

## GNI MLA Talking Points

### *About GNI*

The Global Network Initiative (GNI) is a multi-stakeholder initiative that brings together ICT companies with a variety of civil society organizations, including human rights groups and press freedom organizations, investors, and academics to forge a common approach to free expression and privacy online.

GNI's principles are based on internationally recognized laws and standards for human rights set in the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

Our principles and implementation guidelines guide responsible company decision-making when facing requests from governments around the world that could impact the freedom of expression and privacy rights of users. Our accountability process uses independent assessment to verify that companies are implementing the principles.

ICT companies worldwide can use the GNI's principles, guidelines and tools to assess human rights risk when entering or leaving a market or when designing and introducing new technologies, products or services. By working together with human rights groups, press freedom organizations, investors and academics, ICT companies can manage human rights challenges, maintain credibility and support the privacy and freedom of expression rights of their users. Currently, GNI has six company members: Microsoft, Facebook, Google, Yahoo!, LinkedIn, and ProCera Networks.

### *The Mutual Legal Assistance (MLA) regime*

Governments around the world demand access to customer data for criminal investigations and prosecutions. The global nature of today's Internet services presents a unique challenge to international law enforcement cooperation. On a daily basis, law enforcement agents in one country seek access to data that is beyond their jurisdictional reach. In order to gain lawful access to data that is subject to another state's jurisdiction, law enforcement agents must request mutual legal assistance (MLA) from the country that can legally compel the data's disclosure.

### *Current State of Affairs*

The MLA regime is the dominant and widely accepted method for managing lawful government-to-government requests for data across jurisdictions. There are hundreds of bilateral and multilateral Mutual Legal Assistance Treaties (MLATs) around the globe by which nation states commit to assist one another in criminal investigations and prosecutions.

But the MLA regime is in need of reform: It has not been updated to keep pace with globalized data and manage the increased number of requests. A report, commissioned by GNI earlier this year, concluded that the current process is inefficient, largely opaque and incomplete.

- **Inefficiency:** The current process is long, with the time required to process a request being measured in months and, in some cases, in years.

- **Opaqueness (non-transparent):** Law enforcement officials are often unable to determine who is handling their request or why it is taking so long. For companies, the process is similarly opaque: requests for information arrive in the form of a government warrant, often without identifying that the warrant is being served in accordance with an MLAT and that the data will be shared with a foreign government. This means the process is opaque for users, too, because it limits the company's ability to give full and complete information about which governments are requesting access to their customer data, one of the key features of corporate transparency reports.
- **Incompleteness:** Not every country-to-country relationship is governed by an MLAT, and these gaps can leave companies and local law enforcement unsure of how to manage government requests for data across jurisdictions.

### *Consequences*

When the MLA process does not function swiftly and fairly, law enforcement officials sometimes resort to drastic measures. The response from some governments has been to take unilateral action outside this system to obtain information about private citizens.

For example, some states have attempted to demand that their domestic laws apply extraterritorially. This is problematic for obvious reasons. If every country applied its criminal laws extraterritorially, it would provoke significant international conflict and put businesses in the impossible situation of trying to comply with every legal regime in the world simultaneously.

Another strategy states have deployed is to require all communications companies to store some data locally. But data localization would impose enormous technological burdens on communications companies while increasing costs to users, eroding privacy protections, and delaying innovation.

GNI is also concerned by government proposals and practices that compromise the digital security of individuals to pursue law enforcement objectives, including proposals to weaken or ban encryption.

These MLAT alternatives are potentially harmful to an open, robust and free internet, and could be rendered unnecessary by appropriate MLAT reforms.

### *How to move forward*

A lively policy discussion has emerged around how to move forward and these are all converging on MLAT reform. Where necessary, these reforms could include the negotiation of new international agreements that build upon or supplement the existing MLAT rules and are transparent, accountable and inspire public confidence.

Governments should work together to forge modern laws that promote public safety by facilitating timely access to data across jurisdictions. But they should do so in a way that increases privacy protections for citizens and protects free expression. There is an unprecedented consensus that this is the right approach as it works with, not against, the realities of the internet world.

MLA reform will not be easy. Because the MLA regime is essentially bilateral, the central challenge to reform is strong leadership and political will. Some issues will take time to resolve but there is a lot that can be done in the short term to make these processes more effective. There are at least two important improvements that should be relatively easy to make. First, governments should make the MLA process electronic. Countries must create a secure electronic system for managing MLA requests.

Secondly, governments should standardize the terms and forms used in MLAT processes. Of all the MLA reforms, one of the simplest to implement would be to develop and encourage widespread use of a standardized MLA request form.

Other reforms that would improve the MLA process in the near term are better training for requesting law enforcement officials and adequate staffing. *Key Requirements for MLA Reform (2 minutes)*

Critically, all reform options, regardless of their size or scope, should be built on five important principles.

- **Justified and Proportional Access:** Law enforcement authorities must explain why they have a legitimate and reasonable interest in the relevant data, and reforms should be designed to ensure that all government requests for data are justified in terms that make sense to the responding country.
- **Human Rights Protections:** MLA reforms should be designed to ensure the protection of human rights. This begins with narrowly-tailored requests for data. Countries should also limit their use of the data to the purposes stated in the request and destroy any non-responsive data. Finally, data should not be handed over to governments if there is a reasonable and foreseeable chance the government will use that data to commit human rights abuses.
- **Transparency:** Companies and states must be transparent about the receipt and processing of government requests for access to user data. Laws should be enacted as necessary to require governmental reporting and to permit company reporting about MLA. Total transparency about individual MLA requests may not be possible but reforms should aim for maximal transparency and accountability.
- **Efficiency:** MLATs should identify a clear timetable for responding to requests for data. The bulk of MLA requests should be processed within 30 days, except (a) where additional time is needed to evaluate the potential human rights implications of the MLA request or (b) for particularly complex requests.
- **Scalability:** Any efficiency gains must also be scalable, because the number of government requests for data across jurisdictions—like the amount of digital data itself—is growing enormously. This is only possible if reforms embrace electronic handling of MLA requests, and reduce the number of hops an MLA request makes.

### *Who will benefit from these Reforms*

Internet users, communications companies, and law enforcement authorities all have legitimate interests in a robust and well-functioning mutual legal assistance regime. Government authorities have a legitimate interest in investigating crimes that occur within their borders to ensure the security of their citizens. Internet users have a legitimate interest in securing their data from censorship and suppression; they enjoy a number of fundamental human rights that are implicated by MLA, including the rights to privacy, to freedom of expression, and to freedom of association. Finally, all companies engaged in communications and e-commerce have a legitimate interest in a clear and predictable legal framework

for managing government access to customer data— one that adapts to the ways of modern business. Companies should not be put in the position of making case-by-case determinations, often with little guidance from courts or legislatures, about how and when to comply with government requests for data.

### *Conclusion*

In conclusion, MLATs are the best way to outline a streamlined process for providing MLA while ensuring legal due process for users. Governments should therefore work together to reform MLAT and where necessary adopt new MLAT agreements. All reforms should reflect the principles of justified and proportional access, human rights protections, transparency, efficiency and scalability. GNI calls upon governments to commit to this goal and take swift and meaningful steps to begin this vital work.