

ALAC Updates ----SEPT - DEC. 2021

Policy development activities Statements approved by the ALAC

Proposed Revisions to the ICANN Documentary Information Disclosure Policy.

The ALAC thanks ICANN for the opportunity to provide a statement on the Proposed Revisions to the ICANN Documentary Information Disclosure Policy (DIDP).

Bearing in mind the interests of the Internet end-users around the world, and the importance of transparency as a prerequisite for trust, the ALAC would like to comment on two main points:

1. The mechanism for requestor review of ICANN DIDP responses
2. New DIDP conditions for nondisclosure

The mechanism for requestor review of ICANN DIDP responses.

To make the communication between ICANN and the public more effective, and to demonstrate the importance of public requests, there needs to be a clear and credible mechanism through which requestors seek review of ICANN DIDP responses. Therefore, the ALAC supports the proposal of having the Ombuds take on this role. In addition, should the Ombuds or the ICANN Complaints Officer be designated as a potential recourse against an unsatisfactory DIDP response, this must be noted in the DIDP response and in the policy itself.

New DIDP conditions for nondisclosure.

The new paragraph reads:

“Materials, including but not limited to, trade secrets, commercial and financial information, confidential business information, and internal policies and procedures, the disclosure of which could materially harm ICANN’s financial or business interests

or the commercial interests of its stakeholders who have those interests. Where the disclosure of documentary information depends upon prior approval from a third party, ICANN org will contact the third party to determine whether they would consent to the disclosure in accordance with the DIDP Response Process”.

This first sentence of this new paragraph essentially grants ICANN the right to refuse any and all requests. It is reasonable to reject requests for truly confidential information and for releasing information held by ICANN under nondisclosure agreements. But rejecting a request because it includes commercial or financial information or documents an internal policy makes a mockery of this DIDP policy. Similarly, information legitimately held by ICANN related to its stakeholders, which was not obtained under nondisclosure conditions, should not be withheld. It may be awkward for ICANN to release material that could cause harm, but the DIDP exists to ensure that ICANN is transparent. ICANN should not cover up its errors or poor judgment.

The ALAC stresses the importance of information disclosure in establishing trust and ensuring that ICANN can serve the global public interest as the steward of the Internet’s unique identifiers system. The ALAC finds that the conditions set forth for nondisclosure allow information to be held for no credible reason, which undermines the main purpose of the DIDP in facilitating transparency and access to information. The ALAC is of the view that all legally releasable information that takes into consideration the values and expectations of stakeholders should be available to the public, either through the ICANN website or DIDP policy.

The ALAC agrees with nondisclosure conditions that limit disclosure, such as information requests:

- (i) Which are excessive or overly burdensome
- (ii) Complying with which is not feasible; or
- (iii) Are made with an abusive, vexatious, or querulous purpose

Finally, the ALAC stresses the importance of information disclosure in establishing the trust and support of Internet end users in ICANN.

The ALAC recommends ICANN to:

Allow Ombuds to oversee the mechanism for requestor review of ICANN DIDP responses.

Document within the DIDP Policy any available recourse if a DIDP is not fully satisfied.

Revise the first sentence of the new paragraph related to conditions for nondisclosure.

ICANN must evaluate whether to release material, but the DIDP exists to ensure that ICANN is transparent.

Proposal for Latin Script Root Zone Label Generation Rule

The At-Large Advisory Committee (ALAC) welcomes the opportunity to comment on the proposed Latin Script Root Zone Label Generation Rules. The ALAC appreciates the efforts of the Latin Generation Panel (LGP) but questions some of the instructions received by and assumptions made by the panel.

These “quirks” have led to a proposal that might not be the best for multilingual expression or the mitigation of DNS abuse.

Principle of Least Astonishment.

The principle of least astonishment proposes that a component of a system should behave in a way that most users will expect it to behave. The now expert nature of the Latin GP suggests that it is no longer, if ever, representative of “most users.” Therefore, establishing a high bar for possible confusion is counter intuitive. If even a single Panel member considers that two code points should be a variant, that conclusion should be applied to the Panel findings. Otherwise, the Panel is implying that non-experts will be more successful in spotting differences than some of its experts. This is an entirely unreasonable expectation of a typical end-user and making this assumption further paves the way for misdirection and consequent DNS abuse.

Underlining

The Latin GP has concluded that underlining of domain names (as happens routinely) does not obscure diacritics below the line. While some software products put a blank space around such diacritics, it is not at all clear that end users are cognizant of this practice. Furthermore, many software products, including ICANN’s

own Public Comment system, do not use these spaces. Accordingly, the ALAC recommends revising that conclusion.

Capital Letters

The ALAC notes, in the Latin Generation Panel's report, that the Internationalized Domain Name (IDN) Project has directed the Generation Panels (GPs) to ignore upper case letters when identifying variants. The apparent rationale for this direction is that domain names are restricted to lower case. Unfortunately, a half-century of experience has taught end users that, in a domain name, upper and lower case are entirely interchangeable. Thus, a domain name of `www.example.com` and of `www.example.COM` will take the user to the same place. The users neither know nor care that this is an artifact of their browser, rather than a feature of the DNS.

As a result, if the user is presented with a domain name using Cyrillic lower case for the TLD, such as `www.Example.com`, they will naturally interpret it to be the usual `.com`, just with the TLD capitalized. What they will NOT do, despite in expectation of the IDN Project, is look at the TLD and notice the third letter doesn't look like a Latin lower case M and conclude this is not a `.com` domain name. The potential for DNS abuse is obvious.

Accordingly, the ALAC encourages the LGP to revisit the instructions, attributed to the Project, and consider treating capital letters as a special case.

Repertoire

The objective of the IDN Project is to make domain names available in the languages of all non-native speakers of English. To restrict the repertoire for the Latin script to less than half of the living languages which use that script is contrary to that goal. The ALAC believes that the LGP should go back and include all of the languages which use the Latin script. (At a minimum, languages which have more native speakers than the smallest of the "official languages" which are already included, should be added.) For example, Hawaiian has perhaps 25,000 native speakers but is included because it is an official language of the State of Hawaii, despite the stated threshold of 1 million speakers.

Conclusion.

It is the considered position of the ALAC that, while great strides have been made by the Latin Generation Panel, more must be done to enable more users, with sufficient security, to use the DNS. Again, we appreciate the opportunity to comment on the draft proposal and look forward to further discussions on this topic.

The ALAC Recommends the Latin Generation Panel (LGP) to:

- Establish a lower bar for possible confusion, as they are the experts - not typical end-users.
- Revise their conclusion that the underlining of domain names (as happens routinely) does not obscure diacritics below the line.
- Revisit the instructions attributed to the IDN Project, and consider treating capital letters as a special case.
- Include all of the languages which use the Latin script - at a minimum, languages which have more native speakers than the smallest of the “official languages” which are already included, should be added.

Draft PTI and IANA FY23 Operating Plan and Budgets.

ALAC appreciates the opportunity to comment on the DRAFT PTI and IANA FY23 Operating Plan and Budgets.

The FY23 Operating Plans and IANA budget look robust, indicating an improvement of PTI and IANA functions. We value the opportunity to be involved in the annual PTI planning process.

The following comments refer to the FY23 PTI budget.

Although there is a 27% increase in the budget from the last real results (FY21), in At-Large we are glad to see that ICANN org is dedicating more resources to its core function.

We notice that there is a decrease in the budgeted amount for travel & meetings. We are wondering if this is due to lower venue costs, as many pandemic-related travel restrictions will surely be resolved by FY23.

With respect to staffing, it is not clear if PTI needs to increase the headcount (or FTE). We feel that, if the need exists, it should be reflected in the budget. Otherwise, it may be difficult to fill a staffing gap 9-21 months from now.

Initial Report from the EPDP on Specific Curative Rights Protections for IGOs

The ALAC takes note of the deliberations of the EPDP on Specific Curative Rights Protections for IGOs (“this EPDP”) as well as the preliminary recommendations as contained in its Initial Report of 14 Sep 2021. We offer the following responses to those preliminary recommendations.

The ALAC takes the position that domain names that are identical to the respective acronyms of intergovernmental organizations (“IGOs”) and which are registered and used by third parties (non-IGO registrants) run a conceivable risk of creating confusion to Internet end-users, or worse where the use facilitates fraudulent activity. End-users need to be able to trust that any information delivered using such domain names emanates from the respective IGO.

Thus, the ALAC welcomes the results already achieved on facilitating an IGO’s access to the ICANN-created twin dispute resolution processes of UDRP (Uniform Domain Name Dispute Resolution Policy) and URS (Uniform Rapid Suspension) in a way that preserves an IGO’s privileges and immunities.

To this end, the ALAC supports the following preliminary recommendations: Preliminary Recommendation #1 which seeks to provide clarity and reasonable certainty as to which entities are deemed as IGOs and defines an “IGO Complainant” for purposes of the UDRP and URS..

- Preliminary Recommendation #3 which seeks to remove the requirement for an IGO to submit to Mutual Jurisdiction in order to avail itself to the UDRP and URS, thereby preserving its privileges and immunities in the course of such proceedings.

The ALAC also welcomes the possibility of binding arbitration post a UDRP or URS proceeding involving an IGO and sees this as a favorable alternative and more direct route for a losing registrant to seek a review of an UDRP or URS decision, if the losing registrant so chooses.

To this end, the ALAC supports the following preliminary recommendations:

- Preliminary Recommendations #4(i) to #4(iv) and #4(vi), all of which are designed to introduce and facilitate the possibility of binding arbitral review of a UDRP decision, more or less, immediately after the said decision is rendered.
- Preliminary Recommendation #5(i), #5(ii) and #5(iv), all of which are designed to introduce and facilitate the possibility of binding arbitral review of a URS decision, also, more or less, immediately after the said decision is rendered.

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As for Preliminary Recommendations #4(v) and #5(iii), we opine that from the end-users' perspective the quicker the parties (i.e. IGO Complainant and losing registrant) can arrive at a final outcome, the sooner the question of risk of confusion (or harm) to end-users can be addressed in finality (more so for UDRP cases). For this reason, Options 1 in both #4(v) and #5(ii) are preferred, such that arbitration should not be sought to prolong a dispute for which a losing registrant has opted to initiate through a relevant court and has exhausted all recourse in that (court) route.

As for Preliminary Recommendation #6, we agree with #6(i) which is to allow the arbitral review to be conducted in accordance with the law that is mutually agreed to by the parties. We also support the add-on of Option 2 which is for the arbitral tribunal to decide on the issue of applicable law for an arbitral review where the parties themselves are unable to agree on that issue, but subject to the added step per

#6(ii) to compel the arbitral tribunal to request submissions from the parties on suggested applicable law or principles of law to be applied in the event either party raises concerns to the arbitral tribunal on limits of applicable law affecting it. We also reserve our opinion on #6(iii) in respect of the non-exhaustive general principles that are proposed to be further developed by an Implementation Review Team.

Finally, we understand that it is unnecessary for us to comment on Preliminary Recommendation #2 since the outcome would be subject to what ultimately happens with the package of Preliminary Recommendations #3, #4, #5, and #6.

Final Report of the Temporary Specification for gTLD Registration Data Phase 2A Expedited Policy Development Process

The ALAC recognizes and appreciates the work of the EPDP Phase 2A team, the efforts of the chair, vice-chair, and the liaison to the GNSO council as well as the dedication and efforts of the ICANN org support staff. Nonetheless, the ALAC believes that Phase 2A did not properly address its mandate. The net result is that the importance of the registration data to various community members such as consumer protection agencies, law enforcement authorities, and cybersecurity investigators and the crucial role they play in protecting everyday Internet users, registrants, customers, businesses, and the entire online population will not be properly addressed.

It is important to strike a balance between the protection of registrants' personal information and users' experience, safety, and security. Redacting data that is not protected by data-protection laws does not allow the right balance to occur.

In this Minority statement, the ALAC is concerned about the following aspects of the recommendations of the Phase 2A final report and their impact on the security and safety of everyday Internet users:

- Not mandating differentiation between legal and natural person data,
- Not mandating the usage of the common data element by all contracted parties,
- Lack of means to contact registrants
- "Process"

Not mandating differentiation between legal and natural person data

GDPR does not protect the non-personal data of legal persons. Moreover, the EU GDPR recital number 14 says "this regulation does not cover the processing of personal data, which concerns legal persons, and in particular, undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person".

The EPDP received legal guidance that it was reasonable to allow registrants to self-designate and with proper cautions, disclaimers, and correction capabilities, there was a low risk to contracted parties to do so. This position was supported by the July 2018 EDPB letter to Göran Marby. This advice was ignored by the EPDP. Although the installed base of 200M registrations would take time to address (such as at renewal time), the EPDP did not even recommend that differentiation of new registrations be made. More to the point, even the discussion of taking such action

(as formally proposed by GAC EPDP Members) was summarily dismissed early in Phase 2A, instead of focusing only on “guidance” which could be ignored.

Taking into consideration all of the above and that the Registration Data Directory Service (RDDS) is a public good that protects global online users and the GDPR and similar privacy laws are a public good that protects the registration data of registrants, a right balance needs to occur. This right balance cannot be achieved if more data than what is required by law and legislation is redacted, and the EPDP made virtually no effort to achieve that balance.

Not mandating the usage of the common data element by all contracted parties

The proposed common data element(s) in Recommendation # 1, allows for eight possible different values including “the legal status distinction was not made” and “the presence of personal data wasn’t determined”. Those statuses allow for contracted parties who do not differentiate to make use of the newly defined field. However, the EPDP failed to recommend that the fields must be used, even by those registrars who voluntarily choose to make a legal/natural distinction or identify the presence/absence of personal data. By not requiring the use of the fields, EVEN WHEN valid and useful data is available makes no sense. Moreover, the EPDP did not designate these fields as eligible for public disclosure, even though they contain NO personal information.

According to the EPDP phase 1 and phase 2 final reports recommendations, the contracted parties (CPs) must update their current registration data directory service (RDDS).

Mandating the use of the common data element by all contracted parties would allow similar processes to be followed by all CPs across the globe, whether they differentiate or not and whether they are subject to EU regulations or not.

As a result, we are creating a common element that no one is required to use, defeating the purpose behind the creation of common ways of doing things and opening the door to fragmentation.

Lack of means to contact registrants

The ALAC regrets that the EPDP failed to reach closure on methodologies to better address anonymization or pseudonymization of contact e-mail addresses. That being the case, we are left with the Phase 1 recommendations allowing anonymization but in the absence of that, allowing web forms for contact. Since the

completion of Phase 1, it has become apparent that some (major) registrars use a type of web form that effectively does not allow any useful communications with a registrant. Addressing this apparent gap in the regulations was ruled to be out of scope, despite the GNSO instructions to revisit this Phase 1 recommendation. The net effect is that for a significant part of the gTLD registration base, there is no effective way to achieve registrant communications.

“Process”

The ALAC is concerned that throughout this EPDP, the focus has been exclusively on the projected processes and stated time-schedules with severe impact on the ability to determine and recommend good policy.

Examples include:

- Timelines that do not allow sufficient deliberation of consultation with the groups supporting this EPDP
- Scope determinations that rule some things out of scope because they are not explicitly mentioned in GNSO instructions, but allow other diversions to proceed (such as the recommendation on Code of Conduct)
- Suspension of discussion on differentiation in favor of “guidance”, with the promise of return, but never doing so.
- Inconsistent standards of “proof” which allow some arguments to be dismissed while others stand.

It appears that there is an increasing reluctance of contracted parties to accept ANY new obligations, regardless of the benefits to other parties or the public good. This is troubling for direction.

Summary

The EPDP Phase 1 determined that Phase 2 would “determine and resolve the Legal vs. Natural issue in Phase 2”. This was deferred to Phase 2a. Clearly, we have not achieved this. Moreover, while we have recommended the creation of critical RDDS elements, we are allowing them to be completely ignored.

The ALAC has great difficulty in labeling this effort as a success.

