellectual property infringement, and mitigate other harms. Our comment addresses the BC's priority areas of concern.

Redaction of legal persons' names (see Appendix A, Sections 2.3 and 2.4)

GDPR encourages a distinction between natural persons and legal persons. So the redaction of legal persons' names from the WHOIS record is something that is not mandated by GDPR. The BC therefore encourages the EPDP working group to amend Appendix A, Sections 2.3 and 2.4 to make the distinction between natural and legal persons. As such:

2.3 In response to domain name queries **for domain names registered by natural persons in the European Economic Area only**, Registrar and Registry Operator MUST treat the following Registrant fields as "redacted unless the Registered Name Holder has provided Consent to publish the Registered Name Holder's data:

2.4 In response to domain name queries **for domain names registered by natural persons in the European Economic Area only**, Registrar and Registry Operator MUST treat the following fields as "redacted unless the contact (e.g., Admin, Tech) has provided Consent to publish the contact's data:

"Reasonable Access" (see Appendix A, Sections 4.1 and 4.2)

The BC is concerned about the over lack of a definition of "reasonable access" in the context of access to non-public registration data. The ensuing ambiguity has led contracted parties to make their own interpretations, many of them needlessly restrictive, which has then led to over-compliance with GDPR and fragmentation of the WHOIS system. We find that a description is within scope of the EPDP working group, which should work toward a practical definition of "reasonable access."

Some have suggested that reasonable access may be achieved via the legal system. The BC believes this to be a spurious argument that presents users and contracted parties with burdensome processes.

The BC instead advocates for a sensible approach to access -- one that can be relied upon by those with legitimate reasons for access and contracted parties alike. Reasonable access can flow from an effective process for handling data requests, which could include:

¹ <https://www.icann.org/en/system/files/correspondence/selli-to-chalaby-06apr18-en.pdf>

² <https://www.icann.org/en/system/files/correspondence/business-constituency-to-icann-board-11may18-en.pdf>

³ <https://www.icann.org/en/system/files/correspondence/selli-to-board-marby-jeffrey-21jun18-en.pdf>

- A request that adheres to the parameters of the Temp Spec;
- A review by the contracted party of the data request; and
- An expeditious timeline for action and resolution by the contracted party;

The BC notes the intersection of the recently released [Uniform Access Model](#) (UAM) and the efforts of the EPDP. We urge the working group to specify the types of access available to parties that are accredited using the UAM.

E-mail Redaction

Even for natural person registrants, certain data elements that are designated for redaction should not be redacted. At minimum, the registrant's e-mail address, as supplied to and verified by the registrar, should not be redacted. These views have been expressed repeatedly by the BC, IPC, the GAC and others over the past months both before and after the Temp Spec was issued.

Data Necessary for Performance of a Contract

Although GDPR recognizes several grounds for processing personal data, in addition to for legitimate purposes, the Temp Specification fails to recognize them. For example, processing that is necessary for the performance of a contract to which the data subject is a party (Article 6(1)(b)). A core obligation under the Registration Agreement is the obligation to submit to UDRP and URS for the resolution of trademark disputes with third parties. This must be specifically recognized under the new consensus policy.

This, naturally, is separate from legitimate purposes. The Temp Spec fails to recognize these additional grounds.

Balancing Test

The BC notes that the balancing test mentioned in the Temp Spec-- the rights of individuals vs. legitimate purposes -- does not seem to apply to other areas of the GDPR, such as access for law enforcement or for the data that is necessary for the performance of a contract. The BC recommends that the consensus policy limit the balancing test to apply only to those instances that are specified under GDPR.

Volume queries and searchable WHOIS

The BC reiterates that the capability to perform volume queries and to have access to a searchable WHOIS database is critical to the outcomes necessary to a healthy and secure DNS. We encourage the WG to move toward this important solution. As stated in the [European Commission's "technical input"](#) in February 2018:

The data involved could include all current registration information, including email and phone number of registrant, name and postal address of technical and administrative contacts, and billing details as well as historical domain data retained in line with the principle of storage limitation.

The records should also be searchable in such a way as to allow for cross-referencing of information, e.g., where the same data set was used to register several sites.

Fragmentation

As mentioned above, the WHOIS system has now become fragmented. Differing types of records are produced in inconsistent formats with virtually no reliable avenue for warranted access. This presents a

danger to the health of domain name system itself. Unfortunately, neither GDD nor ICANN's Contractual Compliance Department has published guidance or advisories to encourage the standardization of processes in light of the Temp Specification during the interim before the UAM is formally adopted. The EPDP could, for example, recommend that ICANN take the initiative to provide guidance, advisories, or sample templates or notices to the contracted parties, or other best practices to reduce the amount of friction and fragmentation that is currently occurring, rather than wait until after the new policy is formally implemented.

The working group is very much encouraged to exercise its charter mandate and speedily pursue access requirements that restores the ability of those with legitimate needs to perform the investigatory work that preserves DNS stability and allows the mitigation of cybercrime, IP infringement, and other harms.

Latency/Response Times

The BC has learned, as have others in and outside the community, that fragmentation, slow response times for record requests (or outright refusals to produce), lack of an accreditation and access system, and other problems introduced by the Temp Spec are either impeding or causing delay to investigations of wrongdoing. The longer these investigations take, the more criminals benefit. As cited by the [Cybersecurity Tech Accord](#):

...while ICANN has taken the first steps towards ensuring access, we do not yet have an accreditation program in place. This has created a situation where individual requests need to be made for data for each separate domain, which substantially hinders and slows down the efforts of cybersecurity practitioners and law enforcement authorities.⁴

Again, the BC urges the working group to address access in a manner that helps resolve this shortcoming.

Security and Stability Advisory Committee input

The Security and Stability Advisory Committee (SSAC), in [SAC 101](#), recommended that the ICANN Board "should support the creation of an accredited RDDS access program, with the ICANN Organization ensuring the creation, support of, and oversight of the supporting technical access mechanism."

The BC encourages the working group to be mindful of SSAC advice.

ICANN as a data controller and party to contracts

The BC reminds the working group that ICANN is a data controller, and ICANN collects data from contracted parties based on the RA and RAA. As a controller and party to these contracts, ICANN can rely on its duty to performance of a contract for access to data for compliance function purposes. It would be inappropriate to limit what data ICANN may have access to for the purposes of enforcing its contracts.

Non-disclosure of data

The Temp Spec allows for *redaction* of data, but not *withholding* of every part of a WHOIS record. Regrettably, some contracted parties **are simply refusing to produce any record at all**, even when presented with a legitimate request. While reticence may be understandable in the face of a new law, it is in fact not appropriate to ignore the duty to produce a registration record when supported by a reasonable request.

⁴ https://cybertechaccord.org/uploads/prod/2018/08/ICANN-Proposal_FINAL.pdf

The BC asks the working group to make explicit in the Temp Spec the duty for contracted parties to publish the entirety of a WHOIS record when a well-supported request is made.

Process Concerns

The BC respectfully reminds the working group that “consensus” must be reached by the broader working group itself -- including support organizations and advisory committees (SO/ACs) -- not merely by representatives of the GNSO only.

The BC appreciates the difficulty faced by the Chair in managing such a difficult project with extremely tight deadlines. However, it is important that the Chair serve as a *neutral facilitator* of the process. In light of the Chair’s prior experience, it is important that he be mindful that the Chair’s role is not to serve as the decision-maker, but to help the team members reach consensus. As a result, conclusory statements, agreement with principles, or other outcomes should be left to the working group or made part of a consensus call.

The BC recognizes the significant amount of work being addressed by the working group, and we’re grateful for the community’s effort. Thank you for taking our comment into consideration.

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This comment was drafted by Mason Cole, Tim Chen, and Margie Milam. It was approved in accord with our charter.