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PANAMA – GAC Meeting with GNSO Contracted Parties on GDPR  
Wednesday, June 27, 2018 – 13:30 to 14:00 EST  
ICANN62 | Panama City, Panama

CHAIR ISMAIL:                    So please, if you can take your seats. We'll be starting immediately.

Thank you.

So thank you, everyone, and welcome back to the room.

As highlighted earlier today, we are meeting with the registries and registrars for a half hour before starting our communique drafting. So thanks for reaching out to the GAC and for sharing your views with us. As you may have noticed, we have been discussing GDPR throughout the week with the different constituencies. So it would be good also to hear from yourselves regarding your practical experience with GDPR and the temp specs.

So with this, should I hand over to you, Graeme?

GRAEME BUNTON:                Sure. Thank you very much, Manal, and thank you to the GAC for your time. It's certainly very precious at this meeting, and we're very pleased to be here and share some perspective with the GAC.

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So I'm Graeme Bunton. I'm a chair of the Registrar Stakeholder Group, and you can introduce yourself.

PAUL DIAZ: I'm Paul Diaz, chair of the Registry Stakeholder Group.

GRAEME BUNTON: We have some questions on the screen that I think were posed to the GNSO, and we can answer some of that here as the CPH part of the GNSO as well.

We have I think sort of two or three things on our own agenda that we would like to talk about with the GAC, and so we might start there and then come back to these questions, if we can. And so those three things are that we -- we want to talk about the idea of another temp spec on access and accreditation because I think we've been hearing that around this meeting. We want to talk about access to data and the mechanisms to do so, and our experiences with that so far. And then I think we want to hear from the GAC as well. We're interested in the feedback that GAC has for contracted parties.

So what I might do is kick off to Brian Cimboric from PIR who is sitting over there in the corner to talk a little bit about the idea of our concerns around processing contracts with kicking off another temporary specification.

BRIAN CIMBOLIC:

Thanks, Graeme. This is Brian Cimbolic with PIR.

As Graeme touched upon, there's a few concerns around using the temporary specification process to create an access model. The thing to keep in mind is that temporary specifications are not a broad-brush tool. It sounds like a nice idea when there's a big problem to solve in a hurry, it seems logical, let's use a temporary specification. The issue, though, is temporary specifications are contractual animals. They're not an explicit power in the Board bylaws. They exist in the registries' and registrars' contracts.

They are -- And because they are contractual -- it's a contractual animal, they have contractual limitations for what a temporary specification can cover and what it should not cover.

Now, before I move on, I want to point out that it's -- while I don't believe an access model is appropriate for a temporary specification, that doesn't mean that it's not certainly questions worth addressing. But the proper vehicle for that is the multistakeholder GNSO PDP process.

First and foremost, one of the first constraints on -- on temporary specifications is that they have to be tied to security and stability of the registry services, registrar services, or the

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DNS. And those are, in the registry agreements, are defined interprets. It's not generic security or stability. They have meaning. And security, for instance, relates specifically to the unauthorized disclosure, alteration, insertion, or destruction of registry data, and stability is tied to RFCs, and they have technical meanings.

So those are -- they are thresholds that have to be met in order to be proper under a temporary specification.

Now, the first temporary specification actually does relate to security, because it sought, at least in large part, to prevent the unauthorized disclosure of data. By creating a nonpublic WHOIS system it prevented the unauthorized disclosure of data.

Secondly, temporary specifications have to be narrowly tailored. "Narrowly tailored," it sounds a little wonky, and that's because it is. That is a legal standard in many jurisdictions, but in U.S. law has an extreme bar attached to it. It's traditionally used when a citizen challenges the laws or regulations from governmental authority, and it is usually used in a strict scrutiny test.

Now, that's not to say that that necessarily applies here, but the drafters of the provisions around temporary specifications intentionally set a very high bar for a very narrow set of circumstances where a temporary specification can be used.

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Third, contracted parties are already under an obligation under the first temporary specification. Under 6.3.2 we're required to provide reasonable access.

Now, I understand that there's concerns that there's not clarity around what that means, but a whole new temporary specification isn't the route for that. The fact that we are already under a contractual obligation through the first temporary specification to provide access renders any new temporary specification around the same obligation redundant and also means that there is not an immediate urgent need, because we are already under that obligation.

So again, there's -- the temporary specifications must relate to security and stability, must be as narrowly tailored as feasible to achieve the stated goals, and must have an immediate urgent need in place.

It seems that access where contracted parties are already under an obligation to provide such access does not meet those -- those bars. Again, I want to echo the fact that that doesn't mean they're not conversations worth having, and we should do that through the proper channel the PDP process.

Finally, one last point. To the extent that a temporary specification would be used to essentially modify or amend the first, that would also be inappropriate under the terms of the

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original temporary specification. The only mechanism to amend the temporary specification is under 8.2, and that is after receiving guidance from a DPA, a court order, and a few other limited set of circumstances, which then the Board can, by supermajority, amend the existing temporary specification. So using a second temporary specification to amend the first would be entirely inappropriate.

Thank you.

GRAEME BUNTON:

Thank you very much, Brian. And you can tell that Brian is also a lawyer by trade from that.

But I hope that gave you sort of a broad picture of some of the impediments to doing another temporary specification. And so those are sort of legal and technical that Brian said up front there, too, and it's worth reemphasizing, that the appropriate place to deal with these things is within the multistakeholder model. And we're all firm believers here in that, and we want to ensure that, you know, we address these issues thoroughly and that the PDP process or EPDP inside of the GNSO is the appropriate place to do that.

Are there any -- I'm very conscious of time. We only have another 15 minutes with you before you need to get to your

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drafting session. And so maybe I'll hold questions till the end, if I can, and we can move on to the access to data component, if that's okay?

Okay.

So here we want to talk a little bit about -- so there's no more public WHOIS. It's now gated and redacted, and people with legitimate purposes and interest to get at that data need to request it from contracted parties. And, you know, we're hearing stories at this meeting about success and failure in that arena, and I think we want to elaborate a little bit about what we're required to do, how that's working, and what we can do better there. And for that, I'm going to turn to James Bladel.

JAMES BLADEL:

Thanks, Graeme, Manal, and thanks to everyone for attending.

As Graeme mentioned there have been a number of comments or questions throughout the session yesterday and on Monday regarding what -- what we should or should not require registries and registrars to do, to publish, or to provide in terms of access. And I just want to level-set, because I think by listening, I think that I've picked up on some misconceptions, perhaps, or some misunderstandings about what the current status and what has changed since May 25th when GDPR went

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into effect. And I don't think that understanding what's out there, the status quo and what's changed is -- is 100% shared across all of the community, not just within the GAC. So I wanted to kind of give an opportunity to allude just to -- to speak to that for a moment.

So registrars -- and I apologize to my colleague Brian and all the registries that I did this from a registrar perspective but registrars are required to publish an abuse point of contact in WHOIS and on their website and abuse procedures and how they handle abuse. They're required to respond to requests from law enforcement. They're required to receive reports of abuse. All of that goes back to 2013, under the 2013 RAA, and so is not new and has not been altered by GDPR at all. So those requirements still stand today.

The temporary spec additionally requires that we provide some mechanism of contacting the domain name registrant without sharing the contact information. So I may not give a requestor the email information, but I can give them a link to a form where they can send a request to that domain name registrant. That's required. That's in the temp spec now, and that's what registrars and registries are doing.



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And of course obviously we're required to respond to things like court orders, subpoenas, search warrants from law enforcement, et cetera.

And I kind of made this list with the understanding that this will help build an escalation path or a staircase when someone comes to a registrar or registry's WHOIS page and says, "I need access to data and the data is redacted. What do I do?"

And I think it starts with first understanding whether or not the purpose and the request is legitimate. I don't mean to make light of this, but I hear a number of folks saying that, you know, that because they've done something for years, they assume that something is legitimate. And some of these changes are not a byproduct of GDPR. They are, in fact, the point of GDPR, you know, to contact a registrant because you want to sell them a product or a service or buy the domain name. So some of those things are, by design, being frustrated by GDPR. That's what the new legislation was intended to do.

But the second step would be, if the request is legitimate, would be to use those web forms to send a contact request to the registrant, whether that is a cease and desist, a question, a request for more information, whatever that may be, registries and registrars are required to facilitate that communication

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between the people using WHOIS and the registrant. So that's happening today. That's in our requirements today.

The third is in cases of abuse. And that is a broad term that encompasses law enforcement requests, IP infringement, phishing, malware, things like that. Registries and registrars are required to have processes posted and to have a point of contact for abuse. So those types of queries can be directed to the abuse channels for these providers.

I think that we can do better here. I think we've had some conversations where folks have said, "I'm not sure where to go with this, whether it's phishing or whether it's IP infringement or trademark infringement. Can you help me route this to the proper team, proper abuse channel?" And I think we can do a better job of making that conspicuous and making those tools easier to use. Some of that is an artifact of just having to move so quickly to adopt the temp spec in about eight days.

And the final one -- not the final one but the one in between is if it's an IP claim, file a UDRP, because with a UDRP filing, we are -- we have a process under GDPR and the temp spec to provide that information to the UDRP panelist. So there's another avenue to continue to kind of keep these dispute mechanisms rolling in the absence of public WHOIS data.

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And then the last one is to work with law enforcement to find a way to submit a formal proceeding, whether that's a search warrant, a subpoena, a court order, a formal -- some kind of formal proceeding. In those cases, I think registries and registrars feel they would have sufficient cover backed up by a judge or some other agency to release the data without risk of legal sanction under GDPR. And so I think that's the key, is that we need to have a legitimate purpose and a legitimate channel in order to prevent us from being exposed to those legal risks.

So if we can picture this as a staircase, and I apologize the document is very quick and dirty, but maybe we can have fashion something up that we can distribute by the end of this meeting and get this out, because it is kind of a staircase to getting nonpublic WHOIS data.

And bluntly, not all purposes or requests will be able to climb the entire staircase. Some of them will stop at step one or step two. But the staircase is there. It's there today. It maybe needs, you know, a coat of paint or something, but it's there and it works.

And so I'd be happy to take your questions on any of those.

Thanks.

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GRAEME BUNTON: Thank you very much, James. This is Graeme for the transcript.

And to James' last point on the coat of paint, what we're trying to share with the community, to yourselves and the rest of ICANN and then broader, we're hoping, is -- it will be a one- or two-pager document that sort of outlines that staircase and says, you know, here's how you can access data and here's how you can escalate, and if you feel that you have from -- access wasn't granted where it should have been, then here's how you can escalate to ICANN compliance. And so that people will have a quick and clear guide about how to gain access to nonpublic data.

Do you have anything to add, Paul?

So I think now we've got about eight minutes left, and we would love to hear from the GAC about questions or concerns, and hopefully we can -- we can answer.

CHAIR ISMAIL: So I can see Iran first.

Kavouss.

IRAN: Thank you very much. Due to the time constraint, I just refer to the topics.

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First, did we really need temporary specifications? Because if you do that, you have to finish everything with one year.

Second, during discussion you mentioned there might be something that we review that and may give rise to second. And your colleague says that having second temporary is inappropriate. And then why inappropriate?

Reasonable access. What is reasonable access? Who decide access is reasonable or not reasonable?

Legitimate purposes. Who decide whether that purpose is legitimate or not legitimate?

Abuse. How we handle the abuse or how we monitor abuse and how we face or encounter or combat with the one who made abuse? It will be totally rejected, no access anymore, and how to do that?

So these are things. I'm sorry I did this it in very telegraphic way, but this is the thing. Whether you want to reply it now, whether you want to put it on mailing list, that is up to you.

Thank you.

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GRAEME BUNTON:

Thank you, Kavouss. There is a quite a bit in there to address. Let me see if I can -- I can do justice to a couple of those, and then I think Elliot would like to respond as well.

Do we need another temp spec is a big question and, you know, hard to answer. It's what we ended up with. Certainly contracted parties were imploring ICANN for more than a year prior to May 25th to come together and see if we can resolve some of these contractual issues ahead of time. And unfortunately, we did not get there, and it was too close to the wire. And I don't know that there was another mechanism. Certainly we're not super fans of -- of the temp spec because we really, as I said previously, believe in the multistakeholder model and the ability of the GNSO to resolve these issues. So I think we think it's unfortunate but a necessary evil.

On the reasonable and legitimate pieces, at the moment that is up to the individual contracted parties -- someone can feel free to correct me on that if I'm wrong -- which we get is not palatable because you have such a diversity, then, of responses. So we look forward to more community discussion on that because right now, all of the liability resides with us in making those choices. And we're businesses. We want to run our businesses and we want to avoid liability as much as we can. And so being able to build something with the community that reduces that liability, that provides what guidance on what that

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-- what is the legitimate purpose and what is reasonable access makes our lives easier and better. And that's something that we're really hoping we can come to agreement on in the short term.

Elliot, did you have something more to add on the abuse, or...

ELLIOT NOSS:

Yeah, just for Kavouss. If you could -- I really want you to appreciate that, from our perspective, we feel right in between, you know, the contracted parties who talk about needing, you know, all of these questions answered tomorrow and, you know, the hard work that need be done with governments hopefully very active in it to set standards. We are stuck doing this, I think is an important way to think about it. We're doing something that we don't want to be doing.

One of the things I don't know if you were in the panel yesterday, you know, that I was encouraging was a lot of active community involvement on this. And I think that GAC in particular, governments in general can really help this process in two ways. One, I would invite the GAC to participate in that, with us and the contracted parties as we're working through things on the ground on a day-to-day level. You know, if the GAC wanted somebody to have some visibility to that or understand the

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issues, I think that would be fantastic. That's what's happening in the market.

And then I really deeply believe that we've never had an issue inside of ICANN and the multistakeholder process where the GAC being able to go outbound to their respective national governments to provide clarity on these issues was more important. You know, it really is a complicated, you know, set of issues. And, you know, this is -- I love the opportunity for the GAC to be more active. You know, I know there's discussion around participation in the EPDP or not. And all of these things I think are huge challenges but great opportunities, too.

GRAEME BUNTON:

Thank you, Elliot.

I think we've got two more minutes. Do we have another quick question?

CHAIR ISMAIL:

Yes, Kavouss, please.

IRAN:

I have a second question. This morning when we had the discussion with the ICANN, we said that perhaps in order to understand properly the process. Because some of us are



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engineers, some of us engineer and lawyer, and so on. We need to have a diagram to show the process from where you start, user's request, how the request be done, how we authenticate it, how we go through the process, how we monitor that. Answer, (indiscernible), so on, so forth. If you reject it, how it is monitored? Is it manually? it is automation? So we need a source of the process in the diagram indicating from the very beginning up to the end how the things will be done. If it is possible, that was something we discussed. We are not to bother you, but that is the questions.

Thank you.

GRAEME BUNTON:

That's no bother. Thank you, Kavouss.

I think what we might be able to do -- I'm sort of assuming you're talking about access to data requests in there. And I think we can, in part of the document where we're trying to clarify what that looks like, there's -- we can probably add some sort of process flow to that so you can see how that process works. But it's going to be generic because often the implementations across contracted parties might be unique.

Do you have anything else for us, Manal?

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CHAIR ISMAIL: So any other questions from GAC colleagues?

Okay. Perfect.

GRAEME BUNTON: So if I may, thank you very much again for having us here and giving us some of your time. I hope that was a helpful exchange and some useful information.

Contracted parties, or at least speaking on behalf of registrars, we don't interact with the GAC an awful lot and that's not great. We should do that more. And, you know, I can hear Paul agreeing there. So let's make sure we keep our doors of communication open, and that, you know, if the GAC has questions about how things are working in the marketplace, you know, out there in the real world as we're building and doing these things, we are happy to come here and answer or share documentation or whatever that looks like. We're always willing to talk.

CHAIR ISMAIL: Thank you very much, Graeme, and thanks to all registry and registrar colleagues. And thank you for reaching out to the GAC, and your keen follow-up after our meeting with Council and for this informative conversation with the GAC.

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So thank you very much.

[ Applause ]

So this concludes our meeting with the registries and registrars, but GAC colleagues, please remain members seated. We will start the drafting of the GAC communique.

Thank you.

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