Data Processing Specification Overview

Developed for the Registration Data Policy Implementation Team Meeting 1 June 2022

The purpose of this presentation is to provide the Registration Data Policy Implementation Team with information regarding:

- Efforts by ICANN org and Contracted Parties to implement EPDP Phase 1, Recommendations 19 and 20, and
- The link between this work product and the Registration Data Policy.

Agenda

- Impetus for Data Protection Agreements: Data Protection Regulations and EPDP Policy Recommendations

- Data Processing Specification (DPS)

- Current Status & FAQ

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Introduction: Data Protection Agreements

- In general, some form of data protection agreement may be required when a party is processing data concerning an individual.

- The specific requirements vary by jurisdiction and are dependent on local law.

- The GDPR's data protection agreement requirements are the most well-known
  - GDPR data protection agreement examples:
    - Joint Controller Arrangements
    - Controller-Processor Agreements
    - Standard Contractual Clauses (SCCs) for cross-border data transfers

- **The GDPR is not the only law that may apply to the processing of personal data in registration data. There are roughly 130 data protection laws in existence or under consideration today.**

EPDP Phase 1 Policy Recommendations Relating to Data Protection Agreements

- **EPDP Phase 1 Recommendation 19**

  "The EPDP Team recommends that **ICANN Org negotiates and enters into required data protection agreements, as appropriate, with the Contracted Parties. In addition to the legally required components of such agreement, the agreement shall specify the responsibilities of the respective parties for the processing activities as described therein.** Indemnification clauses should ensure that the risk for certain data processing is borne, to the extent appropriate, by the parties that are involved in the processing."

EPDP Phase 1 Policy Recommendations Relating to Data Protection Agreements

- **EPDP Phase 1 Recommendation 20**

    "During Phase 1 of its work, the EPDP Team documented the data processing activities and responsible parties associated with gTLD registration data. The EPDP Team, accordingly, **recommends the inclusion of the data processing activities and responsible parties, outlined below, to be confirmed and documented in the relevant data protection agreements**, noting, however, this Recommendation may be affected by the finalization of the necessary agreements that would confirm and define the roles and responsibilities."

Data Protection Agreement vs Data Processing Spec

- A data protection agreement is simply a legally binding contract that states the rights and obligations of each party concerning the protection of personal data

- To address a broad range of potential relationships, situations and locations, the ICANN org and CPH implementation of the data protection agreement recommendations is the development of the Data Processing Specification (DPS) to existing contracts (RA & RAA).

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- ***Data Processing Specification (DPS)* Details**

- Current Status & FAQ

Planned Solution: Data Processing Specification (DPS)

- The purpose of the DPS is to facilitate contracted parties' and ICANN's compliance with applicable law when processing personal data within registration data.

- The DPS contains data protection principles that are of general application. They apply regardless of how each party is qualified (controller, processor, joint controller, personal information handler, etc) or where the party is located.

- The DPS is required under the Registration Data Policy if a contracted party determines that a data protection agreement with ICANN is necessary for the party's data processing pursuant to the Policy in order to comply with applicable law (see OneDoc, Section 5).

Data Processing Specification (DPS) Details

- The draft DPS will require each party to comply with applicable data protection law, including relating to:
    - Network security and, overall, the security of personal registration data
    - Security breach notifications
    - Engagement with data subjects and addressing their requests
    - Cross-border data transfers

- The DPS is not designed to create new requirements beyond those that exist under applicable data protection laws.

DPS - Roles and Responsibilities

- The DPS describes the factual circumstances of the processing.

- An Annex lists the operational roles and responsibilities that ICANN, registries, and registrars play in registration data processing required under the Registration Data Policy (the "who" does "what")

- Examples:
  - Registrars collect registration data from registrants
  - Registrars transfer registration data to registries, data escrow agents, and ICANN
  - ICANN collects registration data from registrars for compliance purposes
  - Etc.

DPS - Purposes for Processing

- The DPS includes a section that details purposes for processing data, as recommended by the EPDP Team.
  - Purposes are taken from the EPDP Phase 1 report (including the updated "Purpose 2")

- Note:
  - The DPS will not grant rights that do not currently exist in agreements. It will not require any new data processing that is not required under current agreements and policies.
  - The DPS does not, for example, grant third parties the ability to ask ICANN org for data, compel contracted parties to disclose data (that decision remains with the contracted parties), or allow ICANN org new ways to perform data accuracy assessment and analysis.

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DPS Status

- Current Status:
  - ICANN org and the CPH discussion group continue to work together to develop the language of the specification. Many pieces have been finalized, with ongoing discussions on remaining items.

- Delivery Date:
  - Delivering an agreed draft requires requires continued discussion and compromise, and it is difficult to know when resolution on remaining items will be achieved. Therefore, there is not a clear end date of this process. However, we are working together in good faith to complete this process as soon as possible.

FAQ Part 1

1. **What is the expected date for delivery of the Data Processing Specification?**
   - Discussions between ICANN org and the CPH discussion group concerning the draft Data Processing Specification are ongoing. Because delivering an agreed draft will require discussion and compromise, and it is difficult to know when resolution on remaining items will be achieved, there is not a clear end date of this process. We are working together in good faith to complete this process as soon as possible.

2. **Will the draft DPS document be made available prior to conclusion of negotiations?**
   - ICANN org and the CPH discussion group plan to present an agreed upon draft Data Processing Specification for the EPDP Phase 1 IRT when ready. If issues or questions are raised at that stage, we will consider this feedback.

3. **Will the DPS dictate which party or parties shall make decisions on data disclosure?**
   - No. The draft Data Processing Specification sets out the data protection requirements concerning processing of personal data within gTLD registration data that is required under the RA, RAA, and applicable consensus policies. The DPS will document and memorialize the parties' respective obligations as recognized under applicable law. Under the GDPR and other applicable laws, contracted parties have the obligation to determine whether to disclose personal data, as determined on a case-by-case basis. Nothing in the DPS can or will supersede this obligation.

FAQ Part 2

4. **Will the DPS define or modify legitimate bases for access?**
   - No. Nothing in the DPS can or will supersede the law as written, nor will it change contractual requirements.

5. **Does the DPS change anything about the Policy itself?**
   - No. The DPS will not define, change, modify, or define the legal bases for access or modify the parties' requirements under applicable Consensus Policies and agreements. It also cannot, for example, require Thick WHOIS or require disclosure for specified request types.The sole purpose of the DPS is to facilitate contracted parties' and ICANN's compliance with applicable law when processing personal data within registration data.

6. **Is it possible that the resulting final DPS document will necessitate the alteration or revision of any other ICANN policy?**
   - No. There is nothing in the DPS that can or would require modification of any Consensus Policy.