**Executive Summary:**

The EPDP Phase 2 team sent its first batch of questions to Bird & Bird on 29 August 2019. Bird & Bird answered this batch of questions in a series of three memos. [Memo 3](https://community.icann.org/download/attachments/117604842/ICANN-EPDP%20-%20Q4%20-%209th%20September%202019%5B1%5D.pdf?version=1&modificationDate=1568143573000&api=v2) was delivered on 9 September 2019 and analyzes questions about the legal bases under which personal data contained in gTLD registration data could be disclosed to law enforcement authorities outside the data controller’s jurisdiction.

Specifically, the memo responds to the following questions:

* Can a data controller rely on Article 6(1)(c) of the GDPR to disclose personal data to law enforcement authorities outside the data controller’s jurisdiction?
* If not, may the data controller rely on any other legal bases, besides Article 6(1)(f) to disclose personal data to law enforcement authorities outside the data controller’s jurisdiction?
* Is it possible for non-EU-based law enforcement authorities to rely on art 6(1)(f) GDPR as a legal basis for their processing? In this context, can the data controller rely on art 6(1)(f) GDPR to disclose the personal data? If non-EU-based law enforcement authorities cannot rely on art 6(1)(f) GDPR as a legal basis for their processing, on what lawful basis can non-EU-based law enforcement rely?

 Overall, Bird & Bird advised that:

1. To apply Art 6(1)(c) there must be "Union law or Member State law to which the controller is subject" and this ground therefore has limited application where LEA is outside of the controller’s jurisdiction.
2. Under the six lawful bases for processing personal data, Articles 6(1)(a) - Consent, 6(1)(b) - Contract, 6(1)(d) - Vital interests of a person, and 6(1)(e) - Public interest or official authority are not likely applicable for LEA requests.
3. Art 6(1)(f) - Legitimate interest, may be an applicable basis for the controller where a non-EU law enforcement authority makes a request to obtain personal data from a controller in the EU.
4. If a LEA is outside the EEA, their legal basis for processing under GDPR is not relevant as they are not subject to GDPR. Organizations disclosing to LEAs outside the EEA will still need a valid basis to do so, which will usually be legitimate interest in ICANN's case.
5. Where the CP is subject to GDPR but is located outside the EEA, they will also be subject to local law. This means that controllers may face a conflict of laws.

**1. Can a data controller rely on Article 6(1)(c) GDPR to disclose personal data to law enforcement authorities outside the data controller’s jurisdiction?**

* Processing necessary for compliance with a legal obligation to which the controller is subject is only available where the legal obligation is set out in EU or Member State law.
* Where the controller is subject to disclosure obligations which arise from laws in jurisdictions outside the EU, the controller cannot rely on Art 6(1)(c).
* Controller may be subject to a legal obligation under EU or Member State law to disclose personal data to a non-EU law enforcement authority.
* MLATs may cover, but when a request comes in where an MLAT exists, the controller should deny the request and refer to the MLAT. Where no MLAT or other agreement exists, the controller needs to ensure that the disclosure to a third country would not be in breach of local law.

**2. May the data controller rely on any other legal bases, besides Article 6(1)(f) GDPR, to disclose personal data to law enforcement authorities outside the data controller’s jurisdiction?**

* 6(1)(f) and 6(1)(c) may apply but the other five lawful bases for processing personal data likely not.
* Where a non-EU law enforcement authority makes a request to obtain personal data from a controller in the EU, the controller may be able to show a legitimate interest (6(1)(f)) in disclosing the data. The EDPB has also suggested this approach in correspondence to ICANN (e.g. EDPB-85-2018).

**3. Is it possible for non-EU-based law enforcement authorities to rely on Article 6(1)(f) GDPR as a legal basis for their processing? In this context, can the data controller rely on Article 6(1)(f) GDPR to disclose the personal data? If non-EU-based law enforcement authorities cannot rely on Article 6(1)(f) GDPR as a legal basis for their processing, on what lawful basis can non-EU-based law enforcement rely?**

* As entities of a country, law enforcement authorities are covered by state immunity and therefore non-EU-based law enforcement authorities are not subject to the GDPR.
* Even assuming the GDPR could apply to non-EU-based law enforcement authorities, it seems unlikely that law enforcement authorities outside the EU would consider justifying their processing under the GDPR.
* Non-EU-based law enforcement authorities therefore do not need to assess which GDPR legal basis they rely on for processing the data.
* A controller who transfers data to a LEA outside the EU will nevertheless need to consider how to meet the obligations in Chapter V (transfers of personal data to third countries or international organizations).