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Generic Names Supporting Organization

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

31 July 2020

Status of This Document

This is the Final Recommendations Report of the GNSO Expedited Policy Development Process (EPDP) Team on the Temporary Specification for gTLD Registration Data Phase 2 for submission to the GNSO Council.

Preamble

The objective of this Final Report is to document the EPDP Team's: (i) deliberations on charter questions, (ii) input received on the EPDP's Phase 2 Initial Report and the EPDP Team's subsequent analysis, (iii) policy recommendations and associated consensus levels, and (iv) implementation guidance, for GNSO Council consideration.

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1 Executive Summary

1.1 Background

On 17 May 2018, the ICANN Board of Directors (ICANN Board) adopted the Temporary Specification for generic top-level domain (gTLD) Registration Data ("Temporary Specification"). The Temporary Specification provides modifications to existing requirements in the Registrar Accreditation and Registry Agreements in order to comply with the European Union's General Data Protection Regulation ("GDPR").[1] In accordance with the ICANN Bylaws, the Temporary Specification will expire on 25 May 2019.

On 19 July 2018, the GNSO Council initiated an Expedited Policy Development Process (EPDP) and chartered the EPDP on the Temporary Specification for gTLD Registration Data team. In accordance with the Charter, EPDP team membership was expressly limited. However, all ICANN Stakeholder Groups, Constituencies and Supporting Organizations interested in participating are represented on the EPDP Team.

During phase 1 of its work, the EPDP Team was tasked to determine if the Temporary Specification for gTLD Registration Data should become an ICANN Consensus Policy as is, or with modifications. This Final Report concerns phase 2 of the EPDP Team's charter which covers: (i) discussion of a system for standardized access/disclosure to nonpublic registration data, (ii) issues noted in the Annex to the Temporary Specification for gTLD Registration Data ("Important Issues for Further Community Action"), and (iii) outstanding issues deferred from Phase 1, e.g., legal vs. natural persons, redaction of city field, et. al. For further details, please see here.

In order to organize its work, the EPDP Team agreed to divide its work into priority 1 and priority 2 topics. Priority 1 consists of the SSAD and all directly-related questions. Priority 2 includes the following topics:

- Display of information of affiliated vs. accredited privacy / proxy providers
- Legal vs. natural persons
- City field redaction
- Data retention
- Potential Purpose for ICANN's Office of the Chief Technology Officer
- Feasibility of unique contacts to have a uniform anonymized email address
- Accuracy and WHOIS Accuracy Reporting System

[1] The GDPR can be found at https://eur-lex.europa.eu/eli/reg/2016/679/oj; for information on the GDPR see, https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/contract/.

The EPDP Team agreed that priority should be given to completing the deliberations for priority 1 items. It agreed, however, that where feasible, the Team would also endeavor to make progress on priority 2 items in parallel.

1.2 Initial Report and Addendum to Initial Report

On 7 February 2020, the EPDP Team published its Initial Report for public comment. The Initial Report outlined the core issues discussed in relation to the proposed System for Standardized Access/Disclosure to non-public gTLD registration data ("SSAD") and accompanying preliminary recommendations.

On 26 March 2020, the EPDP Team published an Addendum to the Initial Report for public comment. The Addendum concerns the EPDP Team's preliminary recommendations and/or conclusions on the priority 2 items as listed above.

Following the publication of the Initial Report and the Addendum to the Initial Report, the EPDP Team: (i) continued to seek guidance on legal issues, (ii) carefully reviewed Public Comments received in response to the publication of the Initial Report and Addendum, (iii) continued to review the work-in-progress with the community groups the Team members represent, and (iv) continued its deliberations for the production of this Final Report that will be reviewed by the GNSO Council and, if approved, forwarded to the ICANN Board of Directors for approval as an ICANN Consensus Policy. Consensus calls on the recommendations contained in this Final Report, as required by the GNSO Working Group Guidelines, were carried out by the EPDP Team Chair, as described in Annex D. In short:

- Eleven (11) recommendations obtained a full consensus designation (#1, 2, 3, 4, 11, 13, 15, 16, 17, 19 and 21)
- Three (3) recommendations obtained a consensus designation (#7, 20 and 21)
- Six (6) recommendations obtained a strong support but significant opposition designation (#5, 8, 9, 10, 12 and 18)
- Two (2) recommendations obtained a divergence designation (#6 and 14)

For further details about these designations, please see Annex D as well as section 3.6 of the GNSO Working Group Guidelines.

Recommendations for GNSO Council consideration (see chapter 3 for full text of recommendations):

SSAD Recommendations:

Recommendation #1.	**Accreditation**
Recommendation #2.	**Accreditation of governmental entities**

Recommendation #3.	**Criteria and Content of Requests**
Recommendation #4.	**Acknowledgement of receipt**
Recommendation #5.	**Response Requirements**
Recommendation #6.	**Priority Levels**
Recommendation #7.	**Requestor Purposes**
Recommendation #8.	**Contracted Party Authorization**
Recommendation #9.	**Automation of SSAD Processing**
Recommendation #10.	**Determining Variable SLAs for response times for SSAD**
Recommendation #11.	**SSAD Terms and Conditions**
Recommendation #12.	**Disclosure Requirement**
Recommendation #13.	**Query Policy**
Recommendation #14.	**Financial Sustainability**
Recommendation #15.	**Logging**
Recommendation #16.	**Audits**
Recommendation #17.	**Reporting Requirements**
Recommendation #18.	**Review of implementation of policy recommendations concerning SSAD using a GNSO Standing Committee**

Priority 2 recommendations:

Recommendation #19.	**Display of information of affiliated privacy / proxy providers**
Recommendation #20.	**City Field**
Recommendation #21.	**Data Retention**
Recommendation #22.	**Purpose 2**

Priority 2 conclusions:

Conclusion #1. OCTO Purpose

Conclusion #2. Accuracy and WHOIS Accuracy Reporting System

As a result of external dependencies and time constraints, this Final Report does not address all priority 2 items. Specifically, the following items are not addressed:

Legal vs. natural persons: Although the issue did get some consideration in Phase 2, this did not result in agreement on new policy recommendations. The requested study on this topic was received too late in the process to receive due consideration. As a result, per the EPDP Phase 1 recommendations, Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so. Further work on this issue (including consideration of ICANN org's Differentiation between Legal and Natural Persons in Domain Name Registration Data Directory Services (RDDS) Study) is under consideration by the GNSO Council."

Feasibility of unique contacts to have a uniform anonymized email address: The EPDP Team received legal guidance that indicated that the publication of uniform masked email addresses results in the publication of personal data; which indicates that wide publication of masked email addresses may not be currently feasible under the GDPR. Further work on this issue is under consideration by the GNSO Council.

The EPDP Team will consult with the GNSO Council on how to address the remaining priority 2 items.

1.3 Conclusions and Next Steps

This Final Report will be submitted to the GNSO Council for its consideration and approval.

1.4 Other Relevant Sections of this Report

For a complete review of the issues and relevant interactions of this EPDP Team, the following sections are included within this Final Report:

- Background of the issues under consideration;
- Documentation of who participated in the EPDP Team's deliberations, including attendance records, and links to Statements of Interest, as applicable;
- An annex that includes the EPDP Team's mandate as defined in the Charter adopted by the GNSO Council; and
- Documentation on the solicitation of community input through formal SO/AC and SG/C channels, including responses.

2 EPDP Team Approach

This Section provides an overview of the working methodology and approach of the EPDP Team. The points outlined below are meant to provide the reader with relevant background information on the EPDP Team's deliberations and processes and should not be read as representing the entirety of the efforts and deliberations of the EPDP Team.

2.1 Working Methodology

The EPDP Team began its deliberations for phase 2 on 2 May 2019. The Team agreed to continue its work primarily through conference calls scheduled one or more times per week, in addition to email exchanges on its mailing list. Additionally, the EPDP Team held four face-to-face meetings: the first set of face-to-face discussions took place at the ICANN65 Public Meeting in Marrakech, Morocco, two dedicated set of face-to-face meetings, the second and fourth meeting, were held at the ICANN headquarters in Los Angeles (LA) in September 2019 and January 2020, and the third face-to-face discussion took place at the ICANN66 Public Meeting in Montreal, Canada. All of the EPDP Team's meetings are documented on its wiki workspace, including its mailing list, draft documents, background materials, and input received from ICANN's Supporting Organizations and Advisory Committees, including the GNSO's Stakeholder Groups and Constituencies.

The EPDP Team also prepared a Work Plan, which was reviewed and updated on a regular basis. In order to facilitate its work, the EPDP Team used a template to tabulate all input received in response to its request for Constituency and Stakeholder Group statements (see Annex D). This template was also used to record input from other ICANN Supporting Organizations and Advisory Committees and can be found in Annex D.

The EPDP Team held a community session at the ICANN66 Public Meeting in Montreal, during which it presented its methodologies and preliminary findings to the broader ICANN community for discussion and feedback.

2.2 Mind Map, Worksheets and Building Blocks

In order to ensure a common understanding of the topics to be addressed as part of its phase 2 deliberations, the EPDP Team mapped the topics using the following mind maps, which allowed for the regrouping and consolidation of topics (see mind map). This formed the basis for the subsequent development of the priority 1 and priority 2 worksheets (see worksheets) which the EPDP Team used to capture:

- Issue description / related charter questions
- Expected deliverable

- Required reading
- Briefings to be provided
- Legal questions
- Dependencies
- Proposed timing and approach

The EPDP Team Chair also put forward a number of working definitions to ensure consistent terminology and a shared understanding of terms used during the EPDP Team's deliberations (see working definitions).

Following the review of a number of real life use cases, the EPDP Team established a set of building blocks that the System for Standardized Access/Disclosure ("SSAD") would consist of, recognizing that a decision on the roles and responsibilities of the different parties involved may be influenced by both legal advice and guidance from the European Data Protection Board ("EDPB").

2.3 Priority 1 and Priority 2 Topics

In order to organize its work, the EPDP Team agreed to divide its work into priority 1 and priority 2 topics. Priority 1 consists of the SSAD and all directly-related questions. Priority 2 includes the following topics:

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- Potential Purpose for ICANN's Office of the Chief Technology Officer
- Feasibility of unique contacts to have a uniform anonymized email address
- Accuracy and WHOIS Accuracy Reporting System

The EPDP Team agreed that priority should be given to completing the deliberations for priority 1 items. It agreed, however, that where feasible, the Team would also endeavor to make progress on priority 2 items in parallel.

As a result of external dependencies and time constraints, this Final Report does not address all priority 2 items. Specifically, the following items are not addressed:

Legal vs. natural persons: Although the issue did get some consideration in Phase 2, this did not result in agreement on new policy recommendations. The requested study on this topic was received too late in the process to receive due consideration. As a result, per the EPDP Phase 1 recommendations, Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so. Further work on this issue (including consideration of ICANN org's Differentiation between Legal and Natural Persons in Domain Name Registration Data Directory Services (RDDS) Study) is under consideration by the GNSO Council."

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2.4 Legal Committee

Recognizing the complexity of many issues the EPDP Team was chartered to work through in Phase 2, the EPDP Team requested resources for the external legal counsel of Bird & Bird. To assist in preparing draft legal questions for Bird & Bird, EPDP Leadership chose to assemble a Legal Committee, comprised of members of the EPDP Team with legal experience.

The Phase 2 Legal Committee worked together to review questions proposed by the members EPDP Team to ensure:

1. the questions were truly legal in nature, as opposed to policy or policy implementation questions;
2. the questions were phrased in a neutral manner, avoiding both presumed outcomes as well as constituency positioning;
3. the questions were both apposite and timely to the EPDP Team's work; and
4. the limited budget for external legal counsel was used responsibly.

The Legal Committee presented all agreed-upon questions to the EPDP Team for its final sign-off before sending questions to Bird & Bird, with the exception of the questions on automation of decision making.

To date, the EPDP Team agreed to send eight SSAD-related questions to Bird & Bird. The full text of the questions and executive summaries of the legal advice received in response to the questions can be found in Annex F.

2.5 Charter Questions

In addressing the charter questions,[2] the EPDP Team considered both (1) the input provided by each group as part of the deliberations; (2) relevant input from phase 1; (3) the input provided by each group in response to the request for Early Input in relation to the specific charter questions; (4) the required reading identified for each topic in

[2] Annex A covers in further detail the linkage between each of the topics addressed in the recommendations and the relevant charter questions.

the worksheets, (5) input provided in response to the public comment forums, and (6) input provided by the EPDP Team's legal advisors, Bird & Bird.

3 EPDP Team Responses to Charter Questions & Recommendations

After reviewing public comments on the Initial Report and the Addendum to the Initial Report, the EPDP Team presents its recommendations for GNSO Council consideration. This Final Report states the level of consensus within the EPDP Team achieved for the different recommendations. In short:

- Eleven (11) recommendations obtained a full consensus designation (#1, 2, 3, 4, 11, 13, 15, 16, 17, 19 and 21)
- Three (3) recommendations obtained a consensus designation (#7, 20 and 21)
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For further details about these designations, please see Annex D as well as section 3.6 of the GNSO Working Group Guidelines.

Only in relation to the SSAD related recommendations, the EPDP Team considers these interdependent and as a result, these must be considered as one package by the GNSO Council and subsequently the ICANN Board.

Note: During Phase 1 of the EPDP Team's work, the EPDP Team was tasked with reviewing the Temporary Specification. The Temporary Specification was established as a response to the GDPR.[3] Accordingly, the GDPR is the only law that is specifically referenced in this report. The EPDP team has deliberated whether this Final Report could be drafted in a way that is agnostic to any specific law, but the EPDP Team determined that the report would benefit from explicit references to facilitate the implementation of the Team's recommendations. The GDPR is a regional law covering multiple jurisdictions and - given the strict criteria it contains - compliance with this law has a high probability of being compliant with other national or applicable regional data protection laws. The EPDP team fully endorses ICANN's aspiration to be globally inclusive, and nothing in this report shall overturn the basic principle that contracted parties can and must comply with locally applicable statutory laws and regulations.

[3] "This Temporary Specification for gTLD Registration Data (Temporary Specification) establishes temporary requirements to allow ICANN and gTLD registry operators and registrars to continue to comply with existing ICANN contractual requirements and community-developed policies in light of the GDPR.“

3.1 System for Standardized Access/Disclosure to Non-Public Registration Data (SSAD)

In Annex A, further details are provided in relation to the approach and the materials that the EPDP Team reviewed in order to address the charter questions and develop the following recommendations.

As part of its deliberations, the EPDP Team considered a centralized model, in which both requests and disclosure authorization would be done by ICANN or its delegated processor, and a decentralized model, in which both requests and disclosure decisions would be handled by contracted parties. The Team was not able to agree on either option and instead put forward a hybrid model in which requests would be centralized and disclosure decisions would typically (in the initial implementation) be made by contracted parties. The hybrid model SSAD is based on the following high-level principles:

- The receipt, authentication, and transmission of SSAD requests to the Contracted Party must be fully automated insofar as it is technically and commercially feasible and legally permissible. Disclosure decisions will typically (in the initial implementation) by made by the Contracted Party and should be automated only where technically and commercially feasible and legally permissible. In areas where automation does not meet these criteria, standardization of the disclosure decision process is the baseline objective. Experience gained over time with SSAD disclosure requests and responses must inform further streamlining and standardization of responses.
- In recognition of the need for experience-based adjustments in the function of SSAD, there should be a GNSO Standing Committee, which will monitor the implementation of the SSAD and recommend improvements that could be made. Improvements recommended through this process must not violate the policies established by the EPDP, data protection laws, ICANN Bylaws, or GNSO Procedures and Guidelines.
- Service level agreements (SLAs) need to be put in place and be enforceable, but these may need to change over time to recognize that there will be a learning curve.
- Responses to disclosure requests, regardless of whether review is conducted manually or an automated responses is triggered, are returned from the relevant Contracted Party directly to the Requestor, but appropriate logging mechanisms must be in place to allow for the SSAD to confirm that SLAs are met and responses are being processed according to the policy (for example, the Central Gateway MUST be notified when disclosure requests are rejected or granted).

The benefits of this model are:

Single location to submit requests

- Reduces time and effort spent by requestors to track down individual points of contact or follow individual procedures
- Ensures that requests are routed directly to the responsible party at each disclosing entity, thereby eliminating the uncertainty that requests are not received or go to someone unqualified to process them
- Allows for clear outreach opportunities to socialize the location and method for requesting non-public registration data
- Requests and responses can be tracked to see if there is compliance with the SLAs

Standardized request forms

- Reduces the number of disclosure requests that are denied due to insufficient information
- Increases the efficiency with which disclosing entities can review requests
- Reduces uncertainty for requestors who now have a standard/uniform set of data to provide when submitting disclosure requests.
- Reduces the need for individual set of required information by disclosing parties

Built-in authentication process

- Speeds up the review process for disclosing entities as they will not need to re-verify the Requestor
- External assurance that Requestors have been verified can increase the likelihood and/or speed of disclosure

Standardized review and response process

- Allows creation of a common response format
- Allows creation of rules, guidelines, and best practices disclosing parties can follow in reviewing and responding to requests
- Allows adoption of common response review system
- Allows automation of certain yet-to-be-defined requests by yet-to-be-defined Requestors
- Facilitates automated disclosure decision making in some scenarios
- The logging of requests and responses also allows ICANN Org to audit the actions of disclosing entities, identifying any instances of systemic non-compliance, and take appropriate enforcement action

Main SSAD Roles & Responsibilities:

- Central Gateway Manager – role performed by or overseen by ICANN Org. Responsible for managing intake and routing of SSAD requests that require manual review to responsible Contracted Parties. Responsible for managing and directing requests that are confirmed to be automated to Contracted Parties for release of data, consistent with the criteria established and agreed to in these policy recommendations or based on the recommendation of the GNSO Standing Committee for the review of the implementation of policy recommendations concerning SSAD. Responsible for collecting data on requests, responses, and disclosure decisions taken.

- Accreditation Authority – role performed by or overseen by ICANN Org. A management entity who has been designated to have the formal authority to "accredit" users of SSAD, i.e., to confirm and verify the identity of the user (represented by an Identifier Credential) and assertions (or claims) associated with the Identity Credential (represented by Signed Assertions).
- Identity Provider - Responsible for 1) Verifying the identity of a Requestor and managing an Identifier Credential associated with the Requestor, 2) Verifying and managing Signed Assertions associated with the Identifier Credential. For the purpose of the SSAD, the Identity Provider may be the Accreditation Authority itself or the Accreditation Authority may rely on zero or more third parties to perform the Identity Provider services.
- Contracted Parties – Responsible for responding to disclosure requests that do not meet the criteria for an automated response.[4]
- GNSO Standing Committee for the review of the implementation of policy recommendations concerning SSAD – Committee representative of the ICANN community responsible for evaluating SSAD operational issues emerging as a result of adopted ICANN Consensus Policies and/or their implementation. The GNSO Standing Committee is intended to examine data being produced as a result of SSAD operations, and provide the GNSO Council with recommendations on how best to make operational changes to the SSAD, which are strictly implementation measures, in addition to recommendations based on reviewing the impact of existing Consensus Policies on SSAD operations.

It is the expectation that the different roles and responsibilities will be outlined in detail and confirmed in the applicable agreements.

Below is a detailed breakdown of the underlying assumptions and policy recommendations that the EPDP Team is putting forward for community input.

3.2 ICANN Board and ICANN Org Input

In order to help inform its deliberations, the EPDP Team reached out to both the ICANN Board and ICANN Org “to understand the Board’s position on the scope of operational responsibility and level of liability (related to decision-making on disclosure of non-

[4] As a default, the Central Gateway Manager will send disclosure requests to Registrars, but that does not preclude the Central Gateway Manager from sending disclosure requests to Registries in certain circumstances (see recommendation #5 for further details).

public registration data) they are willing to accept on behalf of the ICANN organization along with any prerequisites that may need to be met in order to do so".

ICANN Org provided its response on 19 November 2019, noting in part that "ICANN org proposed that it could operate a gateway for authorized data to pass through. As noted above, the gateway operator does not make the decision to authorize disclosure. In the proposed model, the authorization provider would decide whether or not the criteria for disclosure are met. If a request is authorized and authenticated, the gateway operator would request the data from the contracted party and disclose the relevant data set to the Requestor".[5]

The ICANN Board provided its response on 20 November 2019 noting in part that "the Board has consistently advocated for the development of an access model for non-public gTLD registration data. If the EPDP Phase 2 Team's work results in a consensus recommendation that ICANN org take on responsibility for one or more operational functions within a SSAD, the Board would adopt that recommendation unless the Board determined, by a vote of more than two-thirds, that such a policy would not be in the best interests of the ICANN community or ICANN. Given the Board's advocacy for the development of an access model, and support for ICANN org's dialogue with the EDPB on a proposed UAM, it is likely that the Board would adopt an EPDP recommendation to this effect".

The EPDP Team posed a number of additional clarifying questions to ICANN org, and they can be found, together with the responses here: https://community.icann.org/x/5BdIBg. This input also included ICANN org's cost estimate for a proposed system for Standardized Access/Disclosure.

The EPDP Team considered this input, the feedback received from the Belgian DPA, and the input received during the public comment period, to make a final determination of the division of roles and responsibilities in the SSAD.

3.3 SSAD Underlying Assumptions

The EPDP Team used the underlying assumptions outlined below to develop its policy recommendations. These underlying assumptions do not necessarily create new requirements for contracted parties; instead, the assumptions are designed to assist both the readers of this Final Report and the ultimate policy implementers in understanding the intent and underlying assumptions of the EPDP Team in putting forward the SSAD model and related recommendations.

[5] Please note that the model described here is not the same as the SSAD model put forward in this report by the EPDP Team.

- The objective of the SSAD is to provide a predictable, transparent, efficient, and accountable mechanism for the access/disclosure of non-public registration data.
- The SSAD must be compliant with the GDPR.
- The SSAD must have the ability to adhere to these policy principles and recommendations.
- Given the decisions made by the EPDP team regarding the SSAD model, the working assumption is that ICANN and Contracted Parties will be Joint Controllers. This designation is based on a factual analysis of the policy as is proposed.

3.4 Conventions Used in this Document

The key words "MUST", "MUST NOT", "REQUIRED", "SHALL", "SHALL NOT", "SHOULD", "SHOULD NOT", "RECOMMENDED", "NOT RECOMMENDED", "MAY", and "OPTIONAL" in this document are to be interpreted as described in BCP 148, RFC2119, and RFC8174.

Note: Noting the EPDP team's choice of model, and pending the specific legal advice as to the responsibility of the parties and the identification as to the controllership of the data, as it applies to the proposed model, the EPDP team notes that certain statements, throughout the recommendations, may require refinement from mandatory to permissive and vice versa. (e.g., "Shall" to "should", "MUST" to "MAY", etc.).

Where Implementation Guidance is referenced, the EPDP Team considers this supplemental context and/or clarifying information to help inform the implementation of the policy recommendations but the EPDP Team notes that implementation guidance does not have the same weight and standing as recommendation text to create policy.

3.5 EPDP Team SSAD Recommendations

3.5.1. Definitions

- **Accreditation** - An administrative action by which the accreditation authority declares that a user is eligible to use SSAD in a particular security configuration with a prescribed set of safeguards.
- **Accreditation Authority** - A management entity who has been designated to have the formal authority to "accredit" users of SSAD, i.e., to confirm and Verify the identity of the user (represented by an Identifier Credential) and assertions (or claims) associated with the Identity Credential (represented by Signed Assertions).
- **Accreditation Authority Auditor** – The entity responsible for carrying out the auditing requirements of the Accreditation Authority, as outlined in

Recommendation #16 (Audits). The entity could be an independent body or, if ICANN Org ultimately outsources the role of Accreditation Authority to a third party, ICANN Org MAY be the Accreditation Authority Auditor.

- **Authentication** - The process or action of Validating the Identity Credential and Signed Assertions of a Requestor.
- **Authorization** - A process for approving or denying disclosure of non-public registration data.
- **Central Gateway Manager (CGM)** - role performed by or overseen by ICANN Org. Responsible for managing intake and routing of SSAD requests that require manual review to responsible Contracted Parties. Responsible for managing and directing requests that are confirmed to be automated to Contracted Parties for release of data, consistent with the criteria established and agreed to in these policy recommendations or based on the recommendation of the GNSO Standing Committee for the review of the implementation of policy recommendations concerning SSAD. Responsible for collecting data on requests, responses, and disclosure decisions taken.
- **De-accreditation of Accreditation Authority –** An administrative action by which ICANN org revokes the agreement with the accreditation authority, if this function is outsourced to a third party, following which it is no longer approved to operate as the accreditation authority.
- **Eligible government entity**: a government entity (including local government and International Governmental Organizations) that has a purpose to access non-public registration data for the exercise of a public policy task within its mandate.
- **Identity Credential:** A data object that is a portable representation of the association between an identifier and authenticated information, and that can be presented for use in Validating an identity claimed by an entity that attempts to access a system. Example: Username/Password, OpenID credential, X.509 public-key certificate.
- **Identity Provider -** Responsible for 1) Verifying the identity of a Requestor and managing an Identifier Credential associated with the Requestor and 2) Verifying and managing Signed Assertions associated with the Identifier Credential. For the purpose of the SSAD, the Identity Provider may be the Accreditation Authority itself or the Accreditation Authority may rely on zero or more third parties to perform the Identity Provider services.
- **Requestor –** An accredited user seeking disclosure of domain name registration data through the SSAD
- **Revocation of User Credentials-** The event that occurs when an Identity Provider declares that a previously valid credential has become invalid.
- **Signed Assertion**: A data object that is a portable representation of the association between an Identifier Credential and one or more access assertions, and that can be presented for use in Validating those assertions for an entity that attempts such access. Example: [OAuth credential], X.509 attribute certificate. Signed Assertions may be user-specific (e.g. to indicate professional

affiliation or affirmation of lawful data handling processes) or request-specific (e.g. indicating the lawful basis for the disclosure request).

- **System for Standardized Access/Disclosure to non-public gTLD registration data** (SSAD) - The SSAD is the overall suite of parties and parts that make up the request, validation and disclosure system.
- **Validate/validation -** To test, prove or establish the soundness or correctness of a construct. (Example: The Discloser will Validate the Identity Credential and Signed Assertions as part of its Authorization process.)
- **Verify -** To test or prove the truth or accuracy of a fact or value. (Example: Identity Providers Verify the identity of the Requestor prior to issuing an Identity Credential.)
- **Verification -** The process of examining information to establish the truth of a claimed fact or value.

3.5.2. Recommendations

Recommendation #1. Accreditation[6]

1.1. The EPDP Team recommends the establishment of, or selection of, an Accreditation Authority.

1.2. The EPDP Team recommends that the Accreditation Authority establish a policy for accreditation of SSAD users in accordance with the recommendations outlined below.

1.3. The following recommendations MUST be included in the accreditation policy:

1.3.1. SSAD MUST only accept requests for access/disclosure from accredited organizations or individuals. However, accreditation requirements MUST accommodate any intended user of the system, including an individual or organization who makes a single request. The accreditation requirements for repeat users of the system and a one-time user of the system MAY differ.

1.3.2. Both legal persons and/or individuals are eligible for accreditation. An individual accessing SSAD using the credentials of an accredited entity (e.g. legal persons) warrants that the individual is acting on the authority of the accredited entity.

1.3.3. The accreditation policy defines a single Accreditation Authority, managed by ICANN org, which is responsible for the verification, issuance, and ongoing management of both Identity Credentials and Signed Assertions. The Accreditation Authority MUST develop a privacy policy. The Accreditation Authority MAY work with external or third-party Identity Providers that could serve as

[6] Note that accreditation is not referring to accreditation/certification as discussed in GDPR Article 42/43.

clearinghouses to Verify identity and authorization information associated with those requesting accreditation. The responsibility for the processing of personal data, regardless of the party carrying out that processing, shall remain with the Accreditation Authority. If ICANN org chooses to outsource the Accreditation Authority function or parts thereof, ICANN org will remain responsible for overseeing the party(ies) to which the function or parts thereof is/are outsourced. Overseeing MUST include monitoring for and addressing potential abuse by the party(ies) to which the function of parts thereof has been outsourced.

1.3.4. The decision to authorize disclosure of registration data, based on validation of the Identity Credential, Signed Assertions, and data as required in the recommendation concerning criteria and content of requests (Recommendation #3), will reside with the Registrar, Registry or the Central Gateway Manager, as applicable.

1.4. Requirements of the Accreditation Authority

1.4.1. Verify the Identity of the Requestor: The Accreditation Authority MUST verify the identity of the Requestor, resulting in an Identity Credential.

1.4.2. Management of Signed Assertions: The Accreditation Authority MAY verify and manage a set of dynamic assertions/claims associated with and bound to the Identity Credential of the Requestor. This verification, which may be performed by an Identity Provider, results in a Signed Assertion. Signed Assertions[7] convey information such as:

- Assertion as to the purpose(s) of the request
- Assertion as to the legal basis of the request
- Assertion that the user identified by the Identity Credential is affiliated with the relevant organization
- Assertion regarding compliance with laws (e.g., storage, protection and retention/disposal of data)
- Assertion regarding agreement to use the disclosed data for the legitimate and lawful purposes stated
- Assertion regarding adherence to safeguards and/or terms of service and to be subject to revocation if they are found to be in violation

[7] For clarity, Signed Assertions are dynamic and may change based on the request (purpose, legal basis, type, urgency, etc.) compared to an Identifier Credential, which is static and typically does not change. Signed assertions are only used to associate/bind attributes to an identity. These attributes are dynamic per request, but can be vetted and managed up front as part of the Accreditation Process as needed. The Accreditation Authority can establish various assertions for a specific Identifier Credential up front or dynamically create them on a per request basis. How this is determined is to be further worked out in the implementation phase. The Accreditation Authority may store multiple Signed Assertions per Identifier Credential, but the Requestor must invoke the relevant assertions per request.

- Assertions regarding prevention of abuse, auditing requirements, dispute resolution and complaints process, etc.
- Assertions specific to the Requestor – trademark ownership/registration for example
- Power of Attorney statements, when/if applicable.

1.4.3. MUST validate Identity Credentials and Signed Assertions, in addition to the information contained in the request, facilitate the decision to accept or reject the Authorization of an SSAD request. For the avoidance of doubt, the presence of these credentials alone MUST NOT result in or mandate an automatic access / disclosure authorization. However, the ability to automate access/disclosure authorization decision making is possible under certain circumstances where lawful.

1.4.4. The Accreditation Authority MUST define a baseline "code of conduct"[8] that establishes a set of rules that contribute to the proper application of data protection laws – such as the GDPR, including:

- A clear and concise explanatory statement.
- A defined scope that determines the processing operations covered (the focus for SSAD would be on the Disclosure operation.)
- Mechanism that allow for the monitoring of compliance with the provisions.
- Identification of an Accreditation Authority Auditor (a.k.a. monitoring body) and definition of mechanism(s) which enable that body to carry out its functions.
- Description as to the extent a "consultation" with stakeholders has been carried out.

1.4.5. The Accreditation Authority MUST develop a privacy policy for the processing of personal data it undertakes as well as terms of service for its accredited users (as outlined in recommendation #11).

1.4.6. Develop a baseline application procedure: The Accreditation Authority MUST develop a uniform baseline application procedure and accompanying requirements for all Identity Providers (when applicable) and all applicants requesting accreditation, including:

i. Accreditation timeline
ii. Definition of eligibility requirements for accredited users
iii. Identity Validation, Procedures
iv. Identity Credential Management Policies: lifetime/expiration, renewal frequency, security properties (password or key policies/strength), etc.
v. Identity Credential Revocation Procedures: circumstances for revocation, revocation mechanism(s), etc. (see also "Accredited User Revocation & abuse section below]

[8] For the avoidance of doubt, the code of conduct referenced here is not intended to refer to the Code of Conduct as described in the GDPR. The code of conduct referenced here refers to a set of rules and standards to be followed by the Accreditation Authority.

vi. Signed Assertions Management: lifetime/expiration, renewal frequency, etc.

vii. NOTE: requirements beyond the baseline listed above may be necessary for certain classes of Requestors.

1.4.7. Define dispute resolution and complaints process: The Accreditation Authority MUST define a dispute resolution and complaints process to challenge actions taken by the Accreditation Authority. The defined process MUST include due process checks and balances.

1.4.8. Audits: The Accreditation Authority MUST be audited by an auditor on a regular basis. Should the Accreditation Authority be found in breach of the accreditation policy and requirements, it will be given an opportunity to cure the breach, but in cases of repeated failure, a new Accreditation Authority must be identified or created. Additionally, accredited entities MUST be audited for compliance with the accreditation policy and requirements on a regular basis; (Note: detailed information regarding auditing requirements for both the Accreditation Authority and any Identity Providers it may use can be found in the Auditing recommendation #16).

1.4.9. User Groups: The Accreditation Authority MAY develop user groups / categories to facilitate the accreditation process as all Requestors will need to be accredited, and accreditation will include identity verification.

1.4.10. Reporting: The Accreditation Authority MUST report publicly and on a regular basis on the number of accreditation requests received, accreditation requests approved/renewed, accreditations denied, accreditations revoked, complaints received and information about the identity providers it is working with. See also recommendation #17 on reporting.

1.4.11. Renewal: The Accreditation Authority MUST establish a timeline and requirements for the renewal of the accreditation.

1.4.12. Confirmation of user data: The Accreditation Authority MUST send periodic reminders (e.g., yearly) to accredited users to confirm user data and remind accredited users to keep the information required for accreditation up to date. Changes to this required information MAY result in the need to re-accredit.

1.5. Accredited User Revocation

1.5.1. Revocation, within the context of the SSAD, means the Accreditation Authority can revoke the accredited user's status as an accredited user of the SSAD.[9] A non-exhaustive list of examples where revocation may

[9] For clarity, a legal entity would not be automatically de-accredited for the single action of an individual user whose accreditation is linked to the accreditation of the legal entity, but the entity may be held responsible for the actions of the individual user whose accreditation is linked to that of the legal entity.

apply include 1) the accredited user's violation of any applicable safeguards or terms of service, 2) a change in affiliation of the accredited user, 3) violation of data retention / destruction requirements or 4) where prerequisites for accreditation no longer exist.

1.5.2. The Accreditation Authority MUST make available an appeals mechanism to allow an accredited user to challenge the decision to revoke the accredited user's status within a defined time frame to be decided by the Accreditation Authority. However, for the duration of the appeal, the accredited user's status will remain suspended. Outcomes of an appeal MUST be reported in a transparent manner**.**

1.5.3. A mechanism to report an accredited user's violation of any safeguards or terms of service MUST be provided by SSAD.[10] Reports MUST be relayed to the Accreditation Authority for handling. The Accreditation Authority MAY also obtain information from other parties in making a determination that abuse has taken place.

1.5.4. The revocation policy for individuals/entities SHOULD include graduated penalties; the penalties will be further detailed during implementation, factoring in how graduated penalties are applied in other ICANN areas. In other words, not every violation of the system will result in Revocation; however, Revocation MAY occur if the Accreditation Authority determines that the accredited individual or entity has materially breached the conditions of its accreditation and failed to cure based on: i) a third-party verified complaint received; ii) results of an audit or investigation by the Accreditation Authority or auditor; iii) any misuse or abuse of privileges afforded; iv) repeated violations of the accreditation policy; v) results of audit or investigation by a DPA.

1.5.5. In the event there is a pattern or practice of abusive behavior within an individual/entity, the credential for the individual/entity MAY be suspended or revoked as part of a graduated sanction.

1.5.6. Revocation MUST prevent re-accreditation in the future absent special circumstances presented to the satisfaction of the Accreditation Authority.

1.5.7. For the avoidance of doubt, De-accreditation does not prevent individuals or entities from submitting future requests under the access method provisioned in Recommendation 18 (Reasonable Requests for Lawful Disclosure) of the EPDP Phase 1 Report.

1.6. De-authorization of Identity Providers

1.6.1. De-authorization of Identity Providers: The Identity Providers Validation Procedures SHOULD include graduated penalties. In other words, not every violation of the policy will result in De-authorization; however, De-

[10] Note, abuse of SSAD by an accredited user is addressed in recommendation #13.

authorization may occur if it has been determined that the Identity Provider has materially breached the conditions of its contract and failed to cure based on: i) a third-party complaint received; ii) results of an audit or investigation by the Accreditation Auditor or auditor; iii) any misuse or abuse of privileges afforded; d) repeated violations of the accreditation policy. Depending upon the nature and circumstances leading to the de-authorization of an Identity Provider, some or all of its outstanding credentials may be revoked or transitioned to a different Identity Provider.

1.6.2. The Accreditation Authority MUST make available an appeals mechanism to allow an Identity Provider to challenge the decision to de-authorize the Identity Provider. However, for the duration of the appeal, the Identity Provider's status will remain suspended. Outcomes of an appeal MUST be reported in a transparent manner.

1.7. Additional considerations for accredited entities or individuals:

1.7.1. MUST agree to:

1.7.1.1. only use the data for the legitimate and lawful purpose stated;

1.7.1.2. the terms of service, in which the lawful uses of data are described;

1.7.1.3. prevent abuse of data received;

1.7.1.4. cooperate with any audit or information requests as a component of an audit;

1.7.1.5. be subject to de-accreditation if they are found to abuse use of data or accreditation policy / requirements;

1.7.1.6. store, protect and dispose of the gTLD registration data in accordance with applicable law;

1.7.2. only retain the gTLD registration data for as long as necessary to achieve the purpose stated in the disclosure request.

1.7.3. The number of SSAD requests that can be submitted during a specific period of time MUST NOT be restricted, except where the accredited entity poses a demonstrable threat to the SSAD, or where they may be otherwise restricted under these recommendations (such as under recommendation 1.5(d) and 13(b)). It is understood that possible limitations in SSAD's response capacity and speed may apply.

1.7.4. MUST keep the information required for accreditation and verification up to date and inform the Accreditation Authority promptly when there are changes to this information. Any changes MAY result in re-accreditation or re-verification of certain pieces of information provided.

Implementation Guidance

1.8. In relation to accreditation, the EPDP Team provides the following implementation guidance, with the understanding that further details will be developed in the implementation phase:

1.8.1. Recognized, applicable, and well-established organizations could support the Accreditation Authority as an Identity Provider. Proper vetting, as described in 1.3(f) above, MUST take place if any such reputable and well-established organizations are to collaborate with the Accreditation Authority.

1.8.2. Examples of additional information the Accreditation Authority or Identity Provider MAY require an applicant for accreditation to provide could include:

- a business registration number and the name of the authority that issued this number (if the entity applying for accreditation is a legal person);
- information asserting trademark ownership.[11]

1.9. Auditing / logging by Accreditation Authority and Identity Providers

1.9.1. The accreditation/verification activity (such as accreditation request, information on the basis of which the decision to accredit or verify identity was made) will be logged by the Accreditation Authority and Identity Providers.

1.9.2. Logged data SHALL only be disclosed, or otherwise made available for review, by the Accreditation Authority or Identity Provider, where disclosure is considered necessary to a) fulfill or meet an applicable legal obligation of the Accreditation Authority or Identity Provider; b) carry out an audit under this policy or; c) to support the reasonable functioning of SSAD and the accreditation policy.

See also auditing and logging recommendations for further details.

1.10. **Verification.** ICANN org should use its experience in other areas where verification is involved, such as registrar accreditation, to put forward a proposal for verification of the identity of the Requestor during the implementation phase.

[11] For clarity, service providers and/or lawyers acting on behalf of trademark owners are also eligible for accreditation. However, such service providers and/or lawyers are acting on behalf (legally) of the trademark owner. Where such service providers and/or lawyers breach the rules of the SSAD, it is necessary that disclosing entities must be provided with such data, and it must be clear that such a breach may be considered in the future disclosures for trade mark owner on whose behalf the agent is acting. The use of different 3rd party agents cannot be used as a means to avoid past sanctions for misuse of the SSAD.

1.11. **Re-Accreditation Periods.** As a best practice, the re-accreditation period and requirements for Registrars may be considered, which is currently 5 years. For the avoidance of doubt, nothing prohibits the Accreditation Authority from requiring additional documentation upon accreditation renewal.

1.12. The accredited entity is expected to develop appropriate policies and procedures to ensure appropriate use by an individual of its credentials. Each user must be accredited, but a user acting on behalf of an organization, must have their accreditation tied to its organization's accreditation.

Recommendation #2. Accreditation of governmental entities

2.1. Objective of accreditation

SSAD MUST provide reasonable access to registration data for entities that require access to this data for the exercise of their public policy tasks. In view of their obligations under applicable data protection rules, the final responsibility for granting access to non-public registration data will remain with the party that is considered to be a controller for the processing of that registration data that constitutes personal data.

The development and implementation of an accreditation procedure that specifically applies to governmental entities will facilitate decisions that Contracted Parties will need to make before granting access to non-public registration data to a particular entity or automated processing of disclosure decisions by the Central Gateway Manager, if applicable. This accreditation procedure can provide data controllers with information necessary to allow them to assess and decide about the disclosure of data.

2.2. Eligibility

Accreditation by a country's/territory's government body or its authorized body[12] would be available to various eligible government entities[13] that require access to non-public registration data for the exercise of their public policy task, including, but not limited to:

- Civil and criminal law enforcement authorities
- Data protection and regulatory authorities
- Judicial authorities
- Consumer rights organizations granted a public policy task by law or delegation from a governmental entity

[12] Implementation consideration: such a body could be an International Governmental Organization.

[13] Intergovernmental organizations (IGOs) are also eligible for accreditation under recommendation #2. An IGO that wants to be accredited MUST seek accreditation via its host country's Accreditation Authority.

- Cybersecurity authorities granted a public policy task by law or delegation from a governmental entity including national Computer Emergency Response Teams (CERTs)

2.3. Determining eligibility

Eligible government entities are those that require access to non-public registration data for the exercise of their public policy task, in compliance with applicable data protection laws. Whether an entity should be eligible is determined by a country/territory- designated Accreditation Authority. This eligibility determination does not affect the final responsibility of the Contracted Party to determine whether or not to disclose personal data following a request for non-public registration data or by the Central Gateway Manager in the case of requests that meet the criteria for automated processing of disclosure decisions, if applicable.

2.4. Governmental Accreditation Authority requirements

Governmental Accreditation requirements MUST follow the requirements set out in Rec. 1.3.

Additionally, the requirements MUST be listed and made available to eligible government entities. Failure to abide by these requirements may result in de-accreditation of the Accreditation Authority by ICANN Org.

2.5. Accreditation procedure

Accreditation MUST be provided by an approved accreditation authority. This authority may be either a country's/territory's governmental agency (e.g. a Ministry) or delegated to an intergovernmental organization. This authority SHOULD publish the requirements for accreditation and carry out the accreditation procedure for eligible government entities.

2.5.1. Accreditation emphasizes the responsibilities of the data Requestor (recipient), who is responsible for complying with law.
2.5.2. Accreditation will focus on the requirements of the law, such as requirements regarding data retention length, secure storage, organizational data controls, and breach notifications.
2.5.3. Renewal, Logging, Auditing, Complaint and De-accreditation will be handled as per Rec. 1.

Implementation Guidance:

2.6. Accreditation is required for a governmental entity to participate in the SSAD. Unaccredited governmental entities can make data requests outside the

SSAD, and Contracted Parties should have procedures in place to provide reasonable access.

2.7. Accredited users will be required to follow the safeguards as set by the policy (see also recommendation #11 SSAD Terms and Conditions). This is without prejudice for the entity to respect safeguards under its domestic law.

2.8. Accredited entities SHOULD provide details to aid the disclosure decision to Contracted Parties such as any applicable local law relating to the request.

Recommendation #3. Criteria and Content of Requests

3.1. The objective of this recommendation is to allow for the standardized submission of requested data elements, including any supporting documentation.

3.2. The EPDP Team recommends that each SSAD request MUST include all information necessary for a disclosure decision, including the following information:

3.2.1. Domain name pertaining to the request for access/disclosure;

3.2.2. Identification of and information about the Requestor including Identity and Signed Assertion information as defined in Recommendation #1 Section 1.4a) and Section 1.4b);[14]

3.2.3. Information about the legal rights of the Requestor specific to the request and legitimate interest or other lawful basis and/or justification for the request, (e.g., What is the legitimate interest or other lawful basis; Why is it necessary for the Requestor to ask for this data?);

3.2.4. Affirmation that the request is being made in good faith and that data received (if any) will be processed lawfully and only in accordance with the purpose specified in (c);

3.2.5. A list of data elements requested by the Requestor, and why the data elements requested are necessary for the purpose of the request;

3.2.6. Request type (e.g. Urgent – see also recommendation #6 Priority Levels, Confidential – see also recommendation #12 – Disclosure Requirements).

3.3. The Central Gateway Manager[15] MUST confirm that all required information is provided. Should the Central Gateway Manager detect that the request is incomplete, the Central Gateway Manager MUST notify the Requestor that the request is incomplete, detailing which required data is missing, and provide an

[14] Consideration will need to be given by all parties involved in SSAD to the requirements that may apply to cross-border data transfers.

[15] See definition in section 3.5.1 – Definitions.

opportunity for the Requestor to complete its request. It must not be possible for a Requestor to submit a request that is incomplete.

Implementation Guidance

The EPDP Team expects that:

3.4. Each request must include data associated with the information detailed in Section 3.2 above. While the mechanism to collect and place this data into a request (be it a web form, an API or similar) is not specified by this policy, the offering of pre-populated fields, tick boxes and/or dropdown options should be considered. However, the use of pre-populated fields, tick boxes or dropdown options must not exclude the ability of Requestors from submitting free form responses.

3.5. Requests must be in English unless the Contracted Party that is receiving the request indicates they are also willing to receive the request and/or supporting documents in other language(s)**.**

3.6. A signed assertion may provide one or more of the requirements as listed above.

Recommendation #4. Acknowledgement of receipt and relay of the disclosure request

4.1. Acknowledgement of receipt

4.1.1. Following confirmation that the request is syntactically correct and that all required fields have been filled out, the Central Gateway Manager MUST immediately and synchronously respond with the acknowledgement of receipt and relay the disclosure request[16] to the responsible Contracted Party.

4.1.2. The response provided by the Central Gateway Manager to the Requestor SHOULD also include information about the subsequent steps, information on how public registration data can be obtained as well as the expected timeline consistent with the SLAs outlined in recommendation #10.

4.2. Relay of disclosure request

4.2.1. By default, the Central Gateway Manager MUST relay the disclosure request to the Registrar of Record. However, where the Central

Gateway Manager is aware of any circumstance, assessed in line with these recommendations, that necessitates the provision of a disclosure request to the relevant Registry Operator, the Central Gateway Manager MAY relay the disclosure request to the relevant Registry Operator, provided that the reasons necessitating such a transfer of a request, are provided to the registry operator for their consideration. The Requestor MUST be able to flag such circumstance to the Central Gateway Manager, but the Central Gateway Manager MUST make its own assessment of whether the identified circumstance necessitates the provision of the disclosure request to the relevant Registry Operator. For clarity, nothing in this recommendation prevents a Requestor from directly contacting, outside of SSAD, the relevant Registry Operator with a disclosure request.

Implementation guidance

The EPDP Team expects that:

4.3. The acknowledgement of receipt will include a "ticket number" or similar mechanism to facilitate interactions between the Requestor and the SSAD, details to be worked out in implementation.

4.4. The Central Gateway Manager relays the disclosure request as well as necessary and appropriate information about the Requestor to the Contracted Party. If it concerns a disclosure requests for which automated processing of the disclosure decision applies (see recommendation Automation), the relay of the disclosure request and all relevant information may happen at the same time as the Central Gateway Manager would direct the Contracted Party to automatically disclose the requested data to the Requestor.

4.5 The Central Gateway Manager is expected to relay the disclosure request as well as all relevant information about the Requestor to the Contracted Party. In the case of disclosure requests for which automated processing of the disclosure decision applies (see recommendation Automation), the relay of the disclosure request and all relevant information may happen at the same time as the Central Gateway Manager would direct the Contracted Party to automatically disclose the requested data to the Requestor.

Recommendation #5. Response Requirements

5.1. For the Central Gateway Manager:[17]

[17] Note that the requirements for disclosure requests that meet the criteria for automated disclosure decisions are covered in recommendation #9.

5.1.1. As part of its relay to the responsible Contracted Party, the Central Gateway Manager MAY provide a recommendation to the Contracted Party whether to disclose or not.

5.2. For Contracted Parties:

5.2.1. The Contracted Party MAY follow the recommendation of the Central Gateway Manager but is not obligated to do so. If the Contracted Party decides not to follow the recommendation of the Central Gateway Manager, the Contracted Party MUST communicate its reasons for not following the Central Gateway Manager's recommendation so the Central Gateway Manager can learn and improve on future response recommendations.

5.2.2. MUST provide a disclosure response without undue delay, unless there are exceptional circumstances. Such exceptional circumstances MAY include the overall number of requests received if the number far exceeds the established SLAs.[18] SSAD requests that meet the automatic response criteria must receive an automatic disclosure response. For requests that do not meet the automatic response criteria, a response MUST be received in line with the SLAs described in the SLA recommendation.

5.2.3. Responses where disclosure of data (in whole or in part) has been denied MUST include a rationale sufficient for the Requestor to objectively understand the reasons for the decision, including, for example, an analysis and explanation of how the balancing test was applied[19] (if applicable). Additionally, in its response, the Contracted Party MAY include information on how public registration data can be obtained.

5.2.4. If the Contracted Party determines that disclosure would be in violation of applicable laws or result in inconsistency with these policy recommendations, the Contracted Party MUST document the rationale and communicate this information to the Requestor, and, if requested, ICANN Org.

5.3. If a Requestor is of the view that its request was denied in violation of the procedural requirements of this policy, a complaint MAY be filed with ICANN Org. ICANN Org MUST investigate complaints regarding disclosure requests under its enforcement processes.

5.4. ICANN org MUST make available an alert mechanism by which Requestors as well as data subjects whose data has been disclosed can alert ICANN org if they are of the view that disclosure or non-disclosure is the result of systemic abuse by a Contracted Party. This alert mechanism is not an appeal mechanism – to

[18] See recommendation #12 for further details on what is considered abusive use of SSAD.

[19] As per recommendation #6, care must be taken to ensure that no personal data is revealed to the Requestor within this explanation.

contest disclosure or non-disclosure affected parties are expected to use available dispute resolution mechanisms such as courts or Data Protection Authorities – but it should help inform ICANN Compliance of allegations of systemic failure to follow the requirements in this policy, which should trigger appropriate enforcement action.

Implementation Guidance

5.5. Information resulting from the alert mechanism is also expected to be included in the SSAD Implementation Status Report (see recommendation #18) to allow for further consideration of potential remedies to address abusive behavior.

5.6. It is not the EPDP Team's expectation that the Central Gateway Manager will provide a recommendation from day one as it is understood that experience will need to be gained before the Central Gateway Manager may be in a position to provide such a recommendation to the Contracted Party. It is the expectation that a recommendation would be developed in an automated fashion by factoring in information contained in the request, information about the Requestor, and the history of requests by the Requestor.

Recommendation #6. Priority Levels

6.1. The EPDP Team recommends that the Central Gateway Manager accommodate at least the following three (3) priority levels, which a Requestor can choose from when submitting requests through the SSAD. The priority level defines the urgency with which the disclosure request should be actioned by the Contracted Party:

6.1.1. **Priority 1** - Urgent Requests - The criteria to determine urgent requests is limited to circumstances that pose an imminent threat to life, serious bodily injury, critical infrastructure (online and offline) or child exploitation. For the avoidance of doubt, Priority 1 is not limited to requests from law enforcement agencies.

6.1.2. **Priority 2** - ICANN Administrative Proceedings – disclosure requests that are the result of administrative proceedings under ICANN's contractual requirements or existing Consensus Policies, such as UDRP and URS verification requests.[20]

6.1.3. **Priority 3** - All other requests.

6.2. For Priority 3 requests, Requestors MUST have the ability to indicate that the disclosure request concerns a consumer protection issue (phishing, malware or fraud), in which case the Contracted Party SHOULD prioritize the request over

[20] For clarity, this priority assignment is expected to be limited to ICANN-approved dispute resolution service providers or its employees in the context of ICANN Administrative Proceedings.

other Priority 3 requests. Persistent abuse of this indication can result in the Requestor's de-accreditation.

6.3. The Contracted Party:

- MAY reassign the priority level during the review of the request. For example, as a request is manually reviewed, the Contracted Party MAY note that although the priority is set as priority 2 (ICANN Administrative Proceeding), the request shows no evidence documenting an ICANN Administrative Proceeding such as a filed UDRP case, and accordingly, the request should be recategorized as Priority 3.
- MUST communicate any recategorization to the Central Gateway Manager and Requestor.

6.4. The EPDP Team recommends that the SSAD MUST support 'urgent' SSAD disclosure requests to which the following requirements apply:

6.4.1. Abuse of urgent requests: Violations of the use of Urgent SSAD Requests will result in a response from the Central Gateway Manager to ensure that the requirements for Urgent SSAD Requests are known and met in the first instance, but repeated violations may result in the Central Gateway Manager suspending the ability to make urgent requests via the SSAD.

6.4.2. Contracted Parties MUST maintain a dedicated contact for dealing with Urgent SSAD Requests which can be stored and used by the Central Gateway Manager, in circumstances where an SSAD request has been flagged as Urgent.

6.5. The EPDP Team recommends that Contracted Parties MUST publish their standard business hours, business days, and accompanying time zone in the SSAD portal.

Implementation Guidance

6.6 See, for reference, Framework for Registry Operator to Respond to Security Threats which notes: *"Initial judgment of a request being "High Priority" should be self-evident and require no unique skills in order to determine a public safety nexus. "High Priority" should be considered an imminent threat to human life, critical infrastructure or child exploitation".*

6.7 Critical infrastructure means the physical and cyber systems that are vital in that their incapacity or destruction would have a major detrimental impact on the physical or economic security or public health or safety.

6.8 See also recommendation #10 which contains further details in relation to the requirements for an Urgent SSAD request.

How is priority defined?
Priority is a code assigned to requests for disclosure that assumes processing will happen based upon agreed to, best effort target response times.

Who sets the priority?
The initial priority of a disclosure request is set by the Requestor, using the priority options defined by this policy. When selecting a priority, the Central Gateway Manager will clearly state the criteria applicable for an Urgent Request and the potential consequences of abusing this priority setting.

What happens if priority needs to be shifted?
It is possible that the initially-set priority may need to be reassigned during the review of the request. For example, as a request is manually reviewed, the Contracted Party MAY note that although the priority is set as 2 (UDRP/URS), the request shows no evidence documenting a filed UDRP case, and accordingly, the request should be recategorized as Priority 3. Any recategorization MUST be communicated to the Central Gateway Manager and Requestor. Following receipt of a non-automated disclosure request from the Central Gateway Manager, the Contracted Party is responsible for determining whether to disclose the nonpublic data. Within the above-defined response times, the Contracted Party MUST respond to the request.

Recommendation #7. Requestor Purposes

7.1. The EPDP Team recommends that:

7.1.1. Requestors MUST submit data disclosure requests for specific purposes such as but not limited to: (i) criminal law enforcement, national or public security, (ii) non law enforcement investigations and civil claims, including, intellectual property infringement and UDRP and URS claims, (iii) consumer protection, abuse prevention and network security and (iv) obligations applicable to regulated entities.[21] Requestors MAY also submit data verification requests on the basis of Registered Name Holder (RNH) consent that has been obtained by the Requestor (and is at the sole responsibility of that Requestor), for example to validate the RNH's claim of ownership of a domain name registration, or contract with the Requestor.

7.1.2. Assertion of one of these specific purposes does not guarantee access in all cases, but will depend on evaluation of the merits of the specific

[21] For example, the EU Directive on security of network and information systems (known as the NIS Directive) imposes specific obligations on Digital Service Providers and Operators of Essential Services.

request, compliance with all applicable policy requirements, and the legal basis for the request.

Recommendation #8. Contracted Party Authorization.

For clarity, this recommendation pertains to disclosure requests that are routed to the Contracted Party for review. These requirements DO NOT apply to disclosure requests that meet the criteria for automated processing of disclosure decisions as described in recommendation #9, regardless of whether automated processing of disclosure decisions is mandated or at the request of the Contracted Party. This recommendation does not override the ability for Contracted Parties to differentiate between registrants based on geographic basis as outlined in recommendation #16 (from EPDP Phase 1) nor does it override the ability for Contracted Parties to differentiate between legal and natural persons as per recommendation #17 (from EPDP Phase 1) for this specific recommendation.

General requirements

The Contracted Party

8.1. MUST review every request individually and not in bulk, regardless of whether the review is done automatically or through meaningful review and MUST NOT disclose data on the basis of accredited user category alone.

8.2. MAY outsource the authorization responsibility to a third-party provider, but the Contracted Party will remain ultimately responsible for ensuring that the applicable requirements are met.

8.3. MUST determine its own lawful basis for the processing related to the disclosure decision.[22] The Requestor will have the ability to identify the lawful basis under which it expects the Contracted Party to disclose the data requested; however, in all instances where the Contracted Party is responsible for making the decision to disclose, the Contracted Party MUST make the final determination of the appropriate lawful basis.

8.4. MUST support reexamination requests received via the SSAD system and MUST consider them based on the rationale provided by the Requestor. For clarity, the resubmission of a disclosure request that is identical to the original request, without a supporting rationale as to why the request must be reconsidered, does not need to be reconsidered by the Contracted Party.

[22] See also implementation guidance #17.

8.5. Absent any legal requirements to the contrary, disclosure MUST NOT be refused solely for lack of any of the following: (i) a court order; (ii) a subpoena; (iii) a pending civil action; or (iv) a UDRP or URS proceeding; nor can refusal to disclose be solely based on the fact that the request is founded on alleged intellectual property infringement.

Authorization determination requirements

Following receipt of a request from the Central Gateway Manager, the Contracted Party:

8.6. MUST conduct a prima facie[23] review of the request's validity, i.e., is the request sufficient for the Contracted Party to ground a substantive review and process the associated underlying data. If the Contracted Party determines that the request is not valid, e.g. it does not provide sufficient ground for a substantive review of the underlying data, the Contracted Party MUST request the Requestor to provide further information prior to denying the request;

8.7. If the request is deemed valid based on the prima facie review, MUST conduct a substantive review of the request and the underlying data:

8.7.1. If, following the evaluation of the underlying data, the Contracted Party reasonably determines that disclosing the requested data elements would not result in the disclosure of personal data, the Contracted Party MUST disclose the data, unless the disclosure is prohibited under applicable law.[24] For clarity, if the disclosure would not result in the disclosure of personal data, the Contracted Party does not have to further evaluate the request.

8.7.2. If following the evaluation of the underlying data, the Contracted Party determines that disclosing the requested data elements would result in the disclosure of personal data, the Contracted Party MUST determine, at a minimum, as part of its substantive review of the request and the underlying data:

8.7.2.1. whether the Contracted Party has a lawful basis for disclosure;[25]
8.7.2.2. whether all the requested data elements are necessary;[26]
8.7.2.3. whether balancing or review is required per the lawful basis identified by the Contracted Party as in 8.3.

[23] Per the Cambridge Dictionary, at first sight (based on what seems to be the truth when first seen or heard).

[24] When considering the publication of non-public data of legal persons, particularly with respect to NGOs and parties engaged in human rights activities that may be protected by local law (e.g. Constitutional and Charter Rights law), the Contracted Party should consider the impact on individuals that could potentially be identified by disclosing the legal person data.

[25] See also implementation guidance #17

[26] For further context regarding the definition of necessary, please refer to p. 7 of the legal guidance the EPDP Team referenced when formulating this definition.

8.8. If the request is subject to balancing or review as per paragraph 8.7.2.3:

8.8.1. MUST disclose the data if, based on its evaluation, the Contracted Party determines that the Requestor's legitimate interest is not outweighed by the interests or fundamental rights and freedoms of the data subject. The Contracted Party MUST document the rationale for its approval.

8.8.2. MUST deny the request, if, based on its evaluation, the Contracted Party determines that the Requestor's legitimate interest is outweighed by the interests or fundamental rights and freedoms of the data subject. The Contracted Party MUST document the rationale for its denial and MUST communicate the reason for denial to the Central Gateway Manager, with care taken to ensure no personal data is included in the reason for denial.

8.9. If the request is not subject to balancing or review as per paragraph 8.7.2.3:

8.9.1. MUST disclose if the Contracted Party determines it has a lawful basis or is not prohibited under applicable law to disclose the data. The Contracted Party MUST document the rationale for its approval.

8.9.2. MUST deny the request if the Contracted Party determines it does not have a lawful basis or is prohibited under applicable law to disclose the data. The Contracted Party MUST document the rationale for its denial and MUST communicate the reason for denial to the Central Gateway Manager, with care taken to ensure no personal data is included in the reason for denial.

The Requestor:

8.10. MAY file a reexamination request if it believes its request was improperly denied.

8.11. MUST, within its reexamination request, provide a supporting rationale as to why its request must be reexamined. The supporting rationale should provide sufficient detail as to why the Requestor believes its request was improperly denied.

8.12. If a Requestor believes a Contracted Party is not complying with any of the requirements of this policy, the Requestor SHOULD notify ICANN org further to the alert mechanism described in Recommendation #5 – Response Requirements.

Implementation Guidance

8.13. The EPDP Team envisions the Contracted Party having the ability to communicate with the Requestor via a dedicated ticket in the SSAD. The EPDP

Team also envisions the SSAD to be fully protected by industry-standard data protection technology including encryption to protect the transmission of personal data, in accordance with applicable data protection laws and cyber security acts.

8.14. The EPDP Team notes the specifics of how the communication in paragraph 8.6 will be assessed in the policy implementation phase; however, the EPDP Team provides this additional guidance to assist. The EPDP Team envisions the Contracted Party sending a notice to the Requestor, via the relevant SSAD ticket, noting its decision to deny the request. The Requestor would then have (x) amount of days to provide updated information to the Contracted Party. Upon the Requestor's provision of updated information, the SLA response time would reset. For example, the Contracted Party would have 1 business day to respond to the updated urgent request. If the Requestor chooses not to provide the information, the SLA would be counted when the Contracted Party sends the "intent to deny" notice to the Requestor. If the Requestor decides not to respond, the request is denied as soon as the time period has expired.

8.15. In situations where the Contracted Party is evaluating the legitimate interest of the Requestor, the Contracted Party SHOULD consider the following:

8.15.1. Interest must be specific, real, and present rather than vague and speculative.

8.15.2. An interest is generally deemed legitimate so long as it can be pursued consistent with data protection and other laws.

8.15.3. Examples of legitimate interests include: (i) enforcement, exercise, or defense of legal claims, including IP infringement; (ii) prevention of fraud and misuse of services; (iii) physical, IT, and network security.

8.16. The Contracted Party SHOULD, as part of its substantive review, assess at least:

8.16.1. Where applicable, the following factors should be used to determine whether the legitimate interest of the Requestor is not outweighed by the interests or fundamental rights and freedoms of the data subject. No single factor is determinative; instead, the Contracted Party SHOULD consider the totality of the circumstances outlined below:

8.16.1.1. *Assessment of impact*. Consider the direct impact on data subjects as well as any broader possible consequences of the data processing. Consider the public interest and legitimate interests pursued by the Requestor to, for example, maintain the security and stability of the DNS. Whenever the circumstances of the disclosure request or the nature of the data to be disclosed suggest an increased risk for the data subject affected, this shall be taken into account during the decision-making.

8.16.1.2. *Nature of the data.* Consider the level of sensitivity of the data as well as whether the data is already publicly available.

8.16.1.3. *Status of the data subject.* Consider whether the data subject's status increases their vulnerability (e.g., children, asylum seekers, other protected classes)

8.16.1.4. *Scope of processing.* Consider information from the disclosure request or other relevant circumstances that indicates whether data will be securely held (lower risk) versus publicly disclosed, made accessible to a large number of persons, or combined with other data (higher risk),[27] provided that this is not intended to prohibit public disclosures for legal actions or administrative dispute resolution proceedings such as the UDRP or URS.

8.16.1.5. *Reasonable expectations of the data subject.* Consider whether the data subject would reasonably expect their data to be processed/disclosed in this manner.

8.16.1.6. *Status of the controller and data subject.* Consider negotiating power and any imbalances in authority between the controller and the data subject.[28]

8.16.1.7. *Legal frameworks involved.* Consider the jurisdictional legal frameworks of the Requestor, Contracted Party/Parties, and the data subject, and how this may affect potential disclosures.

8.16.1.8. *Cross-border data transfers.* Consider the requirements that may apply to cross-border data transfers.

8.17. A lawful basis may be based on the presence of a lawful basis under ICANN policy (or applicable law).

The application of the balancing test and factors considered in this section SHOULD be revised, as appropriate, to address applicable case law interpreting GDPR, guidelines issued by the EDPB or revisions to GDPR or other applicable privacy laws that may occur in the future.

Recommendation #9. Automation of SSAD Processing

9.1. The EPDP Team recommends that the Central Gateway manager MUST automate the receipt, authentication, and transmission of SSAD requests to the

[27] For further context regarding the higher risk when data is combined, please refer to p. 5 of the legal guidance the EPDP Team referenced when considering these factors.

[28] In the context of Contracted Party authorization, the relevant parties are the Contracted Party (controller) and the registrant (data subject); however, the roles and responsibilities of the parties will be further discussed in implementation.

relevant Contracted Party insofar as it is technically and commercially feasible and legally permissible.

9.2. The SSAD MUST allow for the automation of the processing of well-formed, valid, complete, properly identified requests from accredited users as described below.

Automated processing of disclosure decisions

9.3. Contracted Parties MUST process in an automated manner disclosure decisions for any categories of requests for which automation is determined (see 9.4 and the processes detailed in recommendation #18) to be technically and commercially[29] feasible[30] and legally permissible. For the avoidance of doubt, the EPDP Team recommends that any categories of disclosure decisions that do not currently meet these criteria will not be foreclosed from consideration of automated disclosure in the future, subject to the processes detailed in Recommendation #18. In areas where disclosure decisions do not meet these criteria, standardization of the disclosure decision process is the baseline objective.

9.4. Per the legal guidance obtained (see Advice on use cases re automation in the context of disclosure of non-public registrant data - April 2020), the EPDP Team recommends that the following types of disclosure requests, for which legal permissibility has been indicated under GDPR for full automation (in-take as well as processing of disclosure decision) MUST be automated from the time of the launch of the SSAD:

9.4.1. Requests from Law Enforcement in local or otherwise applicable jurisdictions with either 1) a confirmed GDPR 6(1)e lawful basis or 2) processing is to be carried out under a GDPR, Article 2 exemption;

9.4.2. The investigation of an infringement of the data protection legislation allegedly committed by ICANN/Contracted Parties affecting the registrant;

9.4.3. Request for city field only, to evaluate whether to pursue a claim or for statistical purposes;

9.4.4. No personal data on registration record that has been previously disclosed by the Contracted Party.

[29] During implementation, further consideration will need to be given to the commercial feasibility for registrars that may receive a very limited number of requests that will meet the criteria for automated processing of disclosure decisions and whether the financial burden of enabling this automated processing is of such a nature that an exemption may need to be provided. As part of this consideration, the Central Gateway Manager also should consider how it can facilitate the integration of a Contracted Party's system with the SSAD to reduce any potential burden of automated processing of disclosure decisions.

[30] Initial consideration of the financial feasibility of automation will be addressed by ICANN org with the Implementation Review Team and subsequently by the mechanism for the evolution of SSAD, as applicable.

9.5. For clarity, if a Contracted Party determines that automated processing of disclosure decisions for the use cases specified in this recommendation or through the processes detailed in Recommendation #18 is not legally permissible or brings with it a significant risk that was not recognized in the legal guidance obtained by the EPDP Team but has been subsequently identified and documented through, for example, a Data Protection Impact Assessment (DPIA), the Contracted Party MUST notify ICANN org it requires an exemption, from automated processing of disclosure decisions for the identified use case(s) and MUST include supporting documentation with its notice. Unreasonable exemption notifications MAY be subject to review by ICANN Org. ICANN org MUST reverse the exemption recognition if it finds the Contracted Party notification incorrect or abusive.

9.6. As soon as ICANN org has been notified, the Central Gateway Manager MUST halt the transmission of the identified use cases as requiring automated processing and MUST transmit the request pursuant to the requirements in Recommendation 8 – Contracted Party Authorization.

9.7. ICANN org MUST provide a notice and comment process to allow affected stakeholders to provide input on the exemptions provided for in paragraph 9.5. ICANN org MAY facilitate a subsequent discussion between affected stakeholders and the Contracted Party in question to facilitate mutual understanding of the exemption and supporting information. Further details will be determined in implementation, including potential confidentiality of the process.

9.8. As soon as the Contracted Party becomes aware that the exemption is no longer applicable, it MUST inform ICANN org accordingly.

9.9. Following a Contracted Party's notification under paragraph 9.8, the Central Gateway Manager MUST transmit requests that meet the criteria for automated processing to the Contracted Party in accordance with this recommendation and the Contracted Party MUST resume automated processing of disclosure decisions for the relevant use cases.

9.10. With respect to disclosure requests that would be sent to a Contracted Party for review, a Contracted Party MAY request the Central Gateway to automate the processing of the disclosure decision of all, or certain types of, disclosure requests and/or requests coming from a certain Requestor,[31] after the

[31] For example, a Contracted Party could consider implementing a Trusted Notifier scheme that would allow qualification of Requestors that meet certain criteria established by the relevant Contracted Party to obtain automated responses to their disclosure requests.

Contracted Party has weighed the risk and assessed the legal permissibility, as applicable.

9.11. A Contracted Party MAY retract or revise a request for automating the disclosure decision that is not required by these policy recommendations at any time.

9.12. For clarity, the Central Gateway Manager oversees whether a disclosure request has met the criteria for automated processing of disclosure decisions which MAY involve non-automated review at the Central Gateway. Similarly, the Central Gateway MAY request the Contracted Party for further information that may help the Central Gateway Manager in determining whether or not the criteria for an automated processing of disclosure decisions have been met. A Contracted Party MAY provide such further information, if requested. There is no expectation that personal data is transferred in response to such an information request.

Implementation Guidance

In addition to the requirements detailed in Recommendation #4 (Acknowledgement of Receipt) and Recommendation #10 (SLAs), which will also apply to automated processing of disclosure decisions, the following implementation guidance will apply to automated processing of disclosure decisions, i.e., requests for which the Central Gateway Manager determines an automated decision to the disclosure request from the Contracted Party is required, as per this recommendation.

9.13. The EPDP Team expects that aspects of the SSAD such as intake of requests, credential check, request submission validation (format & completeness, not content) could be automated, while it is likely not possible to completely automate all aspects of disclosure request review and disclosure in all cases.

9.14. In the context of further consideration of potential use cases that are deemed legally permissible in the context of recommendation #18, legally permissible is expected to be determined, in the absence of authoritative guidance (e.g. EDPB, European Court of Justice (ECJ), new law), by the party/parties bearing liability for the automated processing of disclosure decisions.

9.15. Further to the legal guidance referenced above, the EPDP Team recommends the GNSO Standing Committee (see recommendation #18), in its review, further consider both the safeguards outlined in appendix 2 of the Advice on use cases re automation in the context of disclosure of non-public registrant data - April 2020 and the use cases outlined in Section 3.4 of that Advice, to consider whether disclosure would constitute a legal or similar significant effect, which might prevent automation of disclosure.

9.16. The way automated processing of disclosure decisions is expected to work in practice is that the Central Gateway Manager would confirm the request meets the requirements for automated processing and direct the Contracted Party to automatically disclose the requested data to the Requestor. The mechanism is expected to be determined during implementation.

9.17. Consideration will need to be given by all parties involved in SSAD to the requirements that may apply to cross-border data transfers.

Recommendation #10. Determining Variable SLAs for response times for SSAD

10.1. The EPDP Team recommends that Contracted Parties MUST abide by Service Level Agreements (SLAs) that are developed, implemented, and enforced, and as updated from time to time per Recommendation #18, in accordance with the implementation guidance provided below.

10.2. For purposes of calculating SLA response time, the EPDP Team recommends the SLA starts when a validated request with all supporting information is provided to the Contracted Party by the Central Gateway Manager and stops when the Contracted Party responds (via the Central Gateway) with either the information requested, a rejection response, or a request for additional information. A reexamination request or a Requestor response with more information would be considered the start of a new request for SLA calculation purposes.

Priority Matrix for non-automated disclosure requests

Request Type	Priority	Proposed SLA[32] (Compliance at 6 months / 12 months / 18 months)
Urgent Requests	1	1 business day, not to exceed 3 calendar days (85% / 90% / 95%)
ICANN Administrative proceedings	2	Max. 2 business days (85% / 90% / 95%)
All other requests*	3	See implementation guidance below.

*Note: Nothing in these policy recommendations explicitly prohibits the development of new categories and defined SLAs.

[32] Note, the business days referenced in the table are from the moment of Contracted Party receipt of the disclosure request from the Central Gateway Manager.

Implementation Guidance

10.3. Priority 1 and 2 requirements are intended to be made binding by the consensus policy document. Priority 3 service level requirements can also be made binding as part of the consensus policy document, in consultation with the IRT.

Proposed Definitions

Business days:[33] as defined in the jurisdiction of the Contracted Party.
Mean Response Time: A rolling average of all response times, automatically calculated frequently (e.g. daily or weekly) as a utility to a Contracted Party to evaluate their own performance at any time.
Response Target Evaluation Interval: A 3-month period allowing for review of response time performance 4 times per year.
Response Target Value: The value of the Mean Response Time measurement on the closing day of the Response Target Evaluation Interval.
Compliance Target Value: The same definition as the Response Target Value, but with a Compliance review of this SLA target.

Contracted Party response time requirements for SSAD requests will ramp up over two phases:

- Phase 1 begins **six (6) months** following the SSAD Policy Effective Date.
- Phase 2 begins **one (1) year** following the SSAD Policy Effective Date.

PHASE 1 (only applies to priority 3 requests)

10.4. During Phase 1, and continuing on thereafter, Contracted Party response targets for SSAD Priority 3 requests will be five (5) business days.

10.5. The Central Gateway Manager MUST measure response targets using a Mean Response Time, not on a per-response basis.

10.6. The SSAD MUST calculate Contracted Party's ongoing Mean Response Time as a rolling average, as a utility to a Contracted Party to evaluate their own performance at any time.

10.7. The SSAD MUST also measure the Response Target Value of the ongoing rolling average at the end of the Response Target Evaluation Interval. Only the 3-month Response Target Value MUST be used to determine success or failure to meet response targets as described below. For the avoidance of doubt, the

[33] See also recommendation #6.5.

intent of the SSAD providing the Contracted Party with the Mean Response Time is to provide a warning to the Contracted Party that there may be an issue with its response times and to allow the Contracted Party to remedy the issue in a cooperative manner. Contracted Parties must therefore at all times have access to view their own current Response Target Value. If the Contracted Party's Response Target Value exceeds five (5) business days, this MUST NOT result in a policy breach.

Instead, failure to meet a response target will prompt ICANN to alert the Contracted Party of a response target failure.

10.8. The Contracted Party MUST respond to the ICANN's response target failure notice within five (5) business days.

10.9. The Contracted Party's response must include a rationale as to why the Contracted Party could not meet its response target.

10.10. Failure of the Contracted Party to respond to ICANN's notice MUST be considered a breach of the policy; accordingly, the failure to respond to the compliance notice will result in an ICANN Compliance inquiry.

PHASE 2 (only applies to priority 3 requests)

10.11. In Phase 2, Contracted Party Compliance Targets for SSAD Priority 3 requests will be ten (10) business days.

10.12. The Central Gateway Manager MUST measure Compliance Targets using a mean response time, not on a per-response basis. The SSAD will calculate Contracted Party's mean Compliance Target on the final day of the Response Target Evaluation Interval.

10.13. If the Contracted Party's Response Target Value exceeds ten business days, this will result in a policy breach, and, accordingly, the Contracted Party will be subject to compliance enforcement.

10.14. Response Targets and Compliance Targets MUST be reviewed, at a minimum, after every six months in the first year, thereafter annually (depending on the outcome of the first review).

10.15. Response targets for disclosure requests that meet the criteria for fully-automated responses are expected to be further developed during the implementation phase, but these are expected to be under 60 seconds.

10.16. The Implementation Review Team should further consider the effect of the SLAs in instances where additional information is requested from the Contracted Party and provided by the Requestor. (Please see Recommendation #8 Contracted Party Authorization for additional information.)

Recommendation #11. SSAD Terms and Conditions

11.1. The EPDP Team recommends that minimum expectations for appropriate agreements and policies, such as terms of use for the SSAD, an SSAD privacy policy, disclosure agreement and an acceptable use policy are further defined during the implementation phase, to be subsequently developed and enforced by the entity responsible for the SSAD (by ICANN Org or a third party that has been tasked by ICANN Org to take on this enforcement function). These agreements and policies MUST take into account all recommendations from this policy. These agreements and policies are expected to be developed and negotiated, as appropriate, by the parties involved in SSAD, taking the below implementation guidance into account.

11.2. All necessary agreements relating to the processing of data requests via the SSAD, MUST include clauses relating to cross border transfers, ensuring a commitment by the parties, where applicable, to ensure and provide for an adequate level of data protection.

11.3. The SSAD Terms and Conditions MAY be updated as appropriate by ICANN org to address applicable law and practices.

Implementation guidance:

11.4. Privacy Policy for processing of personal data of SSAD Users (SSAD Requestors and Contracted Parties) by SSAD

The EPDP recommends, at a minimum, the privacy policy MUST include relevant data protection principles, including:

- The type(s) of personal data processed
- How and why the personal data is processed, for example,
    - verifying identity
    - communicating service notices
- How long personal data will be retained
- The types of third parties with whom personal data is shared
- Where applicable, details of any international data transfers/requirements thereof
- Information about the data subject rights and the method by which they can exercise these rights
- Notification of how changes to the privacy policy will be communicated

- Transparency requirements
- Data security requirements
- Accountability measures (privacy by design, by default, Data Protection Officer (DPO) above certain size, etc)

11.5. Terms of Use for SSAD users (SSAD Requestors and Contracted Parties)

The EPDP recommends, at a minimum, the terms of use MUST address:

- Requestor's indemnification of the controllers (entity responsible for disclosure decision) based on the following principles:
    - Requestors are responsible for damages or costs related to third party claims arising from (i) their misrepresentations in the accreditation or request process; or (ii) misuse of the requested data in violation of the applicable terms of use or applicable law(s).
    - Nothing in these terms limits any parties' liability or rights of recovery under applicable laws (i.e. Requestors are not precluded from seeking recovery from controllers where those rights are provided under law).
    - Nothing in these terms shall be construed to create indemnification obligations for public authority Requestors who lack the legal authority to enter into such indemnification clauses. Further, nothing in this clause shall alter potentially existing government liability as a recourse for the operators of the SSAD.
- Data request requirements
- Logging and audit requirements
- Ability to demonstrate compliance
- Applicable prohibitions
- Abuse prevention requirements

11.6. Disclosure agreements for SSAD Requestors

The EPDP recommends, at a minimum, disclosure agreements MUST address the requirements for Requestors after data has been disclosed to the Requestor:

- Use of the data for the purpose indicated in the request
- Requirements for use of data for a new purpose other than the one indicated in the request
- Retention and destruction of data: Requestors MUST confirm that they will store, protect and dispose of the gTLD registration data in accordance with applicable law. Requestors MUST retain only the gTLD registration data for as long as necessary to achieve the purpose stated in the disclosure request,

unless otherwise required to retain such data for a longer period under applicable law.

- Lawful use of data

11.7. Acceptable Use Policy for SSAD Requestors. The Requestor MUST accept the Acceptable Use Policy before disclosure requests can be submitted through SSAD.

At a minimum, the Acceptable Use Policy MUST include the following requirements:

The Requestor:

11.7.1. MUST only request data from the current RDS data set (no historic data);
11.7.2. MUST, for each request for RDS data, provide representations of the corresponding purpose and lawful basis for the processing, which will be subject to auditing (see the auditing recommendation #16 for further details);
11.7.3. MAY request data from the SSAD for multiple purposes per request, for the same set of data requested;
11.7.4. For each stated purpose must provide (i) representation regarding the intended use of the requested data and (ii) representation that the Requestor will only process the data for the stated purpose(s). These representations will be subject to auditing (see auditing recommendation #16 further details).

Recommendation #12. Disclosure Requirement

12.1. The EPDP Team recommends:

Contracted Parties:
12.1.1. MUST only disclose the data requested by the Requestor;
12.1.2. MUST return current data or a subset thereof (no historic data);

12.2. Contracted Parties and the Central Gateway Manager:
12.2.1. MUST process data in compliance with applicable law;
12.2.2. Where required by applicable law, MUST disclose to the Registered Name Holder (data subject), on reasonable request, confirmation of the processing of personal data relating to them, noting, however, the nature of legal investigations or procedures MAY require SSAD and/or the disclosing entity to keep the nature or existence of certain requests confidential from the data subject. Confidential requests MAY be

disclosed to data subjects in cooperation with the requesting entity, and in accordance with the data subject's rights under applicable law;

12.2.3. Where required by applicable law, MUST provide mechanism under which the data subject may exercise its right to erasure, to object to automated processing of its personal information should this processing have a legal or similarly significant effect, and any other applicable rights;

12.2.4. MUST, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, provide notice to data subjects, of the types of entities/third parties which may process their data. For the avoidance of doubt, Contracted Parties MUST provide the above-described notice to its registrant customers, and the SSAD MUST provide the above-described notice to SSAD users. For Contracted Parties, this notice MUST contain information on potential recipients of non-public registration data including, but not limited to the recipients listed in Recommendation #7 Requestor Purposes, as legally permissible. Information duties according to applicable laws may apply additionally, but the information referenced above MUST be contained as a minimum.

<u>Implementation Guidance</u>

12.3. Current data means the data reviewed by the Contracted Party when making the determination whether to disclose the data. In order to lower the possibility of changes to the data during the pendency of an outstanding disclosure request, e.g., if the registrant updates its contact data, Contracted Parties are encouraged to disclose data as soon as possible following its decision on whether to disclose. For the avoidance of doubt, historic data refers to the registration data in place before the request for disclosure was made, not registration data that may have changed as a result of any updates made by the registrant between the time the request for disclosure is reviewed and the decision to disclose the registration data.

12.4. The nature of legal investigations or procedures are not limited to criminal investigations or to other investigations (e.g. many civil investigations require confidentiality).

Recommendation #13. Query Policy

13.1. The EPDP Team recommends that the Central Gateway Manager:

13.1.1. MUST monitor the system and take appropriate action,[34] such as revoking or limiting access, to protect against abuse or misuse of the system;

[34] The EPDP Team expects that 'appropriate action' will be further defined in the implementation phase.

13.1.2. MAY take measures to limit the number of requests that are submitted by the same Requestor if it is demonstrated that the requests are of an abusive nature;

"Abusive" use of SSAD MAY include (but is not limited to) the detection of one or more of the following behaviors/practices:

13.1.2.1. High volume automated submissions of malformed or incomplete requests.

13.1.2.2. High volume[35] automated duplicate requests that are; frivolous, malicious or vexatious.

13.1.2.3. Use of false, stolen or counterfeit credentials to access the system.

13.1.2.4. Storing/delaying and sending high-volume requests causing the SSAD or other parties to fail SLA performance. When investigating abuse based on this specific behavior, the concept of proportionality should be considered.

13.1.3. As with other access policy violations, abusive behavior can ultimately result in suspension or termination of access to the SSAD. In the event the Central Gateway Manager makes a determination based on abuse to limit the number of requests from a Requestor, the Requestor MAY seek redress[36] via ICANN org if it believes the determination is unjustified. For the avoidance of doubt, if the SSAD receives a high volume of requests from the same Requestor, the volume alone must not result in a de facto determination of system abuse.

13.1.4. MUST respond only to requests for a specific domain name for which non-public registration data is requested to be disclosed and MUST examine[37] each request individually and not in bulk, regardless of whether the consideration is done automatically or through meaningful review.

13.2. The EPDP Team recommends that Contracted Parties:

13.2.1. MUST NOT reject disclosure requests from SSAD on the basis of abusive behavior which has not been determined abusive by the Central Gateway Manager as per a) and b) above. However, Contracted Parties must also have some means to report this behavior back up to the CGM/SSAD. The Central Gateway Manager MUST provide a mechanism for Contracted Parties to report perceived abusive requestors/requests and provide a determination regarding the requestor/request within the

[35] The EPDP Team expects that 'high volume' will be further defined in the implementation phase.

[36] For clarity, redress would be in the form of reconsideration by the Central Gateway Manager, for which the Requestor may provide new information but is not required to do so.

[37] It is the expectation that this examination is done automatically.

timeframe allowed for the Contracted Party to provide a response. Alternatively, the Contracted Party shall be permitted to delay providing a response until such time that the Central Gateway Manager has reviewed the report of abuse and made a determination.

13.3. The EPDP Team recommends:

13.3.1. The Central Gateway Manager MUST support requests keyed on fully qualified domain names (without wildcards).

13.3.2. The Central Gateway Manager MUST support the ability of a Requestor to submit multiple domain names in a single request.[38]

13.3.3. For disclosure requests that are not subject to the automated processing of the disclosure decision, the Central Gateway Manager MUST route each domain individually to the Contracted Party responsible for the disclosure decision (this may require SSAD to split a request into multiple transactions).

13.3.4. Notwithstanding the recommendations relating to the management of abusive behavior, the Central Gateway Manager and Contracted Parties MUST have the capacity to handle a reasonable number of requests in alignment with the SLAs established.

13.3.5. The Central Gateway Manager MUST only support requests for current data (no data about the domain name registration's history).

13.3.6. The SSAD MUST be able to save the history of the different disclosure requests, in order to keep traceability of exchanges between the SSAD Requestors and Contracted Parties via the SSAD. Appropriate safeguards need to put in place to safeguard this information. Appropriate access to such relevant activity statistics should be provided to the CPs, as deemed necessary, to ensure that all relevant information relating to requests for disclosure are available for consideration in such disclosure decisions.

See also the Acceptable Use Policy requirements in recommendation #11 – Terms and Conditions.

Implementation Guidance

13.4. Abusive behavior can ultimately result in suspension or termination of access to the SSAD; however, a graduated penalty scheme should be considered in implementation. There may, however, be certain instances of egregious abuse, such as counterfeiting or stealing credentials, where termination would be immediate.

[38] The EPDP Team expects implementation to reasonably determine how many may be submitted at a time, consistent with the Query Policy.

13.5. An SSAD request must be received for each domain name registration for which non-public registration is requested to be disclosed but it must be possible for Requestors to submit multiple requests at the same time, for example, by entering multiple domain name registrations in the same request form provided that the same request information applies.

13.6. In relation to "Appropriate access to such relevant activity statistics should be provided to the CPs, as deemed necessary" in 13.3, this is expected to be limited to a CP's own activity.,

Recommendation #14. Financial Sustainability

14.1. The EPDP Team recommends that, in considering the costs and financial sustainability of SSAD, one needs to distinguish between the development and operationalization of the system and the subsequent running of the system.

14.2. The objective is that the SSAD is financially self-sufficient without causing any additional fees for registrants. Data subjects MUST NOT bear the costs for having data disclosed to third parties; Requestors of the SSAD data should primarily bear the costs of maintaining this system. Furthermore, Data Subjects MUST NOT bear the costs of processing of data disclosure requests, which have been denied by Contracted Parties following evaluation of the requests submitted by SSAD users. ICANN MAY contribute to the (partial) covering of costs for maintaining the Central Gateway. For clarity, the EPDP Team understands that registrants are ultimately the source of much of ICANN's revenue. This revenue does not per se violate the restriction that "[d]ata subjects MUST NOT bear the costs for having data disclosed to third parties." Data subjects MUST NOT be charged a separate fee by the Central Gateway for having their data requested by or disclosed to third parties. However, the EPDP Team notes that registered name holders will always indirectly bear any costs incurred by registrars and registries. The EPDP Team also understands that the RAA prohibits ICANN from limiting what Registrars may charge. RAA 3.7.12 states: "Nothing in this Agreement prescribes or limits the amount Registrar may charge Registered Name Holders for registration of Registered Names.

14.3. The prospective users of the SSAD, as determined based on the implementation of the accreditation process and Identity Providers to be used, should be consulted on setting usage fees for the SSAD. In particular, those potential SSAD requestors who are not part of the ICANN community must have the opportunity to comment and interact with the IRT. This input should help inform the IRT deliberations on this topic.

14.4. The SSAD SHOULD NOT be considered a profit-generating platform for ICANN or the contracted parties. Funding for the SSAD should be sufficient to cover costs, including for subcontractors at fair market value and to establish a legal risk fund.[39] It is crucial to ensure that any payments in the SSAD are related to operational costs and are not simply an exchange of money for non-public registration data.

14.5. In relation to the accreditation framework:

14.5.1. Accreditation applicants MUST be charged a to-be-determined non-refundable fee proportional to the cost of validating an application, except under certain circumstances these fees may be waived or zero for certain types or categories of applicants which SHOULD be further defined during the implementation phase.

14.5.2. Rejected applicants MAY re-apply, but the new application(s) MAY be subject to the application fee.

14.5.3. Fees are to be established by the accreditation authority. If the Accreditation Authority outsources the Identity Provider function, the Identity Provider MAY establish its own fees after consulting the Accreditation Authority.

14.5.4. Accredited users and organizations MUST renew their accreditation periodically.

Implementation Guidance

14.6. The EPDP Team expects that the costs for developing, deployment and operationalizing the system, similar to the implementation of other adopted policy recommendations, to be initially borne by ICANN org,[40] Contracted Parties and other parties that may be involved.[41] As part of the operationalization of SSAD, ICANN org is expected to consider building on existing mechanisms or using an RFP process to reduce costs rather than building the SSAD and its components from scratch. It is the EPDP Team's expectation that the SSAD will ultimately result in equal or lesser costs to Contracted Parties compared to manual receipt and review of requests as a measure of commercial and technical feasibility.

14.7. The subsequent running of the system is expected to happen on a cost recovery basis whereby historic costs[42] may be considered. For example, the costs associated with becoming accredited would be borne by those seeking

[39] Given the potential for legal uncertainty and the heightened legal and operational risk on all parties included in the provision of the SSAD, creation of a legal risk fund refers to the creation of a suitable legal contingency plan, including but not limited to appropriate insurance cover, and any other appropriate measures that may be deemed sufficient to cover potential regulatory fines or related legal costs.

[40] See also the input that ICANN Org provided at the EPDP Team's request in relation to the cost estimate for a Proposed System for Standardized Access/Disclosure (see https://community.icann.org/x/GIIEC)

[41] For clarity, ICANN org will bear its own costs for developing the system. Contracted Parties will be responsible for their own costs.

[42] Historic costs refer to the costs for developing, deployment, and operationalizing of the system.

accreditation. Similarly, some of the costs of running the SSAD SHOULD be offset by charging fees to the users of the SSAD.

14.8. When implementing and operating the SSAD, a disproportionately high burden on smaller operators should be avoided.

14.9. The EPDP Team recognizes that the fees associated with using the SSAD may differ for users based on request volume or user type among other potential factors. The EPDP Team also recognizes that governments may be subject to certain payment restrictions, which should be taken into account as part of the implementation.

14.10. The fee structure as well as the renewal period is to be determined in the implementation phase, following the principles outlined above. The EPDP Team recognizes that it may not be possible to set the exact fees until the actual costs are known. The EPDP Team also recognizes that the SSAD fee structure may need to be reviewed over time.

Recommendation #15. Logging

15.1. The EPDP Team recommends that that the appropriate logging procedures MUST be put in place to facilitate the auditing procedures outlined in these recommendations. These logging requirements will cover the following:

- Accreditation authority
- Central Gateway Manager
- Identity provider
- Contracted Parties
- Activity of accredited users such as login attempts, queries
- What queries and disclosure decision(s) are made

15.2. The EPDP Team recommends:

15.2.1. The Central Gateway Manager MUST make logs of all activities of all entities which interact with the Central Gateway Manager (for further details, please see below).

15.2.2. Logs MUST include a record of all queries and all items necessary to audit any decisions made in the context of SSAD.

15.2.3. Logs MUST be retained for a period sufficient for auditing and complaint resolution purposes, taking into account statutory limits related to complaints against the controller.

15.2.4. Logs SHOULD NOT contain any personal information. If any information is logged that does contain personal information, appropriate safeguards need to be in place. Logs MAY be used for transparency reports, which may be made publicly available. (see also recommendation #17 on reporting requirements). Logged data that contains personal information MUST remain confidential.

15.2.5. Logs MUST be retained in a commonly used,[43] machine-readable format accompanied by an intelligible description of all variables.

15.2.6. Relevant logged data MUST be disclosed, when legally permissible, in the following circumstances:

- · In the event of a claim of misuse, logs may be requested for examination by an accreditation authority or dispute resolution provider.
- · Logs should be further available to ICANN and the auditing body.
- · When mandated as a result of due legal process, including relevant enforcement and regulatory authorities, as applicable.

15.2.7. Relevant logged data MAY be disclosed for:

- General technical operation to ensure proper running of the system.

15.2.8. Relevant logs should be used as the source to make available any relevant data. This data should enable Requestors and Contracted Parties to review their own statistics.

15.3. At a minimum, the following events MUST be logged:

- Logging related to the Identity Provider[44]
- Logging related to the Accreditation Authority
  - Details of incoming requests for Accreditation
  - Results of processing requests for Accreditation, e.g., issuance of the Identity Credential or reasons for denial
  - Details of Revocation Requests
  - Indication when Identity Credentials and Signed Assertions have been Validated.
  - Unique reference number
- Logging related to the Central Gateway Manager
  - Information related to the contents of the query itself.
  - Results of processing the query, including changes of state (e.g., received, pending, in-process, denied, approved, approved with changes)
  - Rates of:
    - disclosure and non-disclosure;
    - use of each reason for denial for non-disclosure;
    - divergence between the disclosure and non-disclosure decisions of a CP and the recommendations of the Central Gateway.
- Logging related to Contracted Parties

[43] For clarity, "commonly" is intended to mean a format that is used by many, as opposed to a uniform format for all.

[44] To be further detailed in the implementation phase.

- Request Response details, e.g., Reason for denial, notice of approval and data fields released. Disclosure decisions including a reason for denial must be stored.

Recommendation #16. Audits

16.1. The EPDP Team recommends that the appropriate auditing processes and procedures MUST be put in place to ensure appropriate monitoring and compliance with the requirements outlined in these recommendations.

16.2. As part of any audit, the auditor MUST be subject to reasonable confidentiality obligations with respect to proprietary processes and personal information disclosed during the audit.

More specifically:

Audits of the Accreditation Authority

16.3. If ICANN outsources the accreditation authority function to a qualified third party, the accrediting authority MUST be audited periodically to ensure compliance with the policy requirements as defined in the accreditation recommendation. Should the accreditation authority be found in breach of the accreditation policy and requirements, it will be given an opportunity to cure the breach, but in cases of repeated non-compliance or audit failure, a new accreditation authority must be identified or created. ICANN org as the Accreditation Authority is not required to audit governmental entities, whose accreditation and audit requirements are defined in Recommendation #2.

16.4. Any audit of the accreditation authority MUST be tailored for the purpose of assessing compliance, and the auditor MUST give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data, and other information requested.

16.5. As part of such audits, the accreditation authority MUST provide to the auditor in a timely manner all responsive documents, data, and any other information necessary to demonstrate its compliance with the accreditation policy.

16.6. If ICANN serves as the accreditation authority, existing accountability mechanisms are expected to address any breaches of the accreditation policy, noting that in such an extreme case, the credentials issued during the time of the breach will be reviewed. Modalities of this review SHOULD be established in the implementation phase.

Audits of Identity Provider(s)

16.7. Identity Providers MUST be audited periodically to ensure compliance with the policy requirements as defined in the accreditation recommendation. Should the Identity Provider be found in breach of the accreditation policy and requirements, it will be given an opportunity to cure the breach, but in cases of repeated non-compliance or audit failure, a new Identity Provider must be identified.

16.8. Any audit of an Identity Provider MUST be tailored for the purpose of assessing compliance, and the auditor MUST give reasonable advance notice of any such audit, which notice shall specify in reasonable detail the categories of documents, data and other information requested.

16.9. As part of such audits, the Identity Provider MUST provide to the auditor in a timely manner all responsive documents, data, and any other information necessary to demonstrate its compliance with the accreditation policy.

Audits of Accredited Entities/Individuals

16.10. Appropriate mechanisms MUST be developed in the implementation phase to ensure accredited entities' and individuals' compliance with the policy requirements as defined in the accreditation recommendations #1 and 2. These could include, for example, audits triggered by verified complaints, random audits, or audits in response to a self-certification or self-assessment. Should the accredited entity or individual be found in breach of the accreditation policy and requirements, it will be given an opportunity to cure the breach, but in cases of repeated non-compliance or audit failure the matter should be referred back to the Accreditation Authority and/or Identity Provider, if applicable, for action.

16.11. Any audit of accredited entities/individuals MUST be tailored for the purpose of assessing compliance, and the auditor MUST give reasonable advance notice of any such audit, which notice MUST specify in reasonable detail the categories of documents, data and other information requested.

16.12. As part of such audits, the accredited entity/individual MUST, in a timely manner, provide to the auditor all responsive documents, data, and any other information necessary to demonstrate its compliance with the accreditation policy.

Recommendation #17. Reporting Requirements

17.1. The EPDP Team recommends that ICANN org MUST establish regular public reporting on the use and functioning of the SSAD. For the avoidance of doubt, this recommendation does not intend to prevent ICANN org from conducting additional non-public reporting to SSAD users.

17.2. No earlier than 3 months and no later than 9 months after the operationalization of SSAD, ICANN org MUST publish an SSAD Status Report or dashboard, and continue to do so on a quarterly basis, that will include at a minimum:

- Number of disclosure requests received;
- Average response times to the disclosure requests, categorized by priority level;
- Number of requests categorized by third-party purposes / justifications (as identified in recommendation #4);
- Number of disclosure requests approved and denied;
- Number of disclosure requests automated;
- Number of requests processed manually;
- Information about financial sustainability of SSAD;
- New EDPB guidance or new topical jurisprudence (if any);
- Technical or system difficulties;
- Operational and system enhancements.

Implementation guidance:

17.3. The EPDP Team recommends that further consideration is given during implementation to:

- The frequency of public reporting – public reporting on a quarterly basis would be considered reasonable;
- Data to be reported on, which is expected to include information such as: a) number of disclosure requests; b) disclosure requests per category of Requestors; c) disclosure requests per Requestor (for legal entities); disclosure requests granted / denied, and; response times. Please note that this is a non-exhaustive list.
- Mechanism for public reporting – consider the possibility of a publicly-available dashboard instead of or in addition to reports that are posted;
- Needs for possible confidentiality in certain cases such as information about natural persons and LEA requests. Aggregate data or pseudonymization could be considered to address possible confidentiality concerns.

Recommendation #18. Review of implementation of policy recommendations concerning SSAD using a GNSO Standing Committee

18.1. The EPDP Team recommends that the GNSO Council MUST establish a GNSO Standing Committee to evaluate SSAD operational issues emerging as a result of adopted ICANN Consensus Policies and/or their implementation. The GNSO Standing Committee is intended to examine data being produced as a result of SSAD operations, and provide the GNSO Council with Recommendations on how best to make operational changes to the SSAD, which are strictly implementation measures, in addition to Recommendations based on reviewing the impact of existing Consensus Policies on SSAD operations.

18.2. The EPDP Team also recommends that the GNSO Council use the following principles as the basis by which the GNSO Standing Committee shall conduct its mission, which must be reflected in its charter:

18.2.1 Composition: The composition of the GNSO Standing Committee shall be representative of the ICANN Advisory Committees and GNSO Stakeholder Groups and Constituencies represented in the current EPDP Team on the Temporary Specification for gTLD Registration Data. This composition shall include at least one member from the GAC, ALAC, SSAC, RySG, RrSG, NCSG, IPC, BC and ISPCP, as well as at least one alternate member from each group. Note, the number of members per group should not impact the consensus designation process as positions are expected to be considered per group and not at the individual member level. The GNSO Council may also consider inviting ICANN org liaisons as members to the GNSO Standing Committee.

18.2.2. Scope: A Charter must be developed by the GNSO Council in conjunction with Advisory Committees, e.g., GAC, SSAC, and ALAC for the GNSO Standing Committee. The Charter must allow the Committee to address any operational issues involving the SSAD. This may include, but is not limited to, topics such as Service Level Agreements (SLAs), centralization / de-centralization, automation, third party purposes, financial sustainability and operational / system enhancements. The threshold for accepting an issue being on the GNSO Standing Committee’s agenda shall be low enough to allow any of the groups involved the ability to have their interests in SSAD operations seriously considered by the Committee. Identification of issues, which the Committee may address shall be determined using the following two methods:

i. Any policy or implementation topic concerning SSAD operations may be raised by a member of the GNSO Standing

Committee, and shall be placed on the Committee's working agenda if seconded by at least one other 'group's' Committee member.

ii. Additionally, the GNSO Council may identify SSAD operational issues. The GNSO Council may choose to task the GNSO Standing Committee with evaluation of issues it identifies, in order for the Committee to provide the Council with consensus recommendations by the affected stakeholders on how best to address them.

Recommendations concerning implementation guidance shall be sent to the GNSO Council for consideration and adoption, after which they will be sent to ICANN Org for further implementation work. Recommendations which require changes being made to existing ICANN Consensus Policies shall be recorded and maintained, to be used in the issues scoping phase of future policy development and/or review.

18.2.3. <u>Required Consensus:</u> Consensus Level for GNSO Standing Committee Recommendations: Recommendations on SSAD operations and policies developed by the Standing Committee must achieve consensus of the members of the Committee in order to be sent as formal recommendations to the GNSO Council. For recommendations to achieve a consensus designation, the support of the Contracted Parties will be required. For the purpose of assessing level of consensus, Members are required to represent the formal position of their SG/C or SO/AC, not individual views or positions. For the purposes of determining the level of consensus, each of the nine groups comprising consensus must have equal weight subject to the requirement that CPs must support specific recommendations.

18.2.4. <u>Disbanding the GNSO Standing Committee:</u> The Standing Committee may recommend to the GNSO Council that the Committee itself be disbanded, should the need arise. In order for the Standing Committee to recommend to the GNSO Council that it be disbanded, an affirmative vote of a simple majority of the groups involved is required. This recommendation would subsequently need to be adopted by the GNSO Council.

3.6 EPDP Team Priority 2 Recommendations

Recommendation #19. Display of information of affiliated and/or accredited privacy / proxy providers

19.1. In the case of a domain name registration where an affiliated and/or accredited privacy/proxy service is used, e.g., where data associated with a natural person is masked, Registrar (and Registry, where applicable) MUST include the full RDDS data of the applicable privacy/proxy service in response to an RDDS query. The full privacy/proxy RDDS data may also include a pseudonymized email.

Implementation notes:

19.2. Once ICANN org has implemented a privacy/proxy service accreditation program, this recommendation #19 once in effect will replace or otherwise supersede EPDP phase 1 recommendation #14.

19.3. The intent of this recommendation is to provide clear instruction to registrars (and registries where applicable) that where a domain registration is done via an affiliated and/or accredited privacy/proxy provider, that data MUST NOT also be redacted. The working group is intending that domain registration data MUST NOT be both redacted and privacy/proxied.

Recommendation #20. City Field

The EPDP Team recommends that the EPDP Phase 1 recommendation #11 is updated to state that redaction MAY be applied to the city field in reference to the registrant's contact information, instead of MUST.

Recommendation #21. Data Retention

The EPDP Team confirms its recommendation from phase 1 that registrars MUST retain only those data elements deemed necessary for the purposes of the TDRP, for a period of fifteen months following the life of the registration plus three months to implement the deletion, i.e., 18 months. This retention is grounded on the stated policy stipulation within the TDRP that claims under the policy may only be raised for a period of 12 months after the alleged breach (FN: see TDRP section 2.2) of the Transfer Policy (FN: see Section 1.15 of TDRP). For clarity, this does not prevent Requestors, including ICANN Compliance, from requesting disclosure of these retained data elements for purposes other than TDRP, but disclosure of those will be subject to relevant data protection laws, e.g., does a lawful basis for disclosure exist. For the avoidance of doubt, this retention period does not restrict the ability of registries and registrars to retain data elements for longer periods.

Implementation Guidance:
For the avoidance of doubt, registrars are required to maintain the data for 15 months following the life of the registration and MAY delete that data following the 15-month period.

For clarity, this does not prevent the identification of additional retention periods for stated purposes by the controllers, as identified and as established by the controllers, for purposes other than TDRP; this does not exclude the potential disclosure of such retained data to any party, subject to relevant data protection laws.

Recommendation #22. Purpose 2
The EPDP Team recommends the following purpose be added to the EPDP Team Phase 1 purposes, which form the basis of the new ICANN policy:

- Contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission.

3.7 EPDP Team Priority 2 Conclusions

Conclusion – OCTO Purpose
Having considered this input, most members of the EPDP Team agreed that at this stage, there is no need to propose an additional purpose(s) to facilitate ICANN’s Office of the Chief Technology Officer (OCTO) in carrying out its mission. This reason for this agreement is because the newly updated ICANN Purpose 2 sufficiently covers the work of the OCTO, along with the work of other ICANN org teams such as Contractual Compliance and others. Most also agreed that the EPDP Team’s decision to refrain from proposing an additional purpose(s) would not prevent ICANN org and/or the community from identifying additional purposes to support unidentified future activities that may require access to non-public registration data.

Conclusion – Accuracy and WHOIS Accuracy Reporting System
Per the instructions from the GNSO Council, the EPDP Team will not consider this topic further; instead, the GNSO Council is expected to form a scoping team to further explore the issues in relation to accuracy and ARS to help inform a decision on appropriate next steps to address potential issues identified.

4 Next Steps

4.1 Next Steps

This Final Report will be submitted to the GNSO Council for its consideration and approval. If adopted by the GNSO Council, the Final Report would then be forwarded to the ICANN Board of Directors for its consideration and, potentially, approval as an ICANN Consensus Policy.

Glossary

1. Advisory Committee
An Advisory Committee is a formal advisory body made up of representatives from the Internet community to advise ICANN on a particular issue or policy area. Several are mandated by the ICANN Bylaws and others may be created as needed. Advisory committees have no legal authority to act for ICANN, but report their findings and make recommendations to the ICANN Board.

2. ALAC - At-Large Advisory Committee
ICANN's At-Large Advisory Committee (ALAC) is responsible for considering and providing advice on the activities of the ICANN, as they relate to the interests of individual Internet users (the "At-Large" community). ICANN, as a private sector, non-profit corporation with technical management responsibilities for the Internet's domain name and address system, will rely on the ALAC and its supporting infrastructure to involve and represent in ICANN a broad set of individual user interests.

3. Business Constituency
The Business Constituency represents commercial users of the Internet. The Business Constituency is one of the Constituencies within the Commercial Stakeholder Group (CSG) referred to in Article 11.5 of the ICANN bylaws. The BC is one of the stakeholder groups and constituencies of the Generic Names Supporting Organization (GNSO) charged with the responsibility of advising the ICANN Board on policy issues relating to the management of the domain name system.

4. ccNSO - The Country-Code Names Supporting Organization
The ccNSO the Supporting Organization responsible for developing and recommending to ICANN’s Board global policies relating to country code top-level domains. It provides a forum for country code top-level domain managers to meet and discuss issues of concern from a global perspective. The ccNSO selects one person to serve on the board.

5. ccTLD - Country Code Top Level Domain
ccTLDs are two-letter domains, such as .UK (United Kingdom), .DE (Germany) and .JP (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country.

For more information regarding ccTLDs, including a complete database of designated ccTLDs and managers, please refer to http://www.iana.org/cctld/cctld.htm.

6. Domain Name Registration Data

Domain name registration data, also referred to registration data, refers to the information that registrants provide when registering a domain name and that registrars or registries collect. Some of this information is made available to the public. For interactions between ICANN Accredited Generic Top-Level Domain (gTLD) registrars and registrants, the data elements are specified in the current RAA. For country code Top Level Domains (ccTLDs), the operators of these TLDs set their own or follow their government's policy regarding the request and display of registration information.

7. Domain Name

As part of the Domain Name System, domain names identify Internet Protocol resources, such as an Internet website.

8. DNS - Domain Name System

DNS refers to the Internet domain-name system. The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.

9. EPDP – Expedited Policy Development Process

A set of formal steps, as defined in the ICANN bylaws, to guide the initiation, internal and external review, timing and approval of policies needed to coordinate the global Internet's system of unique identifiers. An EPDP may be initiated by the GNSO Council only in the following specific circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or (2) to provide new or additional policy recommendations on a specific policy issue that had been substantially scoped previously, such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP that was not initiated; (b) as part of a previous PDP that was not completed; or (c) through other projects such as a GNSO Guidance Process.

10. GAC - Governmental Advisory Committee

The GAC is an advisory committee comprising appointed representatives of national governments, multi-national governmental organizations and treaty organizations, and distinct economies. Its function is to advise the ICANN Board on matters of concern to governments. The GAC will operate as a forum for the discussion of government interests and concerns, including consumer interests. As an advisory committee, the GAC has no legal authority to act for ICANN, but will report its findings and recommendations to the ICANN Board.

11. General Data Protection Regulation (GDPR)
The General Data Protection Regulation (EU) 2016/679 (GDPR) is a regulation in EU law on data protection and privacy for all individuals within the European Union (EU) and the European Economic Area (EEA). It also addresses the export of personal data outside the EU and EEA areas.

12. GNSO - Generic Names Supporting Organization
The supporting organization responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains. Its members include representatives from gTLD registries, gTLD registrars, intellectual property interests, Internet service providers, businesses and non-commercial interests.

13. Generic Top Level Domain (gTLD)
"gTLD" or "gTLDs" refers to the top-level domain(s) of the DNS delegated by ICANN pursuant to a registry agreement that is in full force and effect, other than any country code TLD (ccTLD) or internationalized domain name (IDN) country code TLD.

14. gTLD Registries Stakeholder Group (RySG)
The gTLD Registries Stakeholder Group (RySG) is a recognized entity within the Generic Names Supporting Organization (GNSO) formed according to Article X, Section 5 (September 2009) of the Internet Corporation for Assigned Names and Numbers (ICANN) Bylaws.

The primary role of the RySG is to represent the interests of gTLD registry operators (or sponsors in the case of sponsored gTLDs) ("Registries") (i) that are currently under contract with ICANN to provide gTLD registry services in support of one or more gTLDs; (ii) who agree to be bound by consensus policies in that contract; and (iii) who voluntarily choose to be members of the RySG. The RySG may include Interest Groups as defined by Article IV. The RySG represents the views of the RySG to the GNSO Council and the ICANN Board of Directors with particular emphasis on ICANN consensus policies that relate to interoperability, technical reliability and stable operation of the Internet or domain name system.

15. ICANN - The Internet Corporation for Assigned Names and Numbers
The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. Originally, the Internet Assigned Numbers Authority (IANA) and other entities performed these services under U.S. Government contract. ICANN now performs the IANA function. As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to

developing policy appropriate to its mission through bottom-up, consensus-based processes.

16. Intellectual Property Constituency (IPC)
The Intellectual Property Constituency (IPC) represents the views and interests of the intellectual property community worldwide at ICANN, with a particular emphasis on trademark, copyright, and related intellectual property rights and their effect and interaction with Domain Name Systems (DNS). The IPC is one of the constituency groups of the Generic Names Supporting Organization (GNSO) charged with the responsibility of advising the ICANN Board on policy issues relating to the management of the domain name system.

17. Internet Service Provider and Connectivity Provider Constituency (ISPCP)
The ISPs and Connectivity Providers Constituency is a constituency within the GNSO. The Constituency's goal is to fulfill roles and responsibilities that are created by relevant ICANN and GNSO bylaws, rules or policies as ICANN proceeds to conclude its organization activities. The ISPCP ensures that the views of Internet Service Providers and Connectivity Providers contribute toward fulfilling the aims and goals of ICANN.

18. Name Server
A Name Server is a DNS component that stores information about one zone (or more) of the DNS name space.

19. Non Commercial Stakeholder Group (NCSG)
The Non Commercial Stakeholder Group (NCSG) is a Stakeholder Group within the GNSO. The purpose of the Non Commercial Stakeholder Group (NCSG) is to represent, through its elected representatives and its Constituencies, the interests and concerns of noncommercial registrants and noncommercial Internet users of generic Top-level Domains (gTLDs). It provides a voice and representation in ICANN processes to: non-profit organizations that serve noncommercial interests; nonprofit services such as education, philanthropies, consumer protection, community organizing, promotion of the arts, public interest policy advocacy, children's welfare, religion, scientific research, and human rights; public interest software concerns; families or individuals who register domain names for noncommercial personal use; and Internet users who are primarily concerned with the noncommercial, public interest aspects of domain name policy.

20. Post Delegation Dispute Resolution Procedures (PDDRPs)
Post-Delegation Dispute Resolution Procedures have been developed to provide those harmed by a new gTLD Registry Operator's conduct an alternative avenue to complain about that conduct. All such dispute resolution procedures are handled by providers external to ICANN and require that complainants take specific steps to address their issues before filing a formal complaint. An Expert Panel will determine whether a Registry Operator is at fault and recommend remedies to ICANN.

21. Registered Name
"Registered Name" refers to a domain name within the domain of a gTLD, whether consisting of two (2) or more (e.g., john.smith.name) levels, about which a gTLD Registry Operator (or an Affiliate or subcontractor thereof engaged in providing Registry Services) maintains data in a Registry Database, arranges for such maintenance, or derives revenue from such maintenance. A name in a Registry Database may be a Registered Name even though it does not appear in a zone file (e.g., a registered but inactive name).

22. Registrar
The word "registrar," when appearing without an initial capital letter, refers to a person or entity that contracts with Registered Name Holders and with a Registry Operator and collects registration data about the Registered Name Holders and submits registration information for entry in the Registry Database.

23. Registrars Stakeholder Group (RrSG)
The Registrars Stakeholder Group is one of several Stakeholder Groups within the ICANN community and is the representative body of registrars. It is a diverse and active group that works to ensure the interests of registrars and their customers are effectively advanced. We invite you to learn more about accredited domain name registrars and the important roles they fill in the domain name system.

24. Registry Operator
A "Registry Operator" is the person or entity then responsible, in accordance with an agreement between ICANN (or its assignee) and that person or entity (those persons or entities) or, if that agreement is terminated or expires, in accordance with an agreement between the US Government and that person or entity (those persons or entities), for providing Registry Services for a specific gTLD.

25. Registration Data Directory Service (RDDS)
Domain Name Registration Data Directory Service or RDDS refers to the service(s) offered by registries and registrars to provide access to Domain Name Registration Data.

26. Registration Restrictions Dispute Resolution Procedure (RRDRP)
The Registration Restrictions Dispute Resolution Procedure (RRDRP) is intended to address circumstances in which a community-based New gTLD Registry Operator deviates from the registration restrictions outlined in its Registry Agreement.

27. SO - Supporting Organizations
The SOs are the three specialized advisory bodies that advise the ICANN Board of Directors on issues relating to domain names (GNSO and CCNSO) and, IP addresses (ASO).

28. SSAC - Security and Stability Advisory Committee
An advisory committee to the ICANN Board comprised of technical experts from industry and academia as well as operators of Internet root servers, registrars and TLD registries.

29. TLD - Top-level Domain
TLDs are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (rightmost) ".", such as "net" in http://www.example.net. The administrator for a TLD controls what second-level names are recognized in that TLD. The administrators of the "root domain" or "root zone" control what TLDs are recognized by the DNS. Commonly used TLDs include .COM, .NET, .EDU, .JP, .DE, etc.

30. Uniform Dispute Resolution Policy (UDRP)
The Uniform Dispute Resolution Policy (UDRP) is a rights protection mechanism that specifies the procedures and rules that are applied by registrars in connection with disputes that arise over the registration and use of gTLD domain names. The UDRP provides a mandatory administrative procedure primarily to resolve claims of abusive, bad faith domain name registration. It applies only to disputes between registrants and third parties, not disputes between a registrar and its customer.

31. Uniform Rapid Suspension (URS)
The Uniform Rapid Suspension System is a rights protection mechanism that complements the existing Uniform Domain-Name Dispute Resolution Policy (UDRP) by offering a lower-cost, faster path to relief for rights holders experiencing the most clear-cut cases of infringement.

32. WHOIS
WHOIS protocol is an Internet protocol that is used to query databases to obtain information about the registration of a domain name (or IP address). The WHOIS protocol was originally specified in RFC 954, published in 1985. The current specification is documented in RFC 3912. ICANN's gTLD agreements require registries and registrars to offer an interactive web page and a port 43 WHOIS service providing free public access to data on registered names. Such data is commonly referred to as "WHOIS data," and includes elements such as the domain registration creation and expiration dates, nameservers, and contact information for the registrant and designated administrative and technical contacts.

WHOIS services are typically used to identify domain holders for business purposes and to identify parties who are able to correct technical problems associated with the registered domain.

Annex A – System for Standardized Access/Disclosure to Non-public Registration Data – Background Info

ISSUE DESCRIPTION AND/OR CHARTER QUESTIONS

From the EPDP Team Charter:
(a) Purposes for Accessing Data – What are the unanswered policy questions that will guide implementation?

a1) Under applicable law, what are legitimate purposes for third parties to access registration data?
a2) What legal bases exist to support this access?
a3) What are the eligibility criteria for access to non-public Registration data?
a4) Do those parties/groups consist of different types of third-party Requestors?
a5) What data elements should each user/party have access to based on their purposes?
a6) To what extent can we determine a set of data elements and potential scope (volume) for specific third parties and/or purposes?
a7) How can RDAP, that is technically capable, allow Registries/Registrars to accept accreditation tokens and purpose for the query? Once accreditation models are developed by the appropriate accreditors and approved by the relevant legal authorities, how can we ensure that RDAP is technically capable and is ready to accept, log and respond to the accredited Requestor's token?

(b) Credentialing – What are the unanswered policy questions that will guide implementation?

b1) How will credentials be granted and managed?
b2) Who is responsible for providing credentials?
b3) How will these credentials be integrated into registrars'/registries' technical systems?

(c) Terms of access and compliance with terms of use – What are the unanswered policy questions that will guide implementation?

c1) What rules/policies will govern users' access to the data?
c2) What rules/policies will govern users' use of the data once accessed?
c3) Who will be responsible for establishing and enforcing these rules/policies?
c4) What, if any, sanctions or penalties will a user face for abusing the data, including future restrictions on access or compensation to data subjects whose

data has been abused in addition to any sanctions already provided in applicable law?
c5) What kinds of insights will Contracted Parties have into what data is accessed and how it is used?
c6) What rights do data subjects have in ascertaining when and how their data is accessed and used?
c7) How can a third party access model accommodate differing requirements for data subject notification of data disclosure?

From the Annex to the Temporary Specification:

- Developing methods to provide potential URS and UDRP complainants with sufficient access to Registration Data to support good-faith filings of complaints
- Limitations in terms of query volume envisaged under an accreditation program balanced against realistic investigatory cross-referencing needs.
- Confidentiality of queries for Registration Data by law enforcement authorities
- Pursuant to Section 4.4, continuing community work to develop an accreditation and access model that complies with GDPR, while recognizing the need to obtain additional guidance from Article 29 Working Party/European Data Protection Board.
- Consistent process for continued access to Registration Data, including non-public data, for users with a legitimate purpose, until the time when a final accreditation and access mechanism is fully operational, on a mandatory basis for all contracted parties.

From EPDP Team Phase 1 Final Report:

EPDP Team Recommendation #3.
In accordance with the EPDP Team Charter and in line with Purpose #2, the EPDP Team undertakes to make a recommendation pertaining to a standardised model for lawful disclosure of non-public Registration Data (referred to in the Charter as 'Standardised Access') now that the gating questions in the charter have been answered. This will include addressing questions such as:

- Whether such a system should be adopted
- What are the legitimate purposes for third parties to access registration data?
- What are the eligibility criteria for access to non-public Registration data?
- Do those parties/groups consist of different types of third-party Requestors?
- What data elements should each user/party have access to?

In this context, the EPDP team will consider amongst other issues, disclosure in the course of intellectual property infringement and DNS abuse cases. There is a need to confirm that disclosure for legitimate purposes is not incompatible with the purposes for which such data has been collected.

TSG Policy Questions

1. Result from the EPDP, or other policy initiatives, regarding access to non-public gTLD domain name registration data.
2. Identify and select Identity Providers (if that choice is made) that can grant credentials for use in the system.[45]
3. Describe the general qualifications of a Requestor that is authorized to access non-public gTLD domain name registration data, such as which sorts of Requestors get access to which fields of non-public gTLD domain name registration data ("the authorization policy").
4. Detail whether a particular category of Requestors or Requestors in general, can download logs of their activity.
5. Describe data retention requirements imposed on each component of the system.
6. Describe service Level Requirements (SLRs) for each component of the system, including whether those SLRs and evaluations of component operators against them are made public, and for handling complaints about access.
7. Specify legitimate causes for denying a request.
8. Outline support for correlation via a pseudonymity query as described in Section 7.2.
9. Outline the selection of an actor model as described in Section 8 and the appropriate supported components and service discovery as described in Sections 10.1 through 10.5.
10. Describe the conditions, if any, under which requests would be disclosed to CPs.
11. Provide legal analysis regarding liability of the operators of various components of the system.
12. Outline a procedure for fielding complaints about inappropriate disclosures and, accordingly, an Acceptable Use Policy.

EXPECTED DELIVERABLE

Policy recommendations for a standardised model for lawful disclosure/access of non-public Registration Data

GENERAL REQUIRED READING

[45] Several noted that this question might not be in scope for the EPDP Team to address.

Description	Link	Required because
Framework Elements for Unified Access Model for Continued Access to Full WHOIS Data (18 June 2018)	https://www.icann.org/en/system/files/files/framework-elements-unified-access-model-for-discussion-18jun18-en.pdf	
Draft Accreditation and Access model for non-public WHOIS DATA (BC/IPC)	Model Version 1.7 dated 23 July 2018	
The Palage Differentiated Registrant Data Access Model (aka Philly Special)	The Palage Differentiated Registrant Data Access Model (aka Philly Special) - Version 2.0 dated 30 May 2018	
Unified Access Model for Continued Access to Full WHOIS Data - Comparison of Models Submitted by the Community (18 June 2018)	https://www.icann.org/en/system/files/files/draft-unified-access-model-summary-elements-18jun18-en.pdf	
Article 29 WP Opinion 2/2003 on the application of the data protection principles to the Whois directories (2003)	https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp76_en.pdf	
EWG Report Section 4c, RDS User Accreditation Principles (June 2014)	https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf	
EWG Research – RDS User Accreditation RFI	https://community.icann.org/download/attachments/45744698/EWG%20USER%20ACCREDITATION%20RFI%20SUMMARY%2013%20March%202014.pdf	

Part 1: How it works: RDAP – 10 March 2019	https://64.schedule.icann.org/meetings/963337	
Part 2: Understanding RDAP and the Role it can Play in RDDS Policy - 13 March 2019	https://64.schedule.icann.org/meetings/961941	
Technical Study Group on Access to Non-Public Registration Data Proposed Technical Model for Access to Non-Public Registration Data (30 April 2019)	TSG01, Technical Model for Access to Non-Public Registration Data	
Final Report on the Privacy & Proxy Services Accreditation Issues (7 December 2015) ● Definitions - pages 6-8 ● Annex B – Illustrative Disclosure Framework applicable to Intellectual Property Rights-holder Disclosure Requests – pages 85 – 93 ● Draft Privacy & Proxy Service Provider Accreditation Agreement	https://gnso.icann.org/sites/default/files/filefield_48305/ppsai-final-07dec15-en.pdf	

BRIEFINGS TO BE PROVIDED

Topic	Possible presenters	Important because
RDAP – Q & A session post review of ICANN 65 sessions	Francisco Arias, ICANN Org	Ensure a common understanding of the workings and abilities of RDAP

DEPENDENCIES

Describe dependency	Dependent on	Expected or recommended timing
The negotiation and finalization of the data protection agreements required according to phase 1 report are a prerequisite for much of work in phase 2 (suggested by ISPCP)	CPs/ICANN Org	

PROPOSED TIMING AND APPROACH

Introduction

Objective of EPDP Team is to develop and agree on policy recommendations for sharing of non-public Registration Data[46] with requesting parties (System for Standardized Access/Disclosure of Non-Public Registration Data).

Until legal assurances satisfactory to relevant parties are provided, the development of the policy recommendations for a System for Standardized Disclosure/Access will be agnostic to the modalities of the System.

[46] From the EPDP Phase 1 Final Report: “Registration Data” will mean the data elements identified in Annex D [of the EPDP Phase 1 Final Report], collected from a natural and legal person in connection with a domain name registration.

In parallel, the EPDP Team as a whole should engage with ICANN Org on the development of policy questions that will help inform the discussions with DPAs which have as its objective to determine what model of System for Standardized Disclosure would be fully compliant with GDPR, workable and address/alleviate the legal liability of contracted parties.

Non-exhaustive list of topics expected to be addressed:

- Terminology and Working Definitions
- Legal guidance needed
- Requirements, incl. defining user groups, criteria & criteria/content of request
- Publication of process, criteria and content request required
- Timeline of process
- Receipt of acknowledgment
- Accreditation
- Authentication & Authorization
- Purposes for third party disclosure
- Lawful basis for disclosure
- Acceptable Use Policy
- Terms of use / disclosure agreements, including fulfillment of legal requirements
- Privacy policies
- Query policy
- Retention and destruction of data
- Service level agreements
- Financial sustainability

Approach

Determine at the outset:

a) Terminology and working definitions
b) Identify legal guidance needed (note, this is also an ongoing activity throughout all the topics).

Possible logical order to address the remaining topics:

c) Define user groups, criteria and purposes / lawful basis per user group

↓

d) Authentication / authorization / accreditation of user groups

↓

e) Criteria/content of requests per user group

↓

f) Query policy

↓

g) Receipt of acknowledgement, including timeline

↓

h) Response requirements / expectations, including timeline/SLAs

↓

i) Acceptable Use Policy

↓

j) Terms of use / disclosure agreements / privacy policies

↓

k) Retention and destruction of data

l) Overall topic of consideration: financial sustainability

Hereunder further details for each of these topics has been provided. To jump to each section, please use the links below:

a) Terminology and Working Definitions
b) Legal Questions
c) Define user groups, criteria and purposes / legal basis per user group
d) Authentication / accreditation of user groups
e) Format of requests per user group
f) Query Policy
g) Receipt of acknowledgement, including timeline
h) Response requirements / expectations, including timeline / SLAs
i) Acceptable Use Policy
j) Terms of use / disclosure agreements / privacy policies
k) Retention and destruction of data
l) Financial sustainability

Following the completion of this and other worksheets, each topic (including Phase 1 topics) and its scope of work will form the basis of an overall scheduled work plan. Some topics may be addressed in parallel, while others may have dependencies to other work before more informed deliberations can be had. Each topic will be given a set time to conduct issue deliberations, formulate possible conclusions and or possible recommendations to the policy questions. Conclusions or recommendations that obtain a general level of support will advance forward for further consideration and refinement towards an Initial Report. The goal is to achieve levels of consensus on the proposal(s) where possible prior to publication.

a) Topic: Terminology and Working Definitions

Objective: To ensure that the same meaning is associated with the terms used in the context of this discussion and avoid confusion, the EPDP Team is to agree on a set of working definitions. It is understood that these working definitions merely serve to clarify terminology used, it is in no way intended to restrict the scope of work or predetermine the outcome. It is understood that these working definitions will need to be reviewed and revised, as needed, at the end of the process.

Materials to review:

- Terminology used in GDPR and other data protection legislation
- Final Report on the Privacy & Proxy Services Accreditation Issues (7 December 2015) - eDefinitions - pages 6-8

Related mind map question: None

Related EPDP Phase 1 Implementation: To be confirmed - recommendation #18 implementation may include definitions that may need to be factored into the EPDP Team's phase 2 deliberations.

Tasks:

- Confirm whether any definitions are expected to be developed or applied in the implementation of recommendation #18 (Staff)
- Develop first draft of working definitions. (Staff)
- EPDP Team to review and provide input (EPDP)
- Obtain agreement on base set of definitions (EPDP)
- Maintain working document of definitions through deliberations (All)

Target date for completion: 30 May 2019

b) Topic: Legal Questions

Objective: identify legal questions that are essential to help inform the EPDP Team deliberations on this topic.

Questions submitted to date:

Question	Status	Owner
1. There is a need to confirm that disclosure for legitimate purposes is not incompatible with the purposes for which such data has been collected.	**ON HOLD** The Phase 2 LC has noted this question as premature at this time and will mark the question as "on hold". The question will be revisited once the EPDP Team has identified the purposes for disclosure.	
2. Answer the controllership and legal basis question for a system for Standardized Access to Non-Public Registration Data, assuming a technical framework consistent with the TSG, and in a way that sufficiently addresses issues related to liability and risk mitigation with the goal of decreasing liability risks to Contracted Parties through the adoption of a system for Standardized Access (IPC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
3. Legal guidance should be sought on the possibility of an accreditation-based disclosure system as such. (ISPCP)	**ON HOLD** The Phase 2 LC has noted this question as premature at this time and will mark the question as "on	

	hold”. The question will be revisited once the EPDP Team has identified the purposes for disclosure.	
4. The question of disclosure to non-EU law enforcement based on Art 6 I f GDPR should be presented to legal counsel. (ISPCP)	**REWORK** The Phase 2 LC is in the process of seeking further guidance from the author of this question, and, upon review of the guidance and/or updated text, will determine if the question should be forwarded to outside counsel.	
5. Can a centralized access/disclosure model (one in which a single entity is responsible for receiving disclosure requests, conducting the balancing test, checking accreditation, responding to requests, etc.) be designed in such a way as to limit the liability for the contracted parties to the greatest extent possible? IE - can it be opined that the centralized entity can be largely (if not entirely) responsible for the liability associated with disclosure (including the accreditation and authorization) and could the contracted parties’ liability be limited to activities strictly associated with other processing not related to disclosure, such as the collection and secure transfer of data? If so, what needs to be considered/articulated in policy to accommodate this? (ISPCP)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	

6. Within the context of an SSAD, in addition to determining its own lawful basis for disclosing data, does the requestee (entity that houses the requested data) need to assess the lawful basis of the third party Requestor? (Question from ICANN65 from GAC/IPC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
7. To what extent, if any, are contracted parties accountable when a third party misrepresents their intended processing, and how can this accountability be reduced? (BC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
8. BC Proposes that the EPDP split Purpose 2 into two separate purposes: ● Enabling ICANN to maintain the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission and Bylaws though the controlling and processing of gTLD registration data. ● Enabling third parties to address consumer protection, cybersecurity, intellectual property, cybercrime, and DNS abuse involving the use or registration of domain names. counsel be consulted to determine if the restated purpose 2 (as stated above) Can legal counsel be consulted to determine if the restated purpose 2 (as stated above) is possible under GDPR? If the above language is not possible, are there suggestions that	**ON HOLD** The Phase 2 LC has noted this question as premature at this time and will mark the question as "on hold". The question will be revisited once the GNSO Council and Board consultations re: Recommendation 1, Purpose 2 have been completed.	

counsel can make to improve this language? (BC)		
9. Can legal analysis be provided on how the balancing test under 6(1)(f) is to be conducted, and under which circumstances 6(1)(f) might require a manual review of a request? (BC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
10. If not all requests benefit from manual review, is there a legal methodology to define categories of requests (e.g. rapid response to a malware attack or contacting a non-responsive IP infringer) which can be structured to reduce the need for manual review? (BC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
11. Can legal counsel be consulted to determine whether GDPR prevents higher volume access for properly credentialed cybersecurity professionals, who have agreed on appropriate safeguards? If such access is not prohibited, can counsel provide examples of safeguards (such as pseudonymization) that should be considered? (BC)	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
12. To identify 6(1)(b) as purpose for processing registration data, we should follow up on the B & B advice that- “it will be	**REWORK**	

necessary to require that the specific third party or at least the processing by the third party is, at least abstractly, already known to the data subject at the time the contract is concluded and that the controller, as the contractual partner, informs the data subject of this prior to the transfer to the third party” B&B should clarify why it believes that the only basis for providing WHOIS is for the prevention of DNS abuse. Its conclusion in Paragraph 10 does not consider the other purposes identified by the EPDP in Rec 1, and, in any event should consider the recent EC recognition that ICANN has a broad purpose to: ‘contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission’, which is at the core of the role of ICANN as the “guardian” of the Domain Name System.”	The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	
13. B&B should advise on the extent to which GDPR’s public interest basis 6(1)e is applicable, in light of the EC’s recognition that: “With regard to the formulation of purpose two, the European Commission acknowledges ICANN’s central role and responsibility for ensuring the security, stability and resilience of the Internet Domain Name System and that in doing so it acts in the public interest.”	**REWORK** The Phase 2 LC is in the process of rewording this question, and, upon review of the updated text, will determine if the question should be forwarded to outside counsel.	

Tasks:

- Determine priority questions for phase 2 related topics
- Agree on approach and approval process for questions that emerge throughout deliberations

Target date for completion: Ongoing

c) Topic: Define user groups, criteria and purposes / lawful basis per user group

Objective:

- Define the categories of user groups that may request disclosure of / access to non-public registration data as well as the criteria that should be applied to determine whether an individual or entity belongs to this category.
- Determine purposes and lawful basis per user group for processing data
- Determine if and how the Phase 2 standardized framework can accommodate requests unique to large footprint groups. Consider if those not fitting in any of the user groups identified may still request disclosure/access through implementation of recommendation #18 or other means.

Related mind map questions:

P1-Charter-a
(a) Purposes for Accessing Data – What are the unanswered policy questions that will guide implementation?

a1) Under applicable law, what are legitimate purposes for third parties to access registration data?
a2) What legal bases exist to support this access?
a3) What are the eligibility criteria for access to non-public Registration data?
a4) Do those parties/groups consist of different types of third-party Requestors?

Annex to the Temporary Specification:
3. Developing methods to provide potential URS and UDRP complainants with sufficient access to Registration Data to support good-faith filings of complaints.

Phase 1 Recommendations
EPDP Team Rec #3

- What are the legitimate purposes for third parties to access registration data?
- What are the eligibility criteria for access to non-public Registration data?
- Do those parties/groups consist of different types of third-party Requestors?

The EPDP Team requests that when the EPDP Team commences its deliberations on a standardized access framework, a representative of the RPMs PDP WG shall provide an update on the current status of deliberations so that the EPDP Team may determine if/how the WG's recommendations may affect consideration of the URS and UDRP in the context of the standardized access framework deliberations.

Note that Purpose 2 is a placeholder pending further work on the issue of access in Phase 2 of this EPDP and is expected to be revisited once this Phase 2 work has been completed. [staff note - linked to purposes but timing to revisit purpose 2 is once phase 2 work has been completed]

TSG-Final-Q#3

3. Describe the general qualifications of a Requestor that is authorized to access non-public gTLD domain name registration data, such as which sorts of Requestors get access to which fields of non-public gTLD domain name registration data ("the authorization policy").

Materials to review:

Description	**Link**	**Required because**
At the end of June 2017, ICANN asked contracted parties and interested stakeholders to identify user types and purposes of data elements required by ICANN policies and contracts. The individual responses received and a compilation of the responses are provided below.	Dataflow Matrix, Compilation of Responses Received – Current Version	Most recent effort to identify user types
EWG Final Report sets forth a non-exhaustive summary of users of the existing WHOIS system, including those with constructive or malicious purposes. Consistent with the EWG's mandate, all of these users were examined to identify existing and possible future workflows and the stakeholders and data involved in them.	https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf - pages 20-25	
Review purposes established and legal basis identified in phase 1 of the EPDP Team	https://gnso.icann.org/en/drafts/epdp-gtld-registration-data-specs-final-20feb19-en.pdf (pages 34-36 / 67-71)	
GDPR Relevant provisions	Relevant provisions in the GDPR - See Article 6(1), Article 6(2) and Recital 40	

ICO lawful basis for processing info page	https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/	

Related EPDP Phase 1 Implementation:
None expected

Tasks:

- Develop first list of categories of Requestors based on source materials. (Staff)
- Review list of categories of Requestors and determine eligibility criteria. (All)
- Develop abuse types and scenarios to formulate use cases that determine requirements for each Requestor
- Determine purposes and legal basis per user group for processing data (All)
- Determine if and how the Phase 2 standardized framework can accommodate requests unique to large footprint groups. Consider if those not fitting in any of the user groups identified may still request disclosure/access through implementation of recommendation #18 or other means. (All)
- Confirm all charter questions have been addressed and documented.

Target date for completion: 13 June 2019
(Revisit purpose 2 - once phase 2 work has been completed)

d) Authentication / authorization / accreditation of user groups

Objective:

- Establish if authentication, authorization and/or accreditation of user groups should be required
  - Can an accreditation model compliment or be used with what is implemented from EPDP-Phase 1 Recommendation #18?
- If so, establish policy principles for authentication, authorization and/or accreditation, including addressing questions such as:
  - whether or not an authenticated user requesting access to non-public WHOIS data must provide its legitimate interest for each individual query/request.
- If not, explain why not and what implications this might have on queries from certain user groups, if any.

Related mind map questions:

P1-Charter-a/b

(a) Purposes for Accessing Data - What are the unanswered policy questions that will guide implementation?
a7) How can RDAP, that is technically capable, allow Registries/Registrars to accept accreditation tokens and purpose for the query? Once accreditation models are developed by the appropriate accreditors and approved by the relevant legal authorities, how can we ensure that RDAP is technically capable and is ready to accept, log and respond to the accredited Requestor’s token?

(b) Credentialing – What are the unanswered policy questions that will guide implementation?
b1) How will credentials be granted and managed?
b2) Who is responsible for providing credentials?
b3) How will these credentials be integrated into registrars’/registries’ technical systems?

Annex to the Temporary Specification

1. Pursuant to Section 4.4, continuing community work to develop an accreditation and access model that complies with GDPR, while recognizing the need to obtain additional guidance from Article 29 Working Party/European Data Protection Board.

TSG-Final-Q#2

Identify and select Identity Providers (if that choice is made) that can grant credentials for use in the system.

Materials to review:

Description	Link	Required because
Identification and authentication in the TSG model	https://www.icann.org/en/system/files/files/technical-model-access-non-public-registration-data-30apr19-en.pdf page 23-24	
EWG Final Report - RDS Contact Use Authorization and RDS User Accreditation Principles	https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf page 39-40 and page 62-67	
Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data - How would authentication requirements for legitimate users be developed?	https://www.icann.org/en/system/files/files/framework-elements-unified-access-model-for-discussion-20aug18-en.pdf pages 9-10, 10-11, 18, 23	

Related EPDP Phase 1 Implementation:
None expected.

Tasks:

- Review materials listed above and discuss perspectives on authentication / authorization.(EPDP)
- Confirm definitions of key terms Authorization, Accreditation and Authentication
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: ICANN 65

e) Criteria / content of requests per user group

Objective: establish minimum policy requirements, criteria and content for requests per user group as identified under c.

Related mind map questions:

P1-Charter-c
c1) What rules/policies will govern users' access to the data?

Materials to review:

Description	Link	Required because
● Annex B – Illustrative Disclosure Framework applicable to Intellectual Property Rights-holder Disclosure Requests – pages 85 – 93 ● Privacy & Proxy Service Provider Accreditation Agreement	Final Report on the Privacy & Proxy Services Accreditation Issues (7 December 2015)	
Example: .DE Information & Request Form	https://www.denic.de/en/service/whois-service/third-party-requests-for-holder-data/ https://www.denic.de/fileadmin/public/downloads/Domaindatenanfrage/Antrag_Domaindaten_Rechteinhaber_EN.pdf	
Example: Nominet Request Form	https://s3-eu-west-1.amazonaws.com/nominet-prod/wp-content/uploads/2018/05/22101442/Data-request-form.pdf	

<u>Related EPDP Phase 1 Implementation</u>:

Recommendation #18 (but does NOT require automatic disclosure of information)

Minimum Information Required for Reasonable Requests for Lawful Disclosure:

- Identification of and information about the Requestor (including, the nature/type of business entity or individual, Power of Attorney statements, where applicable and relevant);
- Information about the legal rights of the Requestor and specific rationale and/or justification for the request, (e.g. What is the basis or reason for the request; Why is it necessary for the Requestor to ask for this data?);
- Affirmation that the request is being made in good faith;
- A list of data elements requested by the Requestor and why this data is limited to the need;
- Agreement to process lawfully any data received in response to the request.

Tasks:

- Confirm implementation approach for recommendation #18
- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

<u>Target date for completion</u>: ICANN 65

f) Query policy

<u>Objective</u>: Establish minimum policy requirements for logging of queries, defining the appropriate controls for when query logs should be made available, and if there should be query limitations for authenticated and unauthenticated users of the SSAD.

- How will access to non-public registration data be limited in order to minimize risks of unauthorized access and use (e.g. by enabling access on the basis of specific queries only as opposed to bulk transfers and/or other restrictions on searches or reverse directory services, including mechanisms to restrict access to fields to what is necessary to achieve the legitimate purpose in question)?
- Should confidentiality of queries be considered, for example by law enforcement?
- How should query limitations be balanced against realistic investigatory cross-referencing needs?

<u>Related mind map questions</u>:

P1-Charter-a

a7) How can RDAP, that is technically capable, allow Registries/Registrars to accept accreditation tokens and purpose for the query? Once accreditation models are developed by the appropriate accreditors and approved by the relevant legal authorities, how can we ensure that RDAP is technically capable and is ready to accept, log and respond to the accredited Requestor's token?

Annex to the Temporary Specification:
6 Limitations in terms of query volume envisaged under an accreditation program balanced
against realistic investigatory cross-referencing needs.
7 Confidentiality of queries for Registration Data by law enforcement authorities.

Materials to review:

Description	**Link**	**Required because**
SSAC 101 - SSAC Advisory Regarding Access to Domain Name Registration Data	https://www.icann.org/en/system/files/files/sac-101-en.pdf	Describes effects of rate-limiting.

Related EPDP Phase 1 Implementation: None.

Tasks:

- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: ICANN 65

g) Receipt of acknowledgement, including timeline

Objective: Define policy requirements around timeline of acknowledgement of receipt and additional requirements (if any) the acknowledgement should contain.

What, if any, are the baseline minimum standardized receipt of acknowledgement requirements for registrars/registries? What about 'urgent' requests and how are these defined?

Related mind map questions:

P1-Charter-c
c1) What rules/policies will govern users' access to the data?

Materials to review:

Description	Link	Required because
Phase 1 Final Report Rec. 18 Timeline & Criteria for Registrar and Registry Operator Responses	https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf p. 19	

Related EPDP Phase 1 Implementation: - Recommendation #18*:*
Timeline & Criteria for Registrar and Registry Operator Responses -
Registrars and Registries must reasonably consider and accommodate requests for lawful disclosure:
• Response time for acknowledging receipt of a Reasonable Request for Lawful Disclosure. Without undue delay, but not more than two (2) business days from receipt, unless shown circumstances does not make this possible.

Tasks:

- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: TBD

h) Response requirements / expectations, including timeline/SLAs

Objective: Define policy requirements around response requirements, including addressing questions such as:

- including addressing questions such as:
  - Whether or not full WHOIS data must be returned when an authenticated user performs a query.
  - What should be the SLA commitments for responses to requests for access/disclosure

- What are the minimum requirements for responses to requests, including denial of requests?

Related mind map questions:

P1-Charter-a/c
a5) What data elements should each user/party have access to based on their purpose?
a6) To what extent can we determine a set of data elements and potential scope (volume) for specific third
parties and/or purposes?
c1) What rules/policies will govern users' access to the data?

Phase 1 Recommendation - #3
What data elements should each user/party have access to?

Annex to the Temporary Specification
2. Addressing the feasibility of requiring unique contacts to have a uniform anonymized email address across domain name registrations at a given Registrar, while ensuring security/stability and meeting the requirements of Section 2.5.1 of Appendix A.

TSG-Final-Q#6
Describe service Level Requirements (SLRs) for each component of the system, including whether those SLRs and evaluations of component operators against them are made public, and for handling complaints about access.
TSG-Final-Q#7
Specify legitimate causes for denying a request.
TSG-Final-Q#8
Outline support for correlation via a pseudonymity query as described in Section 7.2.

Materials to review:

Description	**Link**	**Required because**
Phase 1 Final Report Rec. 18 Timeline & Criteria for Registrar and Registry Operator Responses	https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf p. 19	

Final Report on the Privacy & Proxy Services Accreditation Issues (7 December 2015) ● Annex B – Illustrative Disclosure Framework applicable to Intellectual Property Rights-holder Disclosure Requests – pages 90 - 92	https://gnso.icann.org/sites/default/files/filefield_48305/ppsai-final-07dec15-en.pdf	Section of PPSAI illustrative disclosure framework detailing required minimum response

Related EPDP Phase 1 Implementation*:*
Recommendation #18:

- Requirements for what information responses should include. Responses where disclosure of data (in whole or in part) has been denied should include: rationale sufficient for the Requestor to understand the reasons for the decision, including, for example, an analysis and explanation of how the balancing test was applied (if applicable).
- Logs of Requests, Acknowledgements and Responses should be maintained in accordance with standard business recordation practices so that they are available to be produced as needed including, but not limited to, for audit purposes by ICANN Compliance;
- Response time for a response to the Requestor will occur without undue delay, but within maximum of 30 days unless there are exceptional circumstances. Such circumstances may include the overall number of requests received. The contracted parties will report the number of requests received to ICANN on a regular basis so that the reasonableness can be assessed.
- A separate timeline of [less than X business days] will considered for the response to 'Urgent' Reasonable Disclosure Requests, those Requests for which evidence is supplied to show an immediate need for disclosure [time frame to be finalized and criteria set for Urgent requests during implementation].

Tasks:

- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: August

i) Acceptable Use Policy

Objective: Define the policy requirements around:

1. How should a code of conduct (if any) be developed, continuously evolve and be enforced?
2. If ICANN and its contracted parties develop a code of conduct for third parties with legitimate interest, what features and needs should be considered?
3. Are there additional data flows that must be documented outside of what was documented in Phase 1?

Can a Code of Conduct model compliment or be used with what is implemented from EPDP-Phase 1 Recommendation #18?

Related mind map questions:

P1-Charter-c

c1) What rules/policies will govern users' access to the data?
c2) What rules/policies will govern users' use of the data once accessed?
c3) Who will be responsible for establishing and enforcing these rules/policies?
c4) What, if any, sanctions or penalties will a user face for abusing the data, including future
restrictions on access or compensation to data subjects whose data has been abused in addition to any sanctions already provided in applicable law?
c5) What kinds of insights will Contracted Parties have into what data is accessed and how it is used?
c6) What rights do data subjects have in ascertaining when and how their data is accessed and used?
c7) How can a third party access model accommodate differing requirements for data subject notification of data disclosure?

Materials to review:

Description	**Link**	**Required because**
GDPR Article 40, Code of Conduct	https://gdpr-info.eu/art-40-gdpr/	
Art. 29 Working Party Letter to ICANN 11 April 2018	https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-11apr18-en.pdf	

Bird & Bird - Code of Conduct and Certification Reference Material (May 2017)	https://www.twobirds.com/~/media/pdfs/gdpr-pdfs/43--guide-to-the-gdpr--codes-of-conduct-and-certifications.pdf?la=en	
Example: Cloud Providers Code of Conduct (CISPE) (January 2017)	https://cispe.cloud/code-of-conduct/	
Example: Cloud Providers Code of Conduct (EU Cloud) (November 2018)	https://eucoc.cloud/en/contact/request-the-eu-cloud-code-of-conduct.html	

Related EPDP Phase 1 Implementation: None.

Tasks:

- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: August

j) Terms of use / disclosure agreements / privacy policies

Objective: Define policy requirements around terms of use for third parties who seek to access nonpublic registration data:

- At a minimum, what required measures are needed to adequately safeguard personal data that may be made available to an accredited user/third party?
- What procedures should be established for accessing data?
- What procedures should be established for limiting the use of data that is properly accessed?
- Should separate Terms of Use be required for different user groups?
- Who would monitor and enforce compliance with Terms of Use?

- What mechanism would be used to require compliance with the Terms of Use?

Related mind map questions:

P1-Charter-c
c1) What rules/policies will govern users' access to the data?
c2) What rules/policies will govern users' use of the data once accessed?
c3) Who will be responsible for establishing and enforcing these rules/policies?
c4) What, if any, sanctions or penalties will a user face for abusing the data, including future
restrictions on access or compensation to data subjects whose data has been abused in addition to any sanctions already provided in applicable law?

TSG-Final-Q#4
Detail whether a particular category of Requestors or Requestors in general, can download logs of their activity.
TSG-Final-Q#10
Describe the conditions, if any, under which requests would be disclosed to CPs.
TSG-Final-Q#11
Provide legal analysis regarding liability of the operators of various components of the system.
TSG-Final-Q#12
Outline a procedure for fielding complaints about inappropriate disclosures and, accordingly, an Acceptable Use Policy

Materials to review:

Description	**Link**	**Required because**
Draft Framework for a Possible Unified Access Model for Continued Access to Full WHOIS Data - What would be the role of Terms of Use in a unified access model?	https://www.icann.org/en/system/files/files/framework-elements-unified-access-model-for-discussion-20aug18-en.pdf pages 14-16	

Related EPDP Phase 1 Implementation:

Tasks:

- Confirm definitions of key terms

- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: September

k) Retention and destruction of data

Objective: Establish minimum policy requirements for retention, deletion and logging of data retained for parties involved in the SSAD, including but limited to, gTLD registration data, user account information, transaction logs, and metadata such as date-and-time of requests

Related mind map questions:

P1-Charter-c
c2) What rules/policies will govern users' use of the data once accessed?

TSG-Final-Q#5
Describe data retention requirements imposed on each component of the system.

Materials to review:

Description	**Link**	**Required because**
GDPR Article 5(1)(e)	https://gdpr.algolia.com/gdpr-article-5	
Data retention in the TSG model	https://www.icann.org/en/system/files/files/technical-model-access-non-public-registration-data-30apr19-en.pdf page 26	

Related EPDP Phase 1 Implementation: Recommendation #15:
1. In order to inform its Phase 2 deliberations, the EPDP team recommends that ICANN Org, as a matter of urgency, undertakes a review of all of its active processes and

procedures so as to identify and document the instances in which personal data is requested from a registrar beyond the period of the 'life of the registration'. Retention periods for specific data elements should then be identified, documented, and relied upon to establish the required relevant
and specific minimum data retention expectations for registrars. The EPDP Team recommends community members be invited to contribute to this data gathering exercise by providing input on other legitimate purposes for which different retention periods may be applicable.

2. In the interim, the EPDP team has recognized that the Transfer Dispute Resolution Policy ("TDRP") has been identified as having the longest justified retention period of one year and has therefore recommended registrars be required to retain only those data elements deemed necessary for the purposes of the TDRP, for a period of fifteen months following the life of the registration plus three months to implement the deletion, i.e., 18 months. This retention is grounded on the stated policy stipulation within the TDRP that claims under the policy may only be raised for a period of 12 months after the alleged breach (FN: see TDRP section 2.2) of the Transfer Policy (FN: see Section 1.15 of TDRP). This retention period does not restrict the ability of registries and registrars to retain data elements provided in Recommendations 4 -7 for other purposes specified in Recommendation 1 for shorter periods.

3. The EPDP team recognizes that Contracted Parties may have needs or requirements for different retention periods in line with local law or other requirements. The EPDP team notes that nothing in this recommendation, or in separate ICANN-mandated policy, prohibits contracted parties from setting their own retention periods, which may be longer or shorter than what is specified in ICANN policy.

4. The EPDP team recommends that ICANN Org review its current data retention waiver procedure to improve efficiency, request response times, and GDPR compliance, e.g., if a Registrar from a certain jurisdiction is successfully granted a data retention waiver, similarly-situated Registrars might apply the same waiver through a notice procedure and without having to produce a separate application.

Tasks:

- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: September

l) Financial sustainability

Objective: Ensure that all aspects of SSAD are financially sustainable. Consider how and by whom costs of SSAD implementation and management are borne.

- Determine if market inefficiencies existed prior to May 2018 and if any exist in a post EPDP-Phase 1 implemented world.
- Should contracted parties and or ICANN bear the cost of a standardized solution, even if the disclosure of registration data is considered in the public interest?
- If accreditation is a viable solution, should there be application fees associated, or should a fee structure be based on the type (tiered), size, or quantify of disclosures?
- Should or could data subjects be compensated for disclosures of their data?

Related mind map questions: None

Materials to review:

Description	Link	Required because

Related EPDP Phase 1 Implementation: None

Tasks:

- Confirm definitions of key terms
- Determine full list of policy questions and deliberate each
- Determine possible solutions or proposed recommendation, if any
- Confirm all charter questions have been addressed and documented

Target date for completion: TBD

Annex B – General Background

Process & Issue Background

On 19 July 2018, the GNSO Council initiated an Expedited Policy Development Process (EPDP) and chartered the EPDP on the Temporary Specification for gTLD Registration Data Team. Unlike other GNSO PDP efforts, which are open for anyone to join, the GNSO Council chose to limit the membership composition of this EPDP, primarily in recognition of the need to complete the work in a relatively short timeframe and to resource the effort responsibly. GNSO Stakeholder Groups, the Governmental Advisory Committee (GAC), the Country Code Supporting Organization (ccNSO), the At-Large Advisory Committee (ALAC), the Root Server System Advisory Committee (RSSAC) and the Security and Stability Advisory Committee (SSAC) were each been invited to appoint up to a set number of members and alternates, as outlined in the charter. In addition, the ICANN Board and ICANN Org have been invited to assign a limited number of liaisons to this effort. A call for volunteers to the aforementioned groups was issued in July, and the EPDP Team held its first phase 1 meeting on 1 August 2018.

Issue Background

On 17 May 2018, the ICANN Board approved the Temporary Specification for gTLD Registration Data. The Board took this action to establish temporary requirements for how ICANN and its contracted parties would continue to comply with existing ICANN contractual requirements and community-developed policies relate to WHOIS, while also complying with the European Union (EU)'s General Data Protection Regulation (GDPR). The Temporary Specification has been adopted under the procedure for Temporary Policies outlined in the Registry Agreement (RA) and Registrar Accreditation Agreement (RAA). Following adoption of the Temporary Specification, the Board "shall immediately implement the Consensus Policy development process set forth in ICANN's Bylaws".[47] This Consensus Policy development process on the Temporary Specification would need to be carried out within a one-year period. Additionally, the scope includes discussion of a standardized access system to nonpublic registration data.

At its meeting on 19 July 2018, the Generic Names Supporting Organization (GNSO) Council initiated an EPDP on the Temporary Specification for gTLD Registration Data and adopted the EPDP Team charter. Unlike other GNSO PDP efforts, which are open for anyone to join, the GNSO Council chose to limit the membership composition of this EPDP, primarily in recognition of the need to complete the work in a relatively short timeframe and to resource the effort responsibly. GNSO Stakeholder Groups, the

[47] See section 3.1(a) of the Registry Agreement: https://www.icann.org/resources/unthemed-pages/org-agmt-html-2013-09-12-en

Governmental Advisory Committee (GAC), the Country Code Supporting Organization (ccNSO), the At-Large Advisory Committee (ALAC), the Root Server System Advisory Committee (RSSAC) and the Security and Stability Advisory Committee (SSAC) were each been invited to appoint up to a set number of members and alternates, as outlined in the charter. In addition, the ICANN Board and ICANN Org have been invited to assign a limited number of liaisons to this effort.

The EPDP Team published its Phase 1 Initial Report for Public Comment on 21 November 2018. The EPDP Team incorporated public comments into its Phase 1 Final Report, and the GNSO Council voted to adopt all 29 recommendations within the EPDP's Phase 1 Final Report at its meeting on 4 March 2019. On 15 May 2019, the ICANN Board adopted the EPDP Team's Phase 1 Final Report, with the exception of parts of two recommendations: 1) Purpose 2 in Recommendation 1 and 2) the option to delete data in the Organization field in Recommendation 12. As per the ICANN Bylaws, a consultation will take place between the GNSO Council and the ICANN Board to discuss the parts of the EPDP Phase 1 recommendations that were not adopted by the ICANN Board. At the same time, an Implementation Review Team (IRT), consisting of the ICANN organization (ICANN org) and members of the ICANN community, will now implement the approved recommendations of the EPDP Team's Phase 1 Final Report. For further details on the status of implementation, please see here.

On 2 May 2019, the EPDP Team begun Phase 2 of its work. The scope for EPDP Phase 2 includes (i) discussion of a system for standardized access/disclosure to nonpublic registration data, (ii) issues noted in the Annex to the Temporary Specification for gTLD Registration Data ("Important Issues for Further Community Action"), and (iii) issues deferred from Phase 1, e.g., legal vs natural persons, redaction of city field, et. al. For further details, please see here.

Annex C – EPDP Team Membership and Attendance

EPDP Team Membership and Attendance

Meeting Activity Summary:

Plenary Meetings:

- 75 Plenary Calls for 155.5 hours
- 12 Face to Face Meetings for 77.5 hours
- 01 Webinar for 1.0 hour
- 86% total participation rate

Small Team Meetings:

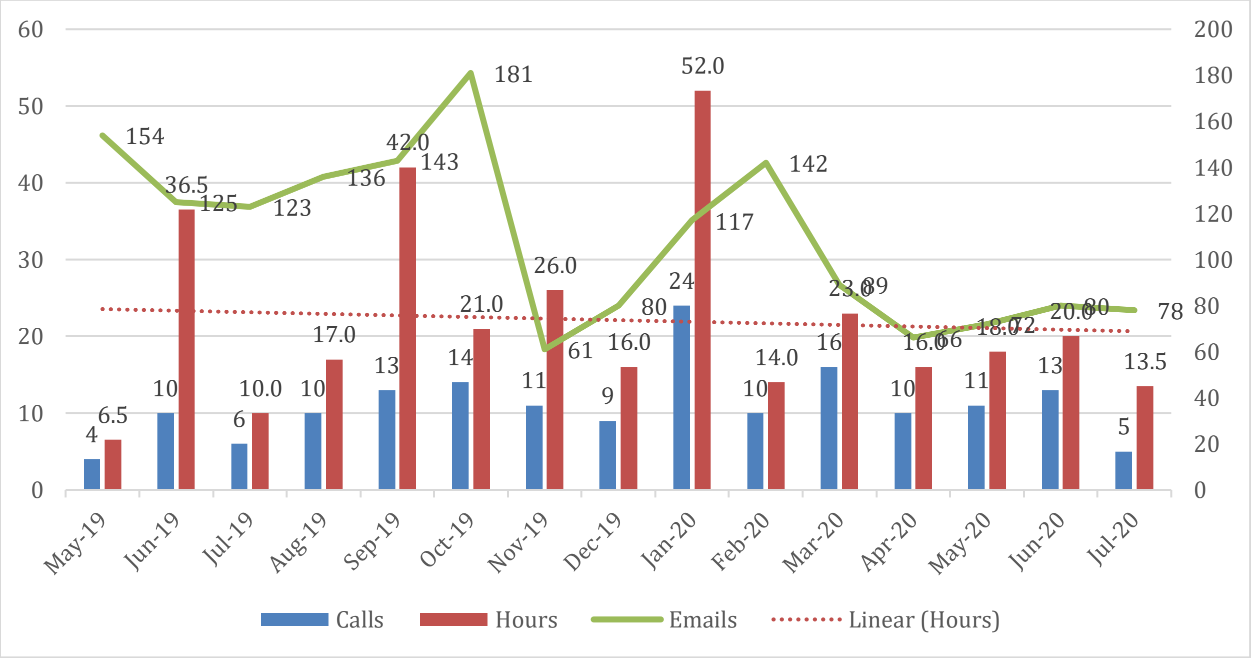
- 10 Subgroup Calls for 18.0 hours

Legal Committee Meetings:

- 19 Subgroup Calls for 29.4 hours
- 01 Face to Face Meetings for 1.5 hours

Leadership Meetings:

- 48 Leadership Calls for 47.5 hours
- 04 Leadership Face to Face Meetings for 20.5 hours



The detailed roster, SOIs & attendance can be found at https://community.icann.org/x/kBdIBg.

The email archives can be found at https://mm.icann.org/pipermail/gnso-epdp-team/.

Active Members of the Plenary EPDP Team:

Member Type / Affiliation / Name	SOI	Start Date	Attended %	Role
Current Participant			87.9%	
Member				
At-Large Advisory Committee			87.9%	
Alan Greenberg	SOI	3-Apr-19	97.7%	
Hadia El-Miniawi	SOI	3-Apr-19	97.7%	LC
Commercial Business Users Constituency			97.7%	
Margie Milam	SOI	3-Apr-19	94.8%	LC
Mark Svancarek	SOI	3-Apr-19	95.4%	
GNSO Council			94.3%	
Rafik Dammak	SOI	3-Apr-19	98.3%	Chair
Governmental Advisory Committee			98.9%	
Christopher Lewis-Evans	SOI	15-May-19	93.6%	
Georgios Tselentis	SOI	3-Apr-19	96.6%	
Laureen Kappin	SOI	21-Oct-19	88.5%	LC
ICANN Board			96.1%	
Becky Burr	SOI	9-Sep-19	84.6%	LC
Chris Disspain	SOI	3-Apr-19	93.5%	
Intellectual Property Constituency			78.2%	
Brian King	SOI	4-Aug-19	91.0%	LC
Franck Journoud	SOI	12-Jan-19	88.5%	
Internet Corporation for Assigned Names & Numbers			95.7%	
Daniel Halloran	-	3-Apr-19	95.9%	
Eleeza Agopian	-	6-Dec-19	94.3%	
Internet Service Providers and Connectivity Providers Constituency			98.4%	
Fiona Asonga	SOI	3-Apr-19	44.8%	
Thomas Rickert	SOI	3-Apr-19	86.2%	LC
Non-Commercial Stakeholder Group			78.9%	
Amr Elsadr	SOI	3-Apr-19	67.8%	
Johan (Julf) Helsingius	SOI	3-Apr-19	75.9%	
Milton Mueller	SOI	3-Apr-19	81.4%	
Stefan Filipovic	SOI	21-May-19	84.5%	
Stephanie Perrin	SOI	3-Apr-19	86.2%	LC
<vacant>	-			
Registrar Stakeholder Group			85.0%	
James Bladel	SOI	3-Apr-19	76.7%	
Matt Serlin	SOI	3-Apr-19	86.2%	
Volker Greimann	SOI	16-Apr-19	92.0%	LC

Registry Stakeholder Group			90.0%	
Alan Woods	SOI	3-Apr-19	90.8%	
Marc Anderson	SOI	3-Apr-19	95.4%	
Matthew Crossman	SOI	3-Apr-19	83.1%	LC
Security and Stability Advisory Committee			92.1%	
Ben Butler	SOI	3-Apr-19	93.1%	
Tara Whalen	SOI	15-May-19	90.9%	LC

Active Alternates of the Plenary EPDP Team:

Member Type / Affiliation / Name	SOI	Start Date	Attended %	Role
Alternate				
At-Large Advisory Committee				
Bastiaan Goslings	SOI	3-Apr-19	50.0%	
Holly Raiche	SOI	3-Apr-19	33.3%	
Commercial Business Users Constituency				
Steve DelBianco	SOI	3-Apr-19	100.0%	
Governmental Advisory Committee				
Olga Cavalli	SOI	22-May-19	95.6%	
Rahul Gosain	SOI	3-Apr-19	75.0%	
Ryan Carroll	SOI	18-Dec-19	100.0%	
Internet Service Providers and Connectivity Providers Constituency				
Suman Lal Pradhan	SOI	3-Apr-19	33.3%	
Non-Commercial Stakeholder Group				
David Cake	SOI	3-Apr-19	90.0%	
Tatiana Tropina	SOI	3-Apr-19	77.8%	LC
Yawri Carr-Quiros	SOI	17-Feb-20	100.0%	
Registrar Stakeholder Group				
Owen Smigelski	SOI	16-Apr-19		
Sarah Wyld	SOI	3-Apr-19	98.7%	
Theo Geurts	SOI	3-Apr-19	80.0%	
Registry Stakeholder Group				
Arnaud Wittersheim	SOI	3-Apr-19	80.0%	
Beth Bacon	SOI	22-Apr-19	95.7%	
Sean Baseri	SOI	6-Nov-19	100.0%	
Security and Stability Advisory Committee				
Greg Aaron	SOI	5-Oct-19	77.8%	
Rod Rasmussen	SOI	3-Apr-19	25.0%	

Active Staff Support of the Plenary EPDP Team:

Member Type / Affiliation / Name	SOI	Start Date	Attended %	Role
Staff Support				
ICANN (Internet Corporation for Assigned Names & Numbers)				
Caitlin Tubergen		3-Apr-2019		LC
Marika Konings		3-Apr-2019		
Berry Cobb		3-Apr-2019		
Amy Bivens		3-Jun-2019		LC
Terri Agnew		3-Apr-2019		
Andrea Glandon		3-Apr-2019		
Julie Bisland		20-Jun-2019		
Michelle DeSmyter		20-Jun-2019		
Nathalie Peregrine		3-Apr-2019		

Former Participants of the Plenary EPDP Team:

Member Type / Affiliation / Name	SOI	Start Date	Attended %	Role	Depart Date
Former Participant	-				
Member	-				
GNSO Council	-				
Janis Karklins	SOI	3-Apr-2019	97.6%	Chair	3-Jul-2020
Governmental Advisory Committee	-				
Ashley Heineman	SOI	3-Apr-2019	75.7%		21-Oct-2019
ICANN Board	-				
Leon Felipe Sanchez Ambia	SOI	3-Apr-2019	88.5%	LC	9-Sep-2019
Intellectual Property Constituency	-				
Alex Deacon	SOI	3-Apr-2019	87.5%		1-Dec-2019
Internet Corporation for Assigned Names & Numbers	-				
Trang Nguyen	-	3-Apr-2019	88.9%	LC	10-Apr-2019
Non-Commercial Stakeholder Group	-				
Ayden Fabien Férdeline	SOI	3-Apr-2019	73.5%		27-Jan-2020
Farzaneh Badiei	SOI	3-Apr-2019	69.2%		27-Jan-2020
Registry Stakeholder Group	-				
Kristina Rosette	SOI	22-Apr-2019	97.6%		7-Aug-2019
Alternate	-				
Intellectual Property Constituency	-				
Jennifer Gore	SOI	3-Apr-2019	97.6%		13-Feb-2020

The detailed attendance records can be found at https://community.icann.org/x/4opHBQ.

The EPDP Team email archives can be found at https://mm.icann.org/pipermail/gnso-epdp-team/.

Annex D – Consensus Designations

Below is the Chair's designation as to the level of Consensus on each recommendation in the EPDP Team Final Report. These designations were made following the process as outlined here and in accordance with section 3.6 - Standard Methodology for Making Decisions of the GNSO Working Group Guidelines as well as the EPDP Team Charter.

Recommendation #		Chair Proposed Designation	Groups not supporting recommendation or part thereof
#1	Accreditation	Full Consensus	
#2	Accreditation of Governmental Entities	Full Consensus	
#3 of	Criteria and Content Requests	Full Consensus	
#4	Acknowledgement of receipt	Full Consensus	
#5	Response Requirements	Strong support but significant opposition	GAC (accuracy) IPC BC
#6	Priority Levels	Divergence	GAC (Does not support 6.2) BC (Does not support 6.2) IPC (Does not support 6.2) ALAC (Does not support 6.2) SSAC
#7	Requestor Purposes	Consensus	NCSG (conditional to removal of footnote)
#8	Contracted Party Authorization	Strong support but significant opposition	GAC (accuracy and objection to 8.17) IPC BC
#9	Automation of SSAD Processing	Strong support but significant opposition	IPC BC ALAC
#10	Determining variable SLAs for response times for SSAD	Strong support but significant opposition	RrSG (Does not support SLA for Urgent Requests) SSAC

		IPC BC
#11 SSAD Terms and Conditions	Full Consensus	
#12 Disclosure Requirements	Strong support but significant opposition	GAC (accuracy) SSAC
#13 Query Policy	Full Consensus	
#14 Financial Sustainability	Divergence	ALAC GAC SSAC IPC BC
#15 Logging	Full Consensus	
#16 Audits	Full Consensus	
#17 Reporting Requirements	Full Consensus	
#18 Review of implementation of policy recommendations concerning SSAD using a GNSO Standing Committee	Strong support but significant opposition	ALAC BC IPC GAC
#19 Display of information of affiliated privacy / proxy providers	Full Consensus	
#20 City Field	Consensus	NCSG
#21 Data Retention	Full Consensus	
#22 Purpose 2	Consensus	NCSG

Annex E - Minority Statements

EN

AL-ALAC-ST-0720-04-01-EN
ORIGINAL: English
DATE: 29 July 2020
STATUS: Ratified

AT-LARGE ADVISORY COMMITTEE

ALAC Statement on Expedited Policy Development Process (EPDP)

ALAC Statement submitted for inclusion in the Final Report of the Temporary Specification for gTLD Registration Data Phase 2 Expedited Policy Development Process (EPDP)

The ALAC entered into the EPDP making the following statement:

1. The ALAC believes that the EPDP MUST succeed and will be working toward that end.
2. We have a support structure that we are organizing to ensure that what we present here is understood by our community and has their input and support.
3. The ALAC believes that individual registrants are users and we have regularly worked on their behalf (as in the PDP that we initiated to protect registrant rights when their domains expire), if registrant needs differ from those of the 4 billion Internet users who are not registrants, those latter needs take precedence. We believe that GDPR and this EPDP are such a situation.
4. Although some Internet users consult WHOIS and will not be able to do so in some cases going forward, our main concern is access for those third parties who work to ensure that the Internet is a safe and secure place for users and that means that law enforcement, cybersecurity researchers, those combating fraud in domain names, and others who help protect users from phishing, malware, spam, fraud, DDoS attacks and such can work with minimal reduction in access to WHOIS data. All within the constraints of GDPR of course.

We have worked valiantly to support the EPDP process and work on behalf of the now almost 5 billion Internet users.

The target of Phase 2 of the EPDP was to develop what is now called the System for Standardized Access/Disclosure to Non-Public Registration Data (SSAD) as well as address a number of issues that were not completed during Phase 1 of the EPDP.

A vast amount of work has been done, but the ALAC believes that if and when the SSAD is deployed, the probability of its meeting the goals needed by the communities whose efforts we support will be low. Those communities need access to specific accurate, usable non-public data and they need it in a timely and predictable manner.

Key methodologies to achieving this include:

- Do not expand the reach of privacy legislation. Redact only data protected by such laws;
- Ensure that data is accurate, and contact information is usable – that is the only reason that the contact information is there;
- To the extent possible and legal, process queries in an automated fashion resulting in quick responses (close to instantaneous when possible).

The Final Report unfortunately does none of this with any certainty.

Specifically:

- Phase 1 allowed the redaction of information about legal persons (companies) as well as natural persons (people) and most registrars and registries are doing such full redaction. They are also redacting regardless of geographic location.
- Phase 2 was supposed to fully address the issue of legal vs natural, but although there was some discussion, the issue is being remanded to the GNSO Council for possible addressing at some future time.
- GDPR requires data to be accurate for the purposes in which it is processed. In the case of RDS data, that is to know who the registrant is and to facilitate contact. WHOIS Accuracy studies have demonstrated that when the information was publicly available, it was woefully inaccurate. Phase 2 was supposed to fully discuss the issue of accuracy in relation to the now redacted data. That has not been done. The PDP was instructed by the GNSO Council to not address this topic and the GNSO Council will consider addressing it in an as yet undefined manner.
- Contact with registrants is currently through methods (largely web forms) which studies have shown are not effective and with no feed-back to the sender on the extent to which the message may have gone to the registrant. Further discussion is remanded to the GNSO Council for possible addressing at some future time.
- There are a few use cases which the SSAD will automatically respond to. The intent was that as laws and jurisprudence and contractual issues advance, an "evolution" mechanism would allow more use-cases to be handled in an automated way. The recommended evolution mechanism

is a GNSO Standing Committee (SC) which requires that new use cases be approved not only by the contracted parties (who may be liable to penalties if not done properly), but also by the GNSO Council. The SC is allowed to recommend both pure implementation (requiring GNSO Council approval to proceed to implementation) and Policy (which would require GNSO policy process such as a PDP before it could proceed). It is unclear whether new SSAD decision use-case recommendations would be treated as implementation, or if a new PDP (or equivalent) would have to be chartered to actually allow such automation (potentially adding years to allow new use-cases).

The ALAC, along with several other groups, accepted the current SSAD model despite strong reservations because we were assured that the evolution mechanism would allow change in a practical and timely manner. Such changes were not guaranteed due to legal and liability issues, but they were possible. Based on what is now known about the evolution mechanism, and the lack of clarity about how it will work and how its recommendation will be treated by the GNSO Council, the ALAC would certainly never have agreed to the current SSAD model.

Moreover, although a Standing Committee Recommendation by default requires a standard majority vote of the GNSO Council, it is possible that this could be changed to require a super-majority[48].

- The financial model is troublesome. At first glance, it may not be unreasonable for users of the SSAD to bear a significant part of the operational costs, but in setting prices to attempt to ensure that, it is possible that they may be set so high so as to discourage use. This would not only result in not meeting those financial objectives but effectively nullifying the entire effort. There must be flexibility in pricing to ensure that the SSAD is truly usable. To that end, it is currently unclear to what extent ICANN may need to subsidize the service.

All of these issues are due to either issues the EPDP was instructed not to address, or chose not to address, or left the recommendation wording sufficiently vague as to not provide any level of confidence in the outcomes.

All of these issues COULD be suitably addressed by the GNSO Council as it deliberates over this Final Report.

[48] A supermajority vote allows a single Stakeholder Group plus one other member of the House to veto any GNSO action.

Accordingly, the ALAC is CONDITIONALLY supporting this report subject to the GNSO Council actions specified below.

If these outcomes cannot be met, the ALAC believes that this report would result in a multi-year-implementation resulting in a system which would effectively be a glorified, overly complex and very expensive ticketing system. As such, the Final Report, in its totality but excluding Recommendations #19-22, would not have our support[49].

GNSO Council outcomes required for the ALAC to support the EPDP Final Report:

1. GNSO Council agrees that any Evolution Standing Committee recommendation on additional SSAD decision use-cases (that are in full accordance with the EPDP Policy Recommendation 9.3) will be treated as Implementation and not require further policy deliberations.
2. Legal vs Natural, Accuracy, WHOIS Accuracy Reporting System and Anonymized contact email will be fully addressed with full participation in all aspects of discussions by the ICANN Advisory Committees that wish to participate. If these issues are deemed to be policy, they must be addressed by a group empowered to make policy recommendations, led by a qualified, non-conflicted chair. The GAC, ALAC and SSAC must be involved in setting the mandate or charter of such groups. The target for completion of all work should be no later than April 2021.
3. The GNSO Council agrees that ratifying the Evolution Standing Committee recommendations will only require a GNSO Majority as currently called for in the GNSO Policy Manual.
4. The GNSO Council acknowledges that deliberations during implementation setting of prices for the SSAD must involve the future potential users of the SSAD and not only look at cost recovery but the actual ability and willingness of SSAD users to pay the prices being set.

Approved unanimously by the ALAC, 29 July 2020
Submitted on behalf of the ALAC by Alan Greenberg

[49] For avoidance of doubt, should the conditions not be met, the ALAC will still support Recommendations 19-22 but not the rest of the report.

Minority Statement of the Business Constituency (BC) and Intellectual Property Constituency (IPC) on the EPDP Phase 2 Final Report

The EPDP Phase 2 Final Report fails to deliver a System for Standardized Access that meets the needs of its users. Accordingly, the Business Constituency (BC) and the Intellectual Property Constituency (IPC) must dissent.

As noted in our statement on the EPDP Phase 1 Final Report, the BC and IPC are staunch supporters of the ICANN bottom-up, consensus-driven multistakeholder model, as shown by our good faith, active participation in this EPDP. Phase 2 of the EPDP was chartered to create a standardized system, with twin goals of protecting registrants' personal data and providing users with consistent, timely and predictable access to registrant data when users have a need to process this data lawfully for their legitimate purposes. Because the Phase 2 Final Report fails to do so, the Phase 2 Final Report is unacceptable.

Shared Concerns

The IPC and BC support privacy protection for personal data, and privacy law seeks to strike a balance between the individual right to privacy and other legitimate interests. Unfortunately, the Phase 2 Final Report fails to strike this balance. This failure is a detriment to those protecting their own fundamental rights and to those acting in the public interest or other legitimate interests. The interests of BC members include promoting user confidence in online communications and business interactions (as advanced by the EU NIS Directive, for example). The interests of IPC members include protecting consumers from phishing, dangerous counterfeit products, and other fraud as provided in Article 38 of the EU Charter of Fundamental rights, as well as protecting intellectual property as provided in Article 17 Section 2 of the EU Charter of Fundamental Rights.

The IPC and BC note that the Phase 2 Final Report fails to address several concerns raised by the European Commission and Belgian Data Protection Authority (DPA), as well as ICANN's own advisory committees: the Government Advisory Committee (GAC) representing law enforcement and consumer protection interests, the At Large Advisory Committee (ALAC) representing internet end user interests, and the Security and Stability Advisory Committee (SSAC) responsible for advising the ICANN Board on matters relating to the security and integrity of the internet's naming and address allocation systems.

Concerns shared with the European Commission and Belgian DPA

The European Commission urged *"ICANN and the community to develop a unified access model that applies to all registries and registrars and provides a stable, predictable, and workable method for accessing non-public gTLD registration data for* *users with a legitimate interest or other legal basis as provided for in the General Data Protection Regulation (GDPR)."* The European Commission stated that it considered this "*vital and urgent*" and urged ICANN to "*develop and implement a pragmatic and workable access model in the shortest timeframe possible…*" The Belgian DPA, which is ICANN's supervisory authority due to its EU establishment in Belgium, called the centralized model a "*better, 'common sense' option in terms of security and for data subjects.*" Unfortunately, the Phase 2 Final Report fails to provide a method for access at all, let alone a method that could be described as "*stable, predictable, and workable.*" On the contrary, the Phase 2 Final Report merely provides for a central location to submit requests. In so doing, it rejects the Belgian DPA's guidance in favor of leaving the decision about whether or not to disclose data at the discretion of over two thousand separate contracted parties, none of whom are required under ICANN's contracts or policies to employ legal counsel, a data protection officer, or a privacy professional.

BC and IPC Concerns that are shared by the GAC

We also share the concerns of the GAC on the EPDP team's failure to address issues of data accuracy and the distinction between legal and natural persons. In their June 22 letter to the GNSO Council the GAC noted that "*These issues are critical to the public interest. Not addressing these issues as part of the current EPDP risks an incomplete system that will lack key capabilities that promote public safety. Moreover, the failure to deal with these important issues throws doubt upon the legitimacy and effectiveness of the GNSO policy development process to address issues of importance to non-GNSO stakeholders and the public interest.*" Unfortunately, the GAC's pleas were ignored in Phase 2. Although the GDPR requires data accuracy, the GNSO Council removed accuracy from the remit of the EPDP Phase 2 work, and the Phase 2 Final Report failed to address the need to distinguish between legal person and natural person registrants.

BC and IPC Concerns that are shared by SSAC and ALAC

The SSAC comment on the EPDP Phase 1 Initial Report (SSAC 111) raised numerous concerns that the recommendations would "*fall far short of what the SSAC believes is necessary and possible to address security and stability issues with ICANN's remit*". Similarly, the ALAC also expressed concern about failure to address issues related to distinguishing between legal and natural person registrants and accuracy, among others, in their May 5, 2020 Statement on the Initial Report Addendum.

Substantive Failures of EPDP Phase 2 Final Report

In addition to concerns previously stated by the GAC, ALAC, and SSAC, the following failures of the Phase 2 Report cause the BC and the IPC to dissent.

- ***Lack of Centralized Disclosure and Insufficient Mechanisms for Evolution***. After Phase 1, we expected to develop a policy supporting centralized decision making. The inherent inefficiencies and inconsistencies of decentralized decision-making are clear: higher costs to contracted parties, slower disclosure request processing, and greater likelihood of disputes between requestors and disclosers as each contracted party applies its own subjective judgment to each request.

  Nevertheless, in the interest of compromise we agreed to consider (though not accept) a proposed *hybrid model* whereby disclosure decisions would initially be mostly decentralized and manual, but would evolve to automated and centralized processing on the basis of experience gained during the SSAD implementation and increasing legal clarity concerning the interpretation of GDPR requirements.

  Over time we expected that the system, with appropriate safeguards, would automatically provide requested registrant data for settled legitimate purposes, to accredited requestors with their own lawful bases. For example, accredited requestors with reasonable evidence of counterfeit sales or copyright infringement, asserted under penalty of perjury, should rapidly and predictably receive registrant data for relevant domain names. The clarity, consistency, and scalability of such a system would greatly enhance the trust and accountability of the DNS system as access to this data has always done, but is not provided for in the Phase 2 Final Report.

  The Phase 2 Report does not enable ICANN to evolve into its natural role of centralized decision maker. Instead it has the effect of giving the contracted parties undue discretion to individually interpret their obligations under the GDPR and their contracts with ICANN without any requirement for reasonableness, uniformity, or other safeguards. It also fails to provide an adequate mechanism to permit centralization and automation in the future. In doing so it permanently locks in the inefficiencies of decentralized decision-making, such as those resulting in unreasonably long SLAs even for urgent requests related to imminent threats to life or critical infrastructure. (Recommendations 9 and 18)

- ***Failure to Distinguish Between Natural and Legal Persons***. By giving contracted parties the sole discretion to determine whether to differentiate between natural and legal persons, the Phase 2 Report fails to provide clarity regarding access to registrant data for *legal persons* that are not covered by the GDPR. The EPDP team sought and received legal advice from Bird & Bird, the external legal counsel that the EPDP had retained to provide guidance on the GDPR obligations, on how to distinguish between legal and natural person registrants. But it then failed to discuss it, over the objections of the IPC, BC, GAC, SSAC, and

ALAC. The continued wholesale redaction of the contact data of legal persons is not required by the GDPR, and it erodes trust, accountability and transparency of the DNS. As such, this represents an unacceptable failure of the EPDP. (Recommendation 8)

- ***Failure to Address Accuracy of Data***. The Phase 2 Report fails to address the fundamental issue of accuracy of registrant data, as was agreed by the EPDP in Phase 1, despite the fact that there are adequate tools today to verify the accuracy of registrant data. The inaccuracy of WHOIS data has been problematic for over 20 years. The EPDP Team failed to follow the legal advice it had requested with respect to the interpretation of accuracy requirements under the GDPR. The EPDP Team also failed to follow the advice of the European Commission, which confirmed that data accuracy is not solely in the interest of the data subject. Patently false data is not protected under data privacy laws, and preserving the wholesale redaction of false or fictitious registrant data from the DNS represents another failure of the EPDP, which further erodes trust, accountability and transparency in the DNS. (Conclusion 2)

- ***Inadequate Enforcement Policies****.* The Phase 2 Report lacks any contractual accountability for contracted parties to provide data in response to legitimate requests. As mentioned above, the Phase 2 Report fails to adequately provide an objective basis and a consistent, predictable and scalable procedure for accredited users to reliably obtain accurate registrant data when there are legal bases and legitimate purposes for requesting and using data, even when the data should not have been hidden in the first place. The Phase 2 Report then fails to empower ICANN to enforce compliance with the weak recommendations made in the Report. A decentralized SSAD has little value if there is no mechanism to ensure compliance with Consensus Policy. Unfortunately, this Report only contemplates enforcement of procedural requirements and does not allow ICANN Compliance to review wrongful denials of legitimate requests. This undermines and delegitimizes the entire policy. (Recommendations 5 and 8)

The result is a Phase 2 Report that recommends a system and policies that are wholly inadequate to meet the stated and agreed goals of an SSAD, including the needs of its users. As a result, the Phase 2 Report fails to maintain the trust, security, and resiliency of the DNS.

In crafting this policy it is essential that the ICANN community support efforts to address growing abuse of domain names that threatens the security, stability and resiliency of the DNS and of the Internet ecosystem more broadly – including the safety and security of its end users. Recently Neustar, a contracted party, addressing the overall growth in internet traffic due to the COVID-19 pandemic and accompanying cyber attacks, reported "*Neustar expected an increase, but we're seeing a dramatic* *upturn in attacks using virtually every metric that we measure. We have observed an increase in the overall number of attacks as well as in attack severity...*" In addition to noting that it has "*mitigated more than double the number of attacks in Q1 2020 than in Q1 2019*", Neustar reported "*an increase in DNS hijacking, a technique in which DNS settings redirect the user to a website that might look the same on the surface but often contains malware disguised as something useful.*"

Consensus Designations

The IPC and BC remind the GNSO Council and the ICANN Board that the EPDP Phase 2 Final Report defines policy for a single **system** (namely the SSAD). While the consensus call occurs on a recommendation-by-recommendation basis, the recommendations are inherently interrelated and interconnected because of their impact and influence on the SSAD overall. As such, the result of the consensus call should be considered holistically at the system level versus strictly on a per-recommendation basis.

Recommendation #	
#1 Accreditation	Support
#2 Accreditation of Governmental Entities	Support
#3 Criteria and Content of Requests	Support
#4 Acknowledgement of receipt	Support
#5 Response Requirements	Oppose
#6 Priority Levels	Oppose
#7 Requestor Purposes	Support
#8 Contracted Party Authorization	Oppose
#9 Automation of SSAD Processing	Oppose
#10 Determining variable SLAs for response times for SSAD	Oppose
#11 SSAD Terms and Conditions	Support
#12 Disclosure Requirements	Support
#13Query Policy	Support
#14 Financial Sustainability	Oppose
#15 Logging	Support
#16 Audits	Support
#17 Reporting Requirements	Support
#18 Review of implementation of policy recommendations concerning SSAD using a GNSO Standing Committee	Oppose
#19 Display of information of affiliated privacy / proxy providers	Support
#20 City Field	Support
#21 Data Retention	Support
#22 Purpose 2	Support

In addition the IPC and BC oppose the language in the following non-recommendation sections:

- Section 1.2 and 2.3 (description of “items not addressed”). We do not support the description of the legal vs. natural outcome.
- Section 3.1 (description of how we got to the “hybrid” model). Our acceptance of the move to a hybrid model was conditioned on the ability to move centralized decisions to the CGM over time using a Mechanism for Evolution that would support that.
- Conclusion - Accuracy (page 60).

Assessing the Overall Value to Requestors

While the EPDP Phase 2 team spent much time and effort in analyzing the financial sustainability of the SSAD itself, we believe it is equally important to analyze the costs and benefits from the users’ point of view (i.e. users of the system seeking disclosure of registrant data). This is crucial given that the Phase 2 policy mandates that the requestors pay most if not all costs for the ongoing operation and maintenance of the SSAD and thus we expect the accreditation and request fees to be paid by requestors to be significant.

Further, the SSAD policy as currently defined will have a material impact beyond direct costs on those who have historically relied on WHOIS data. These indirect costs are related to the following:

- **Non-Timely Response**: Because of the failures previously described, the timeframe for responses to disclosure requests will be unacceptably long, impacting the efficiency of processes related to investigating and managing issues of abuse and illegality.

- **Incompleteness**: As there is no longer the ability to perform so-called ‘reverse’ lookups, it is now harder to identify all of the domains associated with an event or attack.

- **Non-Attribution**: Suppression of reverse lookups interferes with the ability to attribute a criminal or abuse activity with a registrant (actor) in a meaningful response window (if ever). Requestors, especially cyber attack first responders, will rely on proximity factors in lieu of attribution to a greater extent to deploy countermeasures or mitigate attacks.

- **Inaccuracy**: There is no guarantee that data returned will be accurate, nor are there provisions for independent parties to audit registration data for accuracy. Requestors are burdened with the cost of disclosure requests with no certainty of utility or value of the response.

- **Non-Containment**: The inability to perform a timely and complete enumeration of domains associated with a criminal or abuse activity delays mitigation of first response to cyberattacks. Attacks will therefore persist well beyond historical 1-4 hour mitigation objectives. The SLAs as currently defined are insufficient to address issues such as phishing which has a lifetime of hours rather than days, or malware attacks which inflict severe and direct costs or losses upon their victims.

- **Unpredictability**: A decentralized and distributed disclosure model will result in an unpredictable and unreliable system for access and disclosure. This blocks efforts by requestors seeking disclosures from multiple contracted parties for large numbers of domains associated with a single cybercrime or abuse activity.

We have always acknowledged the need to pay accreditation fees in order to use the SSAD. However, it is clear that the value and benefits of the SSAD, as defined by the Phase 2 Final Report, do not come close to justifying the costs (direct and indirect) of using the SSAD.

Conclusion

When the ICANN Board adopted the Temporary Specification in May 2018, it noted, "*the Board's actions are expected to have an immediate impact on the continued security, stability or resiliency of the DNS, as it will assist in maintaining WHOIS to the greatest extent possible while the community works to develop a consensus policy.*" At the November 2019 ICANN66 Montreal meeting, the ICANN Board and CEO reiterated in the open forum the importance of scalable access to registrant data to ensure the safety and security of the Internet and its users. The results of over two years of intense work by the EPDP team amount to little more than affirmation of the [pre-EPDP] status quo: the elements of WHOIS data necessary to identify the owners and users of domain names are largely inaccessible to individuals and entities that serve legitimate public and private interests.

For the reasons stated above, our Board-approved missions and purposes compel us to dissent from the set of policy recommendations set forth in the Phase 2 Final Report.

Despite the IPC and BC's best intentions, the EPDP experiment has failed. It has proven incapable of handling a purely legal issue created by the GDPR. Regulators and legislators should note that the ICANN multi-stakeholder model has failed the needs of consumer protection, cybersecurity, and law enforcement. As a result, there is a need for clear regulatory guidance for the GDPR, and to pursue alternative legal and regulatory approaches.

About the BC and IPC

The mission of the Commercial and Business Users Constituency (BC) as approved by the ICANN Board is "*to ensure that ICANN is accountable and transparent in the performance of its functions and that its policy positions are consistent with the development of an Internet which...promotes user confidence in online communications and business interactions…*"

The purpose of the Intellectual Property Constituency (IPC) as approved by the ICANN Board is to "*represent the views and interests of owners of intellectual property worldwide with particular emphasis on trademark, copyright, and related intellectual property rights and their effect and interaction with Domain Name Systems (DNS), and to ensure that these views, including minority views, are reflected in the recommendations made by the GNSO Council to the ICANN Board.*"

Minority Statement of the Non-Commercial Stakeholders Group (NCSG)

NCSG has not agreed to Recommendations 22, 20 and 7, for the reasons set out below

Recommendation #22: Purpose 2

Purpose 2 in Recommendation #22 currently says: *"Contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission."*

NCSG strongly opposes this purpose. It is far too vague and open-ended, allowing ICANN to process gTLD Registration Data in any way it sees fit. All it would require on ICANN Org's part, is to divine a reason consistent with its interpretation of its Bylaws, as Becky Burr admitted in an email sent to the EPDP Team on behalf of the ICANN Board.

In that email, Burr says, *"SSR, as defined in the Bylaws, *is* ICANN's mission. Article 1, Section 1.1 of the ICANN Bylaws, clearly states that ICANN's mission is to ensure the stable and secure operation (SSR) of the Internet's unique identifier systems. The Bylaws themselves go on to provide significant detail regarding the scope of that mission in the context of names, the root server system, numbers, and protocols."*

In Phase 1, we developed worksheets for each ICANN purpose detailing the legal bases and processing activities for all of them. Phase 2 failed to do this. Consequently, this reformulated Purpose 2 does not indicate why data would need to be disclosed, nor to whom, nor does it indicate why it would need to be retained and for how long. Purpose 2, as currently drafted in the Phase 2 Final Report, is also in conflict with the Purpose limitation Principle of GDPR - Article 5(1)(b), which requires that data be *"collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes"*. Ensuring the stable and secure operation (SSR) of the Internet's unique identifier systems is hardly specific, nor explicit, and the ICANN Board's interpretation of SSR within ICANN's remit makes it even less so.

The NCSG has requested on multiple occasions that the EPDP Team come to a common understanding of what is involved in ICANN's mission regarding SSR, and how that applies to the processing of gTLD Registration Data by ICANN. These requests were consistently denied, despite being required to fulfill ICANN's legal obligation as a Data Controller for this purpose.

The EPDP Team has not successfully reached an understanding of how SSR within ICANN's mission is applicable to this purpose, nor has ICANN indicated its possession of any insight to the same. However, as with other legal bases in GDPR, 6(1)(f) creates additional obligations on the part of the Controller towards the Data Subject, including protecting their rights and interests.

In its guidelines on using Article 6(1)(f) as a legal basis, the United Kingdom's Information Commissioner's Office says that using this legal basis is most appropriate when (among other circumstances) use of people's data is done in ways they would reasonably expect and which have a minimal privacy impact. It is virtually impossible for gTLD Registrants to have any expectations on why or how ICANN would disclose or retain their data based on Purpose 2. These unknown circumstances have not been identified by ICANN or the EPDP Team, and the only means by which a Registrant can have some form of understanding of this is if registering a gTLD domain name requires that the Registrant also acquire expertise in the interpretation and application of ICANN's Bylaws. Such an expectation is not realistic; it is beyond the capacity of ICANN's own staff, Board members and members of the EPDP Team.

The NCSG believes this purpose is not actually required for ICANN to fulfill its mission; it was put there so that ICANN Org can satisfy the desires of third-parties, despite the reference to third-party legitimate interests being removed from the revised recommendation. The ICANN Board seems to believe that this legal basis provides it with cover from liability, which it likely does not, while completely disregarding the interests of the Data Subjects, which the GDPR is meant to empower.

In order for this purpose to be fair to Registrants, the purpose needs to be broken down into multiple clearly stated purposes identifying clearly stated processing activities, which would be communicated and explained to Registrants in a manner they can easily understand.

Recommendation #20: City Field

The NCSG does not believe that a convincing case has been made to change the recommendation made on the "city field" in Phase 1 of the EPDP, from MUST redact to MAY redact. The former recommendation requiring this field to be redacted was based on legal advice by Bird and Bird in which the following was expressed:

> *"3.16 Taking all the above into consideration, the relevant parties may be able to satisfy the legitimate interests test for the publication of the "city" field. However, this is not clear to us from the information available so far. In particular:*
>
> > *a) further information will be required to show that the benefits to rights holders are sufficiently meaningful as to justify universal publication of city field, rather than being of use in very limited cases; and*

> *b) more information on the potential impact on the rights and interests of data subjects is needed.*
>
> *3.17 The relevant parties would then need to conduct a detailed assessment of the facts and circumstances to determine whether the interests pursued outweigh those of data subjects."*

This clearly indicates that conducting a balancing test would be required to weigh the legitimate interests of the third-party seeking disclosure of gTLD Registration Data against the rights of the Registrant involved. The NCSG firmly believes that this needs to be conducted as part of the processing of a disclosure request via the SSAD, and shouldn't be conflated with ICANN's purposes in processing gTLD Registration Data, which is what the EPDP Phase 1 recommendations covered.

This finding by Bird and Bird was reaffirmed in their email to Kurt Pritz, in which they said, *"The legal analysis is clear – this is personal data; in principle publication could be justified on the basis of rights-holders legitimate interests, unless the interests of individuals override this.*

How this is applied to the facts – establishing whether there is sufficient interest for rights holders and balancing this with the interests of registered name holders - is not clear cut."

This is all highly suggestive that the City Field in gTLD Registration Data should be treated like all other personal information, and MUST be redacted.

Recommendation #7: Requestor Purposes

The NCSG maintains its disagreement with including a footnote specifying the EU NIS Directive as a legislative example creating obligations on applicable regulated entities. This example was added to the recommendation during a stage in the EPDP Team's work in which the final report and recommendations were being fine-tuned to achieve as much support as possible, and was not, in the NCSG's view, given sufficient time or attention to be included in the final report, nor were the implications to a policy allowing disclosure to third-parties sufficiently considered.

Furthermore, the NCSG does not believe that excluding this example will have any meaningful impact on the ability of applicable entities regulated by the NIS Directive, or other similar legislation, from requesting disclosure of redacted gTLD Registration Data from the SSAD.

Minority Statement of the Registrar Stakeholder Group (RrSG)

The EPDP Phase 2 Final Report represents the culmination of years of collaborative work among the ICANN Community. The RrSG continues to believe that it is in all our interests to create policies and a system which balance the registrar's data protection requirements with the needs of those who rely on access to non-public registration data for legitimate and lawful purposes.

Registrars have expressed significant concerns throughout this EPDP Phase 2 process with the legality, technical feasibility, and costs associated with developing, deploying, and operating the SSAD. While registrars are more supportive of some recommendations than others, the recommendations are all highly interdependent and must be considered holistically, and we recognize that the end result is greater than the sum of its parts.

Therefore, in the spirit of ongoing compromise with the interests of other stakeholders, we support the outcome of the EPDP Phase 2 and the recommendations of this Final Report, and we will comply with the resulting Consensus Policies.

We believe that the final recommendations provide sufficient guidance on which to base a standardized and predictable system, accommodating the recommendations of EPDP Phase 1 while also permitting the necessary flexibility for each registrar to implement their SSAD operations in a manner they determine to be in accordance with their often-multi-jurisdictional legal- and privacy-related obligations.

We urge the GNSO Council and ICANN Board to adopt all recommendations in the report, so that we can transition to implementation work and an expeditious launch of the SSAD.

Registries Stakeholder Group Statement on EPDP Phase II Final Report

The Registries Stakeholder Group ("RySG") appreciates the work done in Phase II, recognizes the utility of an SSAD to third parties, and supports the recommendations contained in the Final Report. The recommendations reflect the EPDP Team's best effort to develop a solution for access to personal data that balances the privacy rights of data subjects with the legitimate interests of third parties. Although this statement addresses concerns about certain aspects of the Final Report, we nonetheless accept the compromises that form the basis of the SSAD recommendations. We remain optimistic about the future development of the SSAD.

During over a year of diligence, Registries have stood firm on the principles that this system must (i) reflect the reality of data protection law as it is today, (ii) prioritize and appropriately protect a registrant's personal data ahead of third party interests, and (iii) retain our ability as controllers to fulfill our legal obligations to protect personal data. Some have noted dissatisfaction with a system based upon these principles. We are nonetheless comfortable standing for these principles as the best way to protect registrants' personal data and fulfill our obligations under law.

RySG Participated in Good Faith

The EPDP was chartered to "determine if the Temporary Specification for gTLD Registration Data should become an ICANN Consensus Policy, as is or with modifications, while complying with the GDPR and other relevant privacy and data protection law."[50] The charter recognizes that the secondary work of evaluating a system for the benefit of third parties to access a registrant's personal data would only begin once the primary issues "were answered and finalized in preparation for the Temporary Specification initial report."[51] A Final Report for Phase I was issued on 19 February 2019, including a detailed and enforceable recommendation for standardizing the process for third parties to obtain a registrant's personal data.[52]

The RySG engaged in Phase II in good faith to develop a system for the benefit of third parties who have a legitimate interest to access a registrant's personal data. Registries do not need such a system in order to fulfill our obligations to protect a registrant's personal data and respond to third party requests to obtain that personal data. Our members are regularly and responsibly responding to data requests today without an SSAD system, in line with the requirements of the Phase I report and our obligations under law. We will continue to do so even once the SSAD is operational. Unfortunately, in many ways the SSAD will make our task more difficult by introducing additional processing and risks to a registrant's personal data.

[50] EPDP Final Adopted Charter – 19 July 2018, available here.
[51] EPDP Final Adopted Charter – 19 July 2018, available here.
[52] *See* EPDP Phase I Final Report, Recommendation 18, available here.

We listened with an open mind to those communities who insist on more access to personal data and participated in this process in order to find solutions. While we support the Final Report and the many compromises the group has made, for the reasons listed below, we have significant concerns that will require continued diligence moving forward as the community addresses implementation.

RySG Prioritized Data Protection

Our starting point in these discussions has always been data protection principles. Data protection in general, and GDPR specifically, "protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[53] As the EU Commission recently reiterated, "[t]he ultimate objective of the GDPR is to change the culture and behaviour of all actors involved *for the benefit of the individuals*."[54] Simply put, the point of data protection is to protect the personal data of individuals. Although this should be uncontroversial, our experience over the last two years suggests otherwise.[55]

In practice, prioritizing data protection means putting the data subject first when considering the impact of how and by whom their data is processed. It means embracing data minimization and privacy by default as a baseline in order to avoid unnecessary processing of an individual's personal data. It means ensuring that we don't implement policy requirements that restrict our ability as controllers to fulfil our legal obligation to adequately care for personal data that individuals entrust to us.

With these principles in mind, we have still repeatedly shown flexibility and worked to accommodate the interests of third parties, even when doing so required us to make concessions that could increase risk for contracted parties. While some parties would like to have gone further, we must draw the line when we are asked to concede in areas where we have been told repeatedly – by the Phase II independent legal counsel, by data protection authorities, and by our own CPH members with EU data protection expertise – that something is not legally permissible or presents significant risks to the data subject.

The goal of Phase II was to standardize the process for third parties to request a registrant's personal data. However, continued insistence on finding a path to enable virtually automatic access to personal data is not, after many months of analysis, beneficial for data subjects. We are concerned that attempts to pursue automatic access at any cost will ultimately undermine the legality and future viability of the SSAD.

[53] GDPR Article 1 (2).

[54] Communication from the Commission to the European Parliament and the Council, European Commission, dated June 24, 2020, p. 5 (emphasis added), available here.

[55] While Article 17 of Charter of Fundamental Rights acknowledges that "[i]ntellectual property shall be protected," European Parliament has clarified that exercise of that right "should not hamper . . . the protection of personal data, including on the Internet." See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, available here.

Hybrid Model Reflects Legal and Practical Reality

The hybrid model (i.e., centralized intake with decentralized decision-making) is a practical solution that we believe will solve many of the issues requestors cite with the status quo method of requesting access to registrants' personal data. Most importantly, the hybrid model reflects the reality of what is possible under law today.

Bird & Bird confirmed that liability attaches to controllers of data, and even assuming a fully centralized and automated system that removed discretion from contracted parties, "the most likely outcome – and certainly most supervisory authorities' starting position – is that CPs are controllers."[56] Moreover, the Belgian Data Protection Authority emphasized that controllership is a factual role which the parties "are not free to simply 'designate'" and likewise "cannot abdicate . . . by virtue of a joint agreement."[57]

We accept Bird & Bird and the DPA's advice on this matter, and as far back as January we cautioned that "further deliberations on a fully centralized model only distract and delay us from delivering on our work remit in a timely and cost effective manner."[58] Unfortunately, even in the late stages of the EPDP, we continue to hear suggestions for how certain decision-making about registrant personal data could be centralized and controllership could be assigned by our policy recommendations.[59]

Nothing has changed since the EPDP agreed to reject centralization as not meeting the prerequisite of diminishing liability for contracted parties.[60] We are concerned that some parties either don't understand or willfully ignore legal advice that does not align with their preferred policy outcomes. Either scenario is not ideal for finding consensus on implementable policy recommendations.

Even the term "centralization" doesn't accurately reflect what has actually been proposed by those advocating such a model. Only decision-making, and not the actual data itself, has ever been part of the discussion of a "centralized" system. Without possessing the underlying data, this is not a "centralized" system that would limit unnecessary processing and enhance security for data subjects. Instead, such a system

[56] Phil Bradley-Schmieg & Ruth Boardman (Bird & Bird LLP), "Questions 1&2: Liability, Safeguards, Controller & Processor", 9 September 2019, p.6, 2.18.

[57] Data Protection Authority (Belgium), Letter to Goran Marby, 4 December 2019, pg. 3, available here.

[58] CPH Next Steps Letter, dated January 7, 2020.

[59] See, e.g., July 2020 Category 2 Comments on Recommendation 9, IPC/BC proposing "the concept of non-automated by centralized decision making at the CGM" despite legal advice and agreement on a hybrid model: "Per the legal guidance obtained the EPDP Team recommends that the following types of disclosure requests are legally permissible under GDPR for centralized disclosure evaluation (in-take as well as processing of disclosure decision) at the Centralized Gateway Manager when subject to manual processing and review from the start:
· Automated disclosure decisions for clear-cut "domain matching trademark" requests
· Automated disclosure decisions for clear-cut cases of phishing
ICANN org is the controller when processing this disclosure decision."

[60] "And so that means that in essence to have any unified access model whatsoever you either reach an agreement with 2500 contracted parties about what they think is the legal risk they have or you come up with a motions [sic] where you diminish the legal responsibilities for the contracted parties." Goran Marby, EPDP F2F Meeting Transcript, 25 September 2018, pg. 2, available here.

adds additional unnecessary processing steps, and is inconsistent with basic principles of data minimization and privacy by default.

We remain concerned about the continued insistence that "centralization" of personal data disclosure is legally permissible or realistic in the ICANN eco-system despite no change in the facts that led us to reject centralization in the first place. While we supported ICANN's efforts to find answers about the allocation of liability under a centralized system, there is still no guidance that indicates that the prerequisite liability shifting is legally possible.

GNSO Standing Committee

The RySG supports the concept that the SSAD should be flexible and able to recalibrate to changed legal or practical circumstances. We recognize that the SSAD must be nimble and able to adapt to an ever shifting landscape of administrative guidance, court decisions, and new regulations in various jurisdictions. We reject, however, the notion that the work of the GNSO Standing Committee must have a predetermined outcome. Namely, we cannot accept the assumption that the SSAD will inevitably evolve towards more centralization and more automation of personal data disclosures in the future. The SSAD must evolve based on facts and data rather than assumptions and conjecture.

As stated above, the hybrid model reflects what is legally possible today. We did not agree to the hybrid model provided it someday evolves into a centralized model because we have no basis to know where the law will go. We agreed to the hybrid model as a solution to improve on the status quo while still adequately protecting individuals' personal data.

The EPDP working group members should set appropriate expectations within their stakeholder groups about how the SSAD may change over time. While this system may move in the direction that some of the EPDP members desire, it is equally (if not more) likely that the system will need to become more restrictive, less automated, or more decentralized.[61] Pitching evolution as a one-way street rather than as responsive to facts and data sets up this system for failure in the eyes of some members of the community.

Similarly, while we have generally supported the scope of the GNSO Standing Committee's work, we have significant concerns about any effort to structure this mechanism in a manner that would cede control of our legal obligations as controllers. We have resisted efforts to state categorically that certain changes, such as adding new automation use cases, are implementation or policy because we cannot predict the

[61] Many of the most significant recent decisions and guidance in this area seem to suggest further restrictions and enforcement rather than a loosening of requirements. *See, e.g.*, Case C-311/18 Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems ("Schrems II") invalidating the EU-U.S. Privacy Shield system; *see also*, Communication from the Commission to the European Parliament and the Council, European Commission, dated June 24, 2020, which calls for increased enforcement of GDPR rather than any relaxation of restrictions, available here.

shape that future guidance might take on these issues. Unless the European Commission provides perfect, definitive, and unassailable guidance on a topic, automation proposals based on new guidance are likely to have residual risk, additional obligations, or require contractual revisions for contracted parties or the Central Gateway Manager (CGM).

We can easily imagine cases where even straightforward permissible guidance on additional automation could require policy changes. For example, if new guidance is released that full automation is always permitted provided any entity that has any role in the processing of the data has a designated Data Protection Officer as defined under GDPR. Currently our recommendations do not require any party (CGM, Accreditation Authority, Registries, Registrars, Requestors) to have a Data Protection Officer. In this scenario, if further automation use cases were forced on contracted parties through implementation this could significantly increase contracted parties' legal risks if any of the parties involved in the processing did not appoint a Data Protection Officer.

This example illustrates how important it is that we not pre-determine that changes that are likely to involve legal risk are categorically matters of implementation and not policy. As controllers, we require the ability to be responsive to the obligations that we have to the individuals whose personal data we process.

Full Automation is Only Possible Under Narrow Circumstances

The RySG supports the concept of automation where "technically and commercially feasible and legally permissible."[62] We view those criteria as necessary safeguards to ensure that data subjects are not subject to unreasonable automated processing of their data.

As a starting point, it should be uncontroversial that large scale automation of decisions that impact data subjects - but from which they receive no benefit - is not generally in the best interest of the data subject. As GDPR states, "[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."[63] Bird & Bird confirmed for us that, when presented with all possible automation use cases proposed by the team, only four did not produce legal or similarly significant effects for the data subject.[64]

Our take away from that legal advice is that only a very narrowly defined set of decisions do not create a legal or similarly significant effect for data subjects. Similarly, the memo

[62] EPDP Final Report Phase II, 9.3.

[63] GDPR Article 22.

[64] EPDP Final Report Phase II, 9.4: (i) Requests from Law Enforcement in local or otherwise applicable jurisdictions with either 1) a confirmed GDPR 6(1)e lawful basis or 2) processing is to be carried out under a GDPR, an Article 2 exemption; (ii) The investigation of an infringement of the data protection legislation allegedly committed by ICANN/Contracted Parties affecting a the registrant by a data protection authority; (iii) Request for city field only, to evaluate whether to pursue a claim or for statistical purposes; (iv) No personal data on registration record that has been previously disclosed by the Contracted Party.

only assesses these use cases under GDPR. As a result, we should be careful about drawing broad conclusions about legal permissibility that will force contracted parties to implement requirements that will increase their legal risk.

We are also concerned that these four use cases are now required for full automation on day one of the SSAD[65] despite the EPDP Team not even beginning to engage in any technical discussion about how an algorithm can reliably (i) identify requests that are appropriate for automation, or (ii) make decisions in a way that is reliable, accurate, and transparent. We agreed as a plenary that automation had to meet three criteria: (i) technically feasible, (ii) commercially feasible, and (iii) legally permissible.[66] By requiring automation of the use cases in 9.4 on the basis of their legal permissibility, we have collapsed these three important safeguards into a singular assessment of the legality of these use cases.

In fact, the closest we have come to any substantive consideration of how an algorithm could evaluate and make these decisions is the suggestion that the CGM may provide recommendations on disclosure to contracted parties, and that the algorithm would learn from feedback on whether a contracted party's decision to disclose matches the automated recommendation.[67] Not only does this represent a misunderstanding of how machine learning generally works, we have serious doubts about the reliability of recommendations made by a system that does not possess the underlying information that is the basis of our own decisions. Even if our decisions "match" with sufficient regularity, that correlation does not mean that the algorithm is in fact making accurate and reliable decisions.

A much more sophisticated approach to machine learning and algorithm training is needed to assess whether these use cases are technically feasible. This is why requiring technical feasibility as an independent factor is an important part of the consideration of automation use cases. If the parties who now must actually engage in the work of determining technical feasibility and building an algorithm cannot do it successfully, we should not already be locked in to mandatory automation because the technical feasibility requirement has not been met.

Financial Sustainability Requires Attention

From early in Phase II, the RySG advocated for a financial assessment of a proposed SSAD in order to provide important data to guide the EPDP Team's decision-making. We appreciate the work that the ICANN team performed providing us with a cost assessment. In light of ICANN's significant estimated costs for developing and maintaining the proposed SSAD, we are concerned that this assessment is relegated to

[65] EPDP Final Report, 9.4: "Per the legal guidance obtained . . . the EPDP Team recommends that the following types of disclosure requests, for which legal permissibility has been indicated under GDPR for full automation (in-take as well as processing of disclosure decision) MUST be automated from the time of the launch of the SSAD . . ."
[66] EPDP Final Report Phase II, 9.3.
[67] EPDP Final Report Phase II, 5.1.1, 5.5.

a single footnote in the Final Report, especially as we continue to observe pushback from other constituencies on the premise that users of the SSAD should bear the costs of operating the system.

To reiterate a point we raised repeatedly during deliberations, under no circumstances should a data subject subsidize the ability of a third party to access their personal data**.** The SSAD is intended to provide predictable and standardized access to data and should be funded by those who directly enjoy the benefits of such a service.

Furthermore, we support ICANN conducting a cost benefit analysis to determine the financial feasibility of such a system. Considering the extensive work in Phase I to establish a standardized process for third parties to request data directly from contracted parties (Recommendation 18), no party (data subject or third-party requestor) is without a predictable process for requesting personal data. Moreover, any user not wishing to pay for the SSAD service still retains the option of pursuing disclosure requests as established by Phase 1, which is at no cost to the requestor.

In our view, the lack of cost benefit analysis also points to a larger problem: the EPDP never established - beyond anecdotes and conjecture – what the actual problem was that this system is intended to solve. We have seen no reliable data that shows that contracted party responses to requests for disclosure are a problem. Data actually suggests that most appropriately formed queries are responded to and that non-response is generally related to (i) inappropriate requests for data protected by privacy/proxy, or (ii) a lack of response from requestors when additional information is required.[68] The SSAD will not fix either of these requestor mistakes.

Priority 2 Issues Were Addressed

While the RySG supports further work on the Priority 2 issues of Accuracy, Legal vs. Natural, and Feasibility of Unique Contacts, we object to the narrative that these issues were not addressed during Phase II. In fact, each of these issues was addressed in depth, including detailed analysis from Bird & Bird that provides support for maintaining the status quo. We recommend that further work on these topics not start from a blank slate but instead onboard the significant work that the EPDP Team conducted on these topics. We believe it is important to ensure we are transparent and accurate about our consideration of these issues to avoid misconceptions in the community. For example:

Accuracy – Bird & Bird confirmed that accuracy under GDPR is a right of the data subject (and not third parties) and an obligation of the controllers of data.[69] Moreover, Bird & Bird confirmed that the existing procedures under the Registrar Accreditation

[68] *See* Privacy and Lawful Access Privacy and Lawful Access to Personal Data at Tucows, 13 March 2020, available here.

[69] Ruth Boardman & Katerina Tassi (Bird & Bird LLP), "Advice on Accuracy Principle under the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR"): follow up queries on "Legal vs. Natural" and "Accuracy" memos," dated 9 April 2020.

Agreement for confirming registrant data are not insufficient to meet the requirements for accuracy under GDPR.[70]

Legal vs. Natural – We do not dispute that GDPR applies to natural person and not legal person data. We have emphasized that the practical challenge is reliably determining whether data falls into either bucket, and how to handle legal person records that may contain the data of natural persons. While some have suggested relying on consent as a mechanism to reduce risk, Bird & Bird confirmed that reliance on consent is not an easy solution and still involves significant risk of liability for contracted parties.[71]

Feasibility of Unique Contacts – We received precise legal guidance on this issue recognizing that while pseudonymization and anonymization are useful privacy enhancing measures, the publication of masked emails would not meet those standards because they are specifically intended to ensure contactability of individuals.[72] Further, we note that the proposed recommendation language on this issue was presented at plenary on March 12, 2020 and received no objection, only to be later omitted from the Final Report.[73]

Controllers Need Flexibility to Fulfill Their Obligations

We support the compromises required to reach agreement on Recommendation 8 (Contracted Party Authorization) but we are concerned that the framework has become too prescriptive. What started off as guidelines for how the disclosing entity MAY make a determination has become rigid in how the disclosing entity MUST make a determination. While Registries support the principle of standardization established by the working group, there is no way for this policy to account for all variations in local jurisdictions with different privacy laws and regulations, particularly when requests are made across borders. Care must be given in implementing and enforcing this recommendation to ensure that the disclosing entity has enough flexibility to account for their specific legal and jurisdictional obligations in order to avoid obviating this recommendation as unenforceable.

Purpose 2

The new Purpose 2 language in Recommendation 22 replaces the original Purpose 2 from EPDP Phase 1 Recommendation 1 which was not agreed to or adopted by the ICANN

[70] Ruth Boardman & Gabe Maldoff (Bird & Bird LLP), "Advice on the meaning of the accuracy principle pursuant to the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR")," dated 8 February 2019.

[71] Ruth Boardman (Bird & Bird LLP), "Advice on consent options for the purpose of making personal data public in RDS and requirements under the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR")," dated March 2020.

[72] Ruth Boardman (Bird & Bird LLP), ""Batch 2" of GDPR questions regarding a System for Standardized Access/Disclosure ("SSAD"), Privacy/Proxy and Pseudonymized Emails," dated 4 February 2020.

[73] "The EPDP Team agreed to the draft recommendation text for both the feasibility of unique contacts to have a uniform anonymized email address and city field redaction. Staff Support to include these draft recommendations in the addendum on Priority 2 items, which will be published for public comment." Email from Caitlin Tubergen to gnso-epdp-team dated March 12, 2020.

Board. We reiterate our concern from Phase 1[74] that this purpose does not qualify as a legal "Purpose" as defined in the GDPR.[75] It is not clear that by saying "contribute to the maintenance of the security, stability and resiliency of the Domain Name System in accordance with ICANN's mission" that a data subject will understand how their data will be processed or why it is necessary. Noting the above and the Board's support for this purpose[76] and the spirit in which we believe it's intended, the RySG has agreed not to object to this purpose.

Conclusion

The RySG committed to participating actively and in good faith to develop appropriate consensus policy recommendations around access to registrant data. We have focused on ensuring such recommendations provide a clear path to compliance with the GDPR, are commercially reasonable and implementable, take into account our differing business models, and do not inhibit innovation. Consistent with these principles, and noting the concerns detailed above, we provide our consensus support for the Final Report recommendations. We look forward to further consideration and approval by the GNSO Council.

[74] EPDP Phase I Final Report, RySG Phase I Minority Statement, pg. 166, available here.

[75] ICO Guidance on Purpose Limitation: "This requirement aims to ensure that you are clear and open about your reasons for obtaining personal data, and that what you do with the data is in line with the reasonable expectations of the individuals concerned. Specifying your purposes from the outset helps you to be accountable for your processing, and helps you avoid 'function creep'. It also helps individuals understand how you use their data, make decisions about whether they are happy to share their details, and assert their rights over data where appropriate. It is fundamental to building public trust in how you use personal data." Available here.

[76] Letter from Martin Botterman to Keith Drazek, dated 11 March 2020, available here.

Annex F - Community Input

F.1. Request for SO/AC/SG/C Input

According to the GNSO's PDP Manual, an EPDP Team should formally solicit statements from each GNSO Stakeholder Group and Constituency at an early stage of its deliberations. An EPDP Team is also encouraged to seek the opinion of other ICANN Supporting Organizations and Advisory Committees who may have expertise, experience or an interest in the issue. As a result, the EPDP Team reached out to all ICANN Supporting Organizations and Advisory Committees as well as GNSO Stakeholder Groups and Constituencies with a request for input at the start of its deliberations on phase 2. In response, statements were received from:

- The GNSO Business Constituency (BC)
- The GNSO Non-Commercial Stakeholder Group (NCSG)
- The Registries Stakeholder Group (RySG)
- The Registrar Stakeholder Group (RrSG)
- The Internet Service Providers and Connectivity Providers Constituency (ISPCP)

The full statements can be found here: https://community.icann.org/x/zIWGBg.

All of the input received was added to the Early Input review tool and considered by the EPDP Team.

F.2. Public Comment forum on the Initial Report

On 7 February 2020, the EPDP Team published its Initial Report for public comment. The Initial Report outlined the core issues discussed in relation to the proposed System for Standardized Access/Disclosure to non-public gTLD registration data ("SSAD") and accompanying preliminary recommendations.

The EPDP Team used a Google form to facilitate review of public comments. Forty-five contributions were received from GNSO Stakeholder Groups, Constituencies, ICANN Advisory Committees, companies and organizations, in addition to two contributions from individuals. The input provided is at: https://docs.google.com/spreadsheets/d/1EBiFCsWfqQnMxEcCaKQywCccEVdBc9_ktPA3PU8nrQk/edit?usp=sharing.

To facilitate its review of the public comments, the EPDP Team developed a set of public comment review tools (PCRTs) and discussion tables (see https://community.icann.org/x/Hi6JBw). Through online review and plenary sessions, the EPDP Team completed its review and assessment of the input provided and agreed on changes to made to the recommendations and/or report.

F.3. Public Comment on the Addendum

On 26 March 2020, the EPDP Team published an Addendum to the Initial Report for public comment. The Addendum concerns the EPDP Team's preliminary recommendations and/or conclusions on the priority 2 items as listed above.

The EPDP Team used a Google form to facilitate review of public comments. Twenty-eight contributions were received from GNSO Stakeholder Groups, Constituencies, ICANN Advisory Committees, companies and organizations, in addition to one contribution from an individual. The input provided is at: https://docs.google.com/spreadsheets/d/1jN5ThNtmcVJ8txdAGw0ynl5vrGJOuEv8xeccvzjR9qM/edit#gid=2086811131.

To facilitate its review of the public comments, the EPDP Team developed a set of public comment review tools (PCRTs) and discussion tables (see https://community.icann.org/x/Hi6JBw). Through online review and plenary sessions, the EPDP Team completed its review and assessment of the input provided and agreed on which priority 2 recommendations and/or conclusions were ready to be included in this Final Report.

Annex G – Legal Committee

Phase 2 Questions Submitted to Bird & Bird

1. Consider a System for Standardized Access/Disclosure where:

    - contracted parties "CPs" are contractually required by ICANN to disclose registration data including personal data,
    - data must be disclosed over RDAP to Requestors either directly or through an intermediary request accreditation/authorization body,
    - the accreditation is carried out by third party commissioned by ICANN without CP involvement,
    - disclosure takes place in an automated fashion without any manual intervention,
    - data subjects are being duly informed according to ICANN's contractual requirements of the purposes for which, and types of entities by which, personal data may be processed. CP's contract with ICANN also requires CP to notify data subject about this potential disclosure and third-party processing before the data subject enters into the registration agreement with the CP, and again annually via the ICANN-required registration data accuracy reminder. CP has done so.

    Further, assume the following safeguards are in place

    - ICANN or its designee has validated/verified the Requestor's identity, and required in each instance that the Requestor:
        - represents that it has a lawful basis for requesting and processing the data,
        - provides its lawful basis,
        - represents that it is requesting only the data necessary for its purpose,
        - agrees to process the data in accordance with GDPR, and
        - agrees to EU standard contractual clauses for the data transfer.

    - ICANN or its designee logs requests for non-public registration data, regularly audits these logs, takes compliance action against suspected abuse, and makes these logs available upon request by the data subject.

    1. What risk or liability, if any, would the CP face for the processing activity of disclosure in this context, including the risk of a third party abusing or circumventing the safeguards?

2. Would you deem the criteria and safeguards outlined above sufficient to make disclosure of registration data compliant? If any risk exists, what improved or additional safeguards would eliminate[1] this risk?

3. In this scenario, would the CP be a controller or a processor[2], and to what extent, if at all, is the CP's liability impacted by this controller/processor distinction?

4. Only answer if a risk still exists for the CP: If a risk still exists for the CP, what additional safeguards might be required to eliminate CP liability depending on the nature of the disclosure request, i.e. depending on whether data is requested e.g. by private actors pursuing civil claims or law enforcement authorities depending on their jurisdiction or the nature of the crime (misdemeanor or felony) or the associated sanctions (fine, imprisonment or capital punishment)?

Footnote 1: "Here it is important to highlight the special role that safeguards may play in reducing the undue impact on the data subjects, and thereby changing the balance of rights and interests to the extent that the data controller's legitimate interests will not be overridden." (https://iapp.org/media/pdf/resource_center/wp217_legitimate-interests_04-2014.pdf)

Footnote 2: https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en

2. To what extent, if any, are contracted parties liable when a third party that accesses non-public WHOIS data under an accreditation scheme where by the accessor is accredited for the stated purpose, commits to certain reasonable safeguards similar to a code of conduct regarding use of the data, but misrepresents their intended purposes for processing such data, and subsequently processes it in a manner inconsistent with the stated purpose. Under such circumstances, if there is possibility of liability to contracted parties, are there steps that can be taken to mitigate or reduce the risk of liability to the contracted parties?

3. Assuming that there is a policy that allows accredited parties to access non-public WHOIS data through an SSAD (and requires the accredited party to commit to certain reasonable safeguards similar to a code of conduct), is it legally permissible under Article 6(1)(f) to:

- define specific categories of requests from accredited parties (e.g. rapid response to a malware attack or contacting a non-responsive IP infringer), for which there can be automated submissions for non-public WHOIS data, without having to manually verify the qualifications of the accredited parties for each individual disclosure request, and/or

- enable automated disclosures of such data, without requiring a manual review by the controller or processor of each individual disclosure request.

In addition, if it is not possible to automate any of these steps, please provide any guidance for how to perform the balancing test under Article 6(1)(f).

For reference, please refer to the following potential safeguards:

- Disclosure is required under CP's contract with ICANN (resulting from Phase 2 EPDP policy).
- CP's contract with ICANN requires CP to notify the data subject of the purposes for which, and types of entities by which, personal data may be processed. CP is required to notify data subject of this with the opportunity to opt out before the data subject enters into the registration agreement with the CP, and again annually via the ICANN-required registration data accuracy reminder. CP has done so.
- ICANN or its designee has validated the Requestor's identity, and required that the Requestor:
  - represents that it has a lawful basis for requesting and processing the data,
  - provides its lawful basis,
  - represents that it is requesting only the data necessary for its purpose,
  - agrees to process the data in accordance with GDPR, and
  - agrees to standard contractual clauses for the data transfer.
- ICANN or its designee logs requests for non-public registration data, regularly audits these logs, takes compliance action against suspected abuse, and makes these logs available upon request by the data subject.

4. Under the GDPR, a data controller can disclose personal data to law enforcement of competent authority under Art. 6 1 c GDPR provided the law enforcement authority has the legal authority to create a legal obligation under applicable law. Certain commentators have interpreted "legal obligation" to apply only to legal obligations grounded in EU or Member State law.

As to the data controller:

a. Consequently, does it follow that the data controller may not rely on Art. 6 1 c GDPR to disclose personal data to law enforcement authorities outside the data controller's jurisdiction? Alternatively, are there any circumstances in which data controllers could rely on Art. 6 1 c GDPR to disclose personal data to law enforcement authorities outside the data controller's jurisdiction?

b. May the data controller rely on any other legal bases, besides Art. 6 I f GDPR, to disclose personal data to law enforcement authorities outside the data controller's jurisdiction?

As to the law enforcement authority:

> Given that Art. 6 1 GDPR states that European public authorities cannot use Art. 6 I f GDPR as a legal basis for processing carried out in the performance of their tasks, these public authorities need to have a legal basis so that disclosure can take place based on another legal basis (e.g. Art. 6 I c GDPR).
>
> c. In the light of this, is it possible for non-EU-based law enforcement authorities to rely on Art. 6 I 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?

- Executive Summaries[77]

Questions 1 and 2

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 1 was delivered on 9 September 2019. Memo 1 analyzed the legal role of contracted parties in the proposed System for Standardized Access/Disclosure (SSAD), the sufficiency of the proposed safeguards, and the risk of liability to contracted parties for disclosure via the SSAD. The questions sent to Bird & Bird are provided in the Annex to this document and include a series of assumptions in Section 1.1 and 1.2 that are part of the factual basis for the responses below.

In response to these questions, Bird & Bird noted the following with respect to controllership:

1. Contracted parties are likely controllers in the SSAD since registrants have traditionally reasonably expected that contracted parties are the controller for disclosure of their data to third parties. It is difficult to show that contracted parties are only serving ICANN org's interests, particularly in light of relevant judicial decisions that suggest a low threshold for controllership.
2. If the EPDP Team wanted to recommend a policy under which contracted parties are processors in a SSAD, steps could be taken to support this policy goal. Contracted parties would need to have no substantial influence over key aspects of SSAD data processing, such as (i) which data shall be processed; (ii) how long shall they be processed; and (iii) who shall have access to the data. There would also be a need for "constant and careful" supervision by ICANN org "to ensure thorough compliance of the

[77] To be updated when Legal committee signs off on executive summaries

processor with instructions and terms of the contract", and efforts to instruct registrants that contracted parties are only acting on ICANN org's behalf (e.g., ICANN org website materials, privacy notices, information in domain name registration process).

3. However, the most likely outcome and starting position for supervisory authorities would be that contracted parties are controllers and likely joint controllers with ICANN org regarding disclosure of registration data through the SSAD.

Bird & Bird noted the following with respect to SSAD safeguards and liability:

4. Given the number of jurisdictions involved, and the likely variety of requests that could be handled by the SSAD, Bird & Bird could not confirm that the criteria and safeguards described in the assumptions would make disclosure of data in a fully automated SSAD compliant.
5. Bird & Bird suggested additional safeguards that the EPDP should consider related to (i) legal basis, proportionality, and data minimization; (ii) individual rights; (iii) international data transfer; and (iv) security.
6. Under the GDPR, parties involved in the same processing are subject to liability to both individuals and supervisory authorities. Individual liability is joint and several, meaning each party involved in the processing is potentially liable for all damages to the data subject, with some differing standards for controllers vs. processors. Supervisory authorities may proceed against controllers or processors, and it is currently unclear whether joint and several liability applies when multiple parties involved in the same processing (i.e., enforcement action isn't appropriate if others are responsible).

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1. Are Contracted Parties Controllers or Processors?

Controllers

- Liability is significantly impacted by whether Contracted Parties are controllers or processors. (1.4)

- A controller is the "natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data." (2.2)

- Whether an entity is a controller is a factual determination based on "control over key data processing decisions." The role of controller cannot be assigned or disclaimed. (2.3)

- The Article 29 Working Party provided pre-GDPR guidance on the roles of controller and processor. The EDPB is currently revising this guidance with an update anticipated in the next six months. (2.4, 2.19)
- The EDPB's predecessor, the Article 29 Working Party (WP29) determined that "the first and foremost role of the concept of controller is to determine who shall be responsible for compliance with data protection rules, and how data subjects can exercise the rights in practice. In other words: to allocate responsibility." Read literally, this reflects that a controller has responsibility for most obligations under the GDPR; but the phrase also indicates a degree of regulatory expediency: it shows the underlying need to hold someone accountable. This can influence a court or supervisory authority's approach, says B&B. (2.4)
- An entity that makes key decisions (alone, or jointly with others) about (i) what data is processed; (ii) the duration of processing; and (iii) who has access to data is acting as a controller, not a processor – these are sometimes referred to as the "essential elements" of processing. (2.6)
- An entity can be both a controller and a processor. This will be the case where an entity that acts as a processor also makes use of personal data for its own purposes. (2.7)

Processors

- A processor is the "natural or legal person, public authority, agency or other body, which processes personal data on behalf of the controller." (2.5)
- The Article 29 Working Party guidance emphasizes the importance of examining "'the degree of actual control exercised by a party, the image given to data subjects and the reasonable expectations of data subjects on the basis of this visibility" in determining whether an entity is a controller or processor. (2.5)
- According to WP29, a processor serves "someone else's interest" by "implement[ing] the instructions given by the controller at least with regard to the purpose of the processing and the essential elements of the means." (2.5)
- A processor can only process personal data pursuant to instructions of the controller or as required by EEA or Member State law. (2.7)

Application to the SSAD

Presumption of controllership

- In some cases, "existing traditional roles that normally imply a certain responsibility will help identifying the controller: for example, the employer in relation to data on his employees, the publisher in relation to data on subscribers, the association in relation to data on its members or contributors". The relation between a Contracted Party and registrant (or registrant's contact) could be regarded in a similar way. (2.8) Similarly, the "image given to data subjects and the reasonable expectations of data subjects" is an important consideration for determining controllership. A registrant will typically expect that Contracted Parties are the controller for disclosure of their data to third parties. (2.9)

- Since Contracted Parties are currently seen as the controller for disclosure of data to third parties, this will lead to a presumption that Contracted Parties continue to be controllers, even once an SSAD is implemented. (2.9)
- However, such a presumption can't always be made, depending on analysis of technical processing activities. WP169 does note that where there is an assumption that a person is a controller (referred to in WP169 as "control stemming from implicit competence") that this should only be the case "unless other elements indicate the contrary". Recent cases from the CJEU – in particular its recent Fashion ID ruling – have also supported closer, fact-specific analysis. (2.11)

Difficulty presenting Contracted Parties as acting "on behalf of" someone else

- The most important element of a processor's role is that they only act on behalf of the controller. It will be difficult to show that Contracted Parties are only serving ICANN's interests and processing data on ICANN's behalf. (2.10)
- Disclosure of data is likely to be seen as an inevitable consequence of being a Contracted Party, not something that Contracted Parties agree to do on ICANN's behalf. (2.10)

Close factual analysis of technical processing activities

- The factual threshold for becoming a controller (determining purposes or means of processing) is low. The test, according to the CJEU, is simply whether someone "exerts influence over the processing of personal data, for his own purposes, and (…) participates, as a result, in the determination of the purposes and means of that processing". (2.12)
- In the CJEU's Jehovan Todistajat ruling, the national Jehovah's Witnesses community organization was stated to have "general knowledge" and to have encouraged and coordinated data collection by community members (door to door preachers) at a very general level – but it was nevertheless held to have satisfied the test for joint controllership with those community members. In the CJEU's Fashion ID ruling, it was sufficient for the website operator to integrate with Facebook platform code, such that the operator thereby participated in determination of the "means" of Facebook's data collection, and was a joint controller with Facebook. (2.14)

- Courts and supervisory authorities are therefore likely to consider that a Contracted Party is involved in determining the means of processing, possibly just by implementing/interfacing with the SSAD. (2.14)

Factors that could support processor status

- The key to avoid controller status is being able to show that you are not involved in determining the "essential elements" of processing (2.6).

- Also, ICANN monitoring compliance with a contractual requirement to disclose data could be proof of a controller processor relationship, since "constant and careful supervision by the controller to ensure thorough compliance of the processor with instructions and terms of contract provides an indication that the controller is still in full and sole control of the processing operations." (2.16)

- Taking steps to clearly inform data subjects that data is collected only on ICANN's behalf (e.g. disclosures in domain name registration process, annual data accuracy reminder, privacy notices, ICANN org website materials) and other presentations that clearly depict this action as being performed by CPs solely on ICANN's behalf could result in individuals becoming more aware of ICANN's role as a Controller, and the Contracted Parties' role as a processor. (2.17)

Summary – Contracted Parties most likely joint controllers with ICANN

- The most likely outcome and the starting point for supervisory authorities is that Contracted Parties are controllers. (2.18)

- ICANN's role in determining purpose and means of processing suggests they are joint controllers with Contracted Parties for the disclosure of data to third parties. (2.18)

2. Are the Safeguards Proposed Sufficient to Make Disclosure of Registration Data Compliant?

SSAD safeguards

- Given the number of jurisdictions involved, and the likely variety of requests that could be handled by the SSAD, this opinion cannot confirm that the criteria and safeguards described in the assumptions would make disclosure of data in a fully automated system compliant. (3.8)

- B&B states that care must be taken in processing personal data -- a processor (either in breach of its contract with the controller or otherwise behaving in a way inconsistent with the instructions of the controller) can become a controller itself, and thus face breaches (as identified in the table on p.7 of the memo). (3.6)

- The safeguards described are helpful, but will need to include additional measures described below. (3.8)

  - Legal basis: safeguards need to (i) consider whether Contracted Parties, not just Requestor, have a legal basis for processing; (ii) account for the particular legal framework applicable to a Contracted Party; (iii) ensure that an appropriate balancing test is performed on legitimate interests, if that is an appropriate legal basis in a given case[78] (and it may not be safe to assume that for a category of requests that the balance of interests is always in favor of disclosure; certain cases, such as investigations or prosecutions that could lead to capital punishment, might be especially problematic); and (iv) assurances that improper data types or volumes will not be disclosed to requestors (e.g., rule-based monitoring or blocking of unusual request sizes, permissioning systems). (3.9 – 3.12)

  - Individual rights: address how data subject requests are handled, including (i) access rights to request logs (which may themselves be high risk or even "special category" personal data); (ii) appropriate time period for retention of those logs; (iii) the manner in which information is provided to data subjects; (iv) how to deal with situations where Requestor insists on not providing information to the data subject (e.g., law enforcement confidentiality); and (v) requests to restrict or block processing. (3.13 – 3.16)

  - Data transfer: for international data transfers, EPDP envisages relying on the EU Standard Contractual Clauses (SCC) legal safeguarding mechanism, however (i) some Requestors, including public authorities, will not agree to their terms; (ii) the terms of the SCCs are not easy to comply with, especially at scale; (iii) if EEA Contracted Parties are processors they cannot directly rely on SCCs to transfer data to ICANN org or Requestors outside of the EEA, so a workaround would need to be found. (3.17)

  - Security: safeguards should be proportionate to the risk to data subjects should their data be compromised. (3.18)

3. What is the Risk of Liability to Contracted Parties for Disclosure?

- If the safeguards are inadequate or abused/circumvented by Requestors (or other aspects of the GDPR are contravened, e.g. inadequate notice or lack of a legal basis for processing), Contracted Parties could face investigations, enforcement orders (e.g. processing prohibitions), and (financially) both liability to individuals (civil) and liability to supervisory authorities (fines).

- In broad strokes, B&B offers in pertinent parts that (1) where parties are joint controllers, this does not mean that the parties each have to undertake all elements of compliance, (2) if CPs are processors, they will only be liable to individuals (civil liability)

[78] If disclosure is a legal obligation pursuant to EU or EU/EEA Member State laws (including treaties to which the EU or a relevant member State is a party), there is no need to consider the legitimate interests test.

under art. 82 if they have failed to comply with obligations placed on processors under the Regulation, or have acted outside or contrary to lawful instructions from the controller, (3) even when parties are deemed to be joint controllers, recent court decisions (concerning enforcement by supervisory authorities) have emphasized that joint control does not imply equal responsibility for breaches of the GDPR, and (4) CPs, as joint controllers with ICANN org, would benefit from clear allocation of responsibilities under the terms of the joint controllership "arrangement" they must enter into pursuant to GDPR Art. 26.

Liability to individuals

- GDPR Article 82 sets out the rules on liability to individuals. (4.2)
- Controllers are liable for damages caused by processing that violates GDPR. Processors are liable for damages caused by processing where the processor has not complied with processor specific requirements or where the processor acted outside of or contrary to instructions from the controller. (4.2)
- A controller or processor is not liable if it proves it was in no way responsible for the event resulting in damages. (4.2)
- Where multiple controllers or processors involved in the same processing, each entity is liable for the entire damages (joint and several liability) to individuals (4.2, 4.3)
- If Contracted Parties are processors, they are only liable if they fail to comply with processor-specific obligations under GDPR or act outside or contrary to instructions from the controller. In such a scenario, it is unlikely Contracted Parties would violate the controller's instructions because the SSAD is automated; the more likely source of liability for them, therefore, would be for having inadequate security measures, or failing to comply with the GD{PR's rules on international data transfers. Contracted Parties could look to ICANN org to prescribe security and international transfer arrangements to give Contracted Parties ability to argue that they are "not in any way responsible for the event giving rise to the damage." (4.4)
- If Contracted Parties are controllers, and if disclosure violates GDPR, they are unlikely to avoid liability to individuals if they cannot prove that they are "not in any way responsible for the event giving rise to the damage," if they actively participate in the disclosure event.
- Any liability creates the potential that Contracted Parties would be liable for all damages to the data subject. This risk is highest under a joint controller scenario. (4.5, 4.6).
- Contracted Parties held liable for the entirety of damages to a data subject can seek appropriate contributions from other responsible parties. (4.7)

- As controllers, Contracted Parties and ICANN would have a positive obligation to address the risk of Requestors seeking improper access to personal data. Safeguards must be appropriate to the level of risk. If a Requestor circumvents SSAD safeguards, courts might accept that the safeguards were adequate, which would limit Contracted Parties' primary liability. (4.9, 4.10)

- Even in the event of a GDPR breach caused by a Requestor, the Contracted Parties, ICANN, and the Requestor may be deemed "involved in the same processing" with each party jointly and severally liable for damages arising from that breach. Contracted Parties and ICANN may be able to argue that they are "not in any way responsible for the event giving rise to damage" but otherwise would need to seek recovery from the Requestor or join the Requestor in the initial proceedings in order to apportion damages. (4.11)

Liability to supervisory authorities

- Supervisory authorities may proceed against controllers or processors. (4.12)

- It is unclear whether joint and several liability applies where multiple parties are involved in processing (i.e., enforcement action arguably isn't appropriate if others are responsible). (4.13)

- There needs to be clear wording in a law, to impose joint and several liability - this strengthens the argument that this would have been stated expressly if it was intended in respect of fines from supervisory authorities. Art. 83(2)(d) makes it clear that joint/several liability doesn't apply concerning supervisory authorities. (4.13.2)
- Even when parties are joint controllers, recent court decisions (about enforcement by supervisory authorities) emphasize that joint control doesn't imply equal responsibility for GDPR breaches. (4.13.4)

- Contracted Parties and ICANN would therefore benefit from clearly allocated responsibilities under a joint controllership arrangement (and a joint controllership arrangement is in any case mandatory, in all joint control siutations, pursuant to GDPR Art. 26). (4.14)

- It may be possible to take advantage of the "lead authority" (a.k.a. "one stop shop" or "consistency") provisions of GDPR to ensure that any enforcement action takes place through ICANN org's Brussels establishment, rather than against Contracted Parties. This mechanism is only available where there is cross-border processing of personal data (entities in multiple EEA member states, or effects on data subjects in multiple EEA member states). (4.15 – 4.17)

- The "lead authority" provisions in GDPR don't specifically address joint controllerships, but guidance suggests that if ICANN org and Contracted Parties designated ICANN's Belgian establishment as the main establishment for the processing (i.e., where decisions regarding processing are made) it may minimize the risk of enforcement directly against Contracted Parties. This is a novel and untested approach. (4.15 – 4.20)

Annex:
Legal Questions 1 & 2: Liability, Safeguards, Controller & Processor

As the EPDP Team deliberated on the architecture of an SSAD, several questions came up with respect to liability and safeguards. In response, the Phase 2 Legal Committee formulated the following questions to outside counsel:

1. Consider a System for Standardized Access/Disclosure where:

    o contracted parties "CPs" are contractually required by ICANN to disclose registration data including personal data,

    o data must be disclosed over RDAP to Requestors either directly or through an intermediary request accreditation/authorization body,

    o the accreditation is carried out by third party commissioned by ICANN without CP involvement,

    o disclosure takes place in an automated fashion without any manual intervention,

    o data subjects are being duly informed according to ICANN's contractual requirements of the purposes for which, and types of entities by which, personal data may be processed. CP's contract with ICANN also requires CP to notify data subject about this potential disclosure and third-party processing before the data subject enters into the registration agreement with the CP, and again annually via the ICANN-required registration data accuracy reminder. CP has done so.

Further, assume the following safeguards are in place

- ICANN or its designee has validated/verified the Requestor's identity, and required in each instance that the Requestor:
    - represents that it has a lawful basis for requesting and processing the data,
    - provides its lawful basis,
    - represents that it is requesting only the data necessary for its purpose,
    - agrees to process the data in accordance with GDPR, and
    - agrees to EU standard contractual clauses for the data transfer.
- ICANN or its designee logs requests for non-public registration data, regularly audits these logs, takes compliance action against suspected abuse, and makes these logs available upon request by the data subject.

a. What risk or liability, if any, would the CP face for the processing activity of disclosure in this context, including the risk of a third party abusing or circumventing the safeguards?

b. Would you deem the criteria and safeguards outlined above sufficient to make disclosure of registration data compliant? If any risk exists, what improved or additional safeguards would eliminate791 this risk?

c. In this scenario, would the CP be a controller or a processor802, and to what extent, if at all, is the CP's liability impacted by this controller/processor distinction?

d. Only answer if a risk still exists for the CP: If a risk still exists for the CP, what additional safeguards might be required to eliminate CP liability depending on the nature of the disclosure request, i.e. depending on whether data is requested e.g. by private actors pursuing civil claims or law enforcement authorities depending on their jurisdiction or the nature of the crime (misdemeanor or felony) or the associated sanctions (fine, imprisonment or capital punishment)?

2. To what extent, if any, are contracted parties liable when a third party that accesses non-public WHOIS data under an accreditation scheme where by the accessor is accredited for the stated purpose, commits to certain reasonable safeguards similar to a code of conduct regarding use of the data, but misrepresents their intended purposes for processing such data, and subsequently processes it in a manner inconsistent with the stated purpose. Under such circumstances, if there is possibility of liability to contracted parties, are there steps that can be taken to mitigate or reduce the risk of liability to the contracted parties?

[79] "Here it is important to highlight the special role that safeguards may play in reducing the undue impact on the data subjects, and thereby changing the balance of rights and interests to the extent that the data controller's legitimate interests will not be overridden." https://iapp.org/media/pdf/resource_center/wp217_legitimate-interests_04-2014.pdf

[80]https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en

Question 3

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 2 was delivered on 10 September 2019 and analyzed questions related to how the legitimate interests "balancing test" required under GDPR Art 6(1)(f) could be applied in a SSAD, either in highly automated fashion (Question A) or, if it is not possible to automate such a decision, then how the balancing test should be performed (Question B). The full questions are provided in Annex A to this summary and include a series of assumptions that are part of the factual basis for the responses below.

In response to Question A, Bird & Bird noted the following with respect to automation:

1. The highly-automated process described by the EPDP team could amount to solely automated decision making having a legal or similarly significant effect on the data subjects ("data subjects" here would be the targets of requests for nonpublic gTLD data).
2. This is generally is not permitted unless one of the limited legal bases/exemptions under GDPR Art. 22(1) would justify the disclosure. This is much narrower than GDPR Art. 6(1)(f). It would be difficult for the SSAD, as proposed, to meet the GDPR Art. 22(1) exemptions; the SSAD must therefore be structured so it doesn't fall into the scope of Article 22 in the first place.
3. To achieve this it would be necessary to limit automatic access/disclosure to situations where there will be no "legal or similarly significant effects" for the data subject. Examples provided in the memo include the release of admin contact details for non-natural registrants in response to malware attacks or IP infringement. The process for dealing with higher-risk requests should not be fully automated; some meaningful human involvement (at least, oversight) should be present.
4. Alternatively, the SSAD could potentially be structured so that it does not make a decision based on its automatic processing of personal data relating to targets of a request. For example, the SSAD could publish the categories of requests which will be accepted and ask Requestors to confirm that they meet the relevant criteria. By instead requiring *the Requestor* to conduct the necessary analysis and then certify the outcome to the SSAD, the SSAD would then arguably not make a decision (to release data) based on its own automated processing of personal data, so GDPR Art. 22 would not apply. However, relying on self-certification by Requestors perhaps creates scope for abuse of the system by Requestors, which (as previous answers explained) could mean liability for ICANN and the Contracted Parties.
5. As regards authentication of the Requestor (as a distinct step from evaluating the grounds or other parameters of a request), Bird & Bird think it would certainly be

possible to automate the process to authenticate the person making the request. It may also be possible to automate other aspects of the request process.

In response to Question B, Bird & Bird:

1. Set out the EU (WP29)'s official guidance on how the Art. 6(1)(f) legitimate interests balancing test should be conducted;
2. Noted that if ICANN and Contracted Parties are joint controllers, they must both establish a legitimate interest in the processing. So far as Contracted Parties are concerned, it is likely that the relevant interest will be that of the third party, the Requestor. ICANN, in contrast, may be able to establish its interest in the security, stability and resilience of the domain name system *as well as* the interest of the third party requestor; and
3. Provided a high level discussion of safeguards that could be deployed in order to further tip the scales in favour of the processing envisaged as part of the SSAD.

1. Question A

Question A asks whether GDPR Article 6(1)(f) (the "legitimate interests" legal basis for processing) would allow the SSAD to automatically process requests (at least in certain predefined categories), without requiring manual, request-by-request (i) verification that the request meets the relevant criteria for disclosure; and (ii) disclosure of the relevant registration data.

The SSAD could fall within the scope of GDPR Art. 22, rather than purely being concerned with GDPR Art. 6(1)(f)

- GDPR Art. 6(1)(f) permits automated processing *unless* this would amount to "automated individual decision-making" having legal or similarly significant effects for the data subject ("solely automated decision making"), which generally is not permitted unless one of the more limited legal bases/exemptions under GDPR Art. 22(1) would justify the disclosure.

- While GDPR Article 22 states that a data subject has a "right not to be subject to" such a decision, in practice Article 22 has been interpreted by regulators as a general *prohibition* (i.e. there is no need for the data subject to object to such decision-making).

- The process described by the EPDP team could amount to such automated decision-making affecting the target of a request (for instance, when law enforcement wants to bring a prosecution against individuals running unlawful websites).

- If art.22 applies to the processing described by the EPDP, i.e. **if SSAD processing amounts to an automated individual decision having legal or similarly significant effects, it would not be permitted under GDPR Art. 6(1)(f) (the "legitimate interests"**

basis for processing). Art. 22(1) sets out its own, more limited set of grounds on which Art. 22 decision-making can be based.

- B&B advises that **it will be hard for the SSAD to meet the exemptions in Art. 22(1); so therefore, the EPDP should ensure that SSAD processing does not fall within the scope of Art. 22.**

Mitigation strategy 1: avoiding decisions if they might have "legal or similarly significant effects" for individuals whose data is disclosed

- One way to achieve this could be by limiting automatic access and disclosure to situations where there will not be “legal or similarly significant effects” for the data subject.

- A decision to release data via the SSAD would not in itself have a "legal effect" on the data subject. The more relevant test for the SSAD is “similarly significant effects.” This means something similar to having legal effect -- something worthy of attention (e.g., significantly affect the circumstances, behavior or choices of the individuals concerned).[81]

- It may be possible to determine categories of requests that don’t have a “legal or similarly significant” effect on the individual, like releasing admin contact details for non-natural (company/organizational/institutional) registrants. Other disclosures involving registrant data of a natural person may be much more likely to have a “similarly significant effect.” Considerable care would need to be taken over such analysis.

- For decisions more likely to have a "significant effect", human review or oversight would be necessary. "Token" human involvement would not suffice. For the human review element to count, the controller must ensure meaningful oversight by someone who has the authority and competence to change the decision.

Mitigation strategy 2: Avoiding SSAD designs that involve processing of personal data about the target of a request in order to decide whether to comply with the request

- It may also be possible to structure the SSAD so it doesn’t involve “a decision based solely on automated processing.” GDPR Article 22 requires the decision to be based on processing *of personal data.* If decisions are based on something other than personal data, GDPR Article 22 does not apply.

- Therefore, rather than the SSAD requesting details from requestors (e.g. information about the target of the request, e.g. the registrant, and why their data is required), and

[81] According to official guidance, the following are classic examples of decisions that could be sufficiently significant: (i) decisions that affect someone’s financial circumstances; (ii) decisions that affect access to health services; (iii) decisions that deny employment opportunities or put someone at a serious disadvantage; (iv) decisions that affect someone’s access to education.

then analyzing that information (automatically) in order to evaluate whether the relevant criteria for release of non-public registration data are met, the SSAD could instead publish the categories of requests which will be accepted, and ask Requestors to confirm that they meet the relevant criteria. In this case, the SSAD would not process *personal data* about the target of the request, in order to reach a decision to release the data – so Article 22 would not apply.

- As noted for earlier questions, parties involved in the SSAD have a responsibility to take "appropriate technical and organisational measures" to protect against the risk of misuse of the SSAD system by Requestors.
- Any decision to rely on self-certification, rather than assessing requests, would therefore need to be balanced carefully against these risk mitigation obligations; this would likely narrow the occasions when this self-declaration approach could be used. Bird & Bird notes that under such a scheme, the SSAD could still ask Requestors to provide additional information about the nature of their request *for audit purposes* – but it would not be used to evaluate the request itself (i.e. it would not be used for automated decision-making).

2. Question B

In this question, **the EPDP team asks for guidance on how to perform the balancing test under 6(1)(f) (assuming it's not possible to automate the steps described).**

- Official guidance is that the balancing test should be divided into four steps:
    1. Assess the interest which the processing meets
    2. Consider the impact on the data subject
    3. Undertake a provisional balancing test
    4. Consider the impact of any additional safeguards deployed to prevent any undue impact on the data subject.

1. Assessing the controller's legitimate interest

- 6(1)(f) says you can lawfully process if it is "necessary for the purposes of the legitimate interests pursued by the controller or a third party."
- There are three sub-elements to this: (i) legitimacy; (ii) existence of an interest; and (iii) necessity.

Legitimacy

- It seems that “legitimacy” is not a high test -- WP29 said *“*an interest can be considered as legitimate as long as the controller can pursue this interest in a way that is in accordance with data protection and other laws.”

Establishing "interest" in the processing

- B&B notes that if ICANN and Contracted Parties are joint controllers, they must both establish a legitimate interest in the processing. So far as Contracted Parties are concerned, it is likely that the relevant interest will be that of the third party, the requestor. ICANN, in contrast, may be able to establish its interest in the security, stability and resilience of the domain name system as well the interest of the third party requestor.

- “Interest” is not the same as “purpose.”
  - “Purpose” is the specific reason why the data is processed
  - “Interest” is the broader stake that a controller may have in the processing, or the benefit the controller derives, or that society might derive from the processing. (This also means that interests could be public or private; for example, in the case of actions to prevent trademark infringement, there could be a private interest for the person whose trademark has been infringed and a wider public interest in preventing a risk of confusion by the public. This factor could usefully be noted in the documentation of the balancing test.)

- Interest must be “real and specific”, not “vague and speculative.”

- At p.25, WP217 provides a non-exhaustive list of contexts in which legitimate interests may arise, including:
  - "Exercise of the right to freedom of expression or information, including in the media and the Arts"
  - Enforcement of legal claims
  - Prevention of fraud, misuses of services,
  - Physical security, IT and network security
  - Processing for research purposes

- The EPDP suggests that potential SSAD safeguards could include requiring the requestor to represent that it has a lawful basis for making the request and that it can "provide its lawful basis". However, where data will be released pursuant to art.6(1)(f), then it would be more helpful for the requestor to confirm its *interest* in receiving the personal data.

Necessity

- With regard to necessity, B&B advises the proposed processing (disclosure) must be "necessary" for this interest.
    - The CEJU Oesterreichischer Rundfunk case defines this as: *"…the adjective 'necessary'…implies that a 'pressing social need' is involved and that the measure employed is 'proportionate to the legitimate aim pursued'."*
    - A UK Court of appeals likewise suggests that necessary means "more than desirable but less than indispensable or absolutely necessary."
- B&B suggests that a relevant factor to consider for necessity could be whether a requestor has tried to make contact with the individual in any other ways (although this may be inappropriate in the case of law enforcement requests).
- B&B notes that the SSAD proposes to ask requestors to confirm they are requesting only data that is necessary for their purpose.

2. Assessing the impact on the individual

- B&B says the EDPB suggests a range of factors to be considered when assessing the impact on the individual:
    - ***Assessment of impact.*** Consider the direct impact on data subjects as well as any broader possible consequences of the data processing (e.g., triggering legal proceedings).
    - ***Nature of the data.*** Consider the level of sensitivity of the data as well as whether the data is already publicly available.
    - ***Status of the data subject***. Consider whether the data subject's status increases their vulnerability (e.g., children, other protected classes).
    - ***Scope of processing.*** Consider whether the data will be closely held (lower risk) versus publicly disclosed, made accessible to a large number of persons, or combined with other data (higher risk).
    - ***Reasonable expectations of the data subject***. Consider whether the data subject would reasonably expect their data to be processed/disclosed in this manner.
    - ***Status of the controller and data subject.*** Consider negotiating power and any imbalances in authority between the controller and the data subject.

- It may be possible for the SSAD to take account of these factors, by identifying requests that would pose a high risk for individuals so that those requests receive additional attention.
- A classic risk methodology (looking at severity and likelihood) can be used in assessing risk.
- This is not a purely quantitative exercise; while a request's metrics (e.g. number of data subjects affected) is relevant, it is not determinative – a potentially significant impact on a single data subject should still be considered.

3. Provisional balance

- Once legitimate interests of the controller or third party and those of the individual have been considered, they can be balanced. Ensuring other data protection obligations are met assists with the balancing but is not determinative (e.g., SSAD ensuring standard contractual clauses in place with requestors regarding adequate protection of data is helpful, because it perhaps reduces risk for individuals, but it is not determinative).

4. Additional safeguards

- B&B reports that if it's not clear how the balance should be struck, the controller can consider additional safeguards to reduce the impact of processing on data subjects.
- These include, for example:
  - Transparency
  - Strengthened subject rights to access or port data
  - Unconditional right to opt out
- WP217, pp. 41-42, provides more details on safeguards that can help "tip the scales" in favour of processing (here, in favour of disclosures), in legitimate interests balancing tes

Annex: Legal Question 3: legitimate interests and automated submissions and/or disclosures

a) Assuming that there is a policy that allows accredited parties to access non-public WHOIS data through a System for Standardized Access/ Disclosure of non-public domain registration data to third parties ("SSAD") (and requires the accredited party to commit to certain reasonable safeguards similar to a code of conduct), is it legally permissible under Article 6(1)(f) to:

- define specific categories of requests from accredited parties (e.g. rapid response to a malware attack or contacting a non-responsive IP infringer), for which there can be automated submissions for non-public WHOIS data, without having to manually verify the qualifications of the accredited parties for each individual disclosure request, and/or

- enable automated disclosures of such data, without requiring a manual review by the controller or processor of each individual disclosure request.

b) In addition, if it is not possible to automate any of these steps, please provide any guidance for how to perform the balancing test under Article 6(1) (f).

For reference, please refer to the following potential safeguards:

- Disclosure is required under CP's contract with ICANN (resulting from Phase 2 EPDP policy).
- CP's contract with ICANN requires CP to notify the data subject of the purposes for which, and types of entities by which, personal data may be processed. CP is required to notify data subject of this with the opportunity to opt out before the data subject enters into the registration agreement with the CP, and again annually via the ICANN- required registration data accuracy reminder. CP has done so.
- ICANN or its designee has validated the Requestor's identity, and required that the Requestor:
  - represents that it has a lawful basis for requesting and processing the data,
  - provides its lawful basis,
  - represents that it is requesting only the data necessary for its purpose,
  - agrees to process the data in accordance with GDPR, and
  - agrees to standard contractual clauses for the data transfer.
- ICANN or its designee logs requests for non-public registration data, regularly audits these logs, takes compliance action against suspected abuse, and makes these logs available upon request by the data subject.

Question 4

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 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).

Question 5 (Pseudonymized Email Addresses)

The group has discussed the option of replacing the email address provided by the data subject with an alternate email address that would in and of itself not identify the data subject (Example: 'sfjgsdfsafgkas@pseudo.nym'). With this approach, two options emerged in the discussion, where (a) the same unique string would be used for multiple registrations by the data subject ('pseudonymisation'), or (b) the string would be unique for each registration ('anonymization'). Under option (a), the identity of the data subject might - but need not necessarily - become identifiable by cross-referencing the content of all domain name registrations the string is used for.

From these options, the following question arose: Under options (a) and/or (b), would the alternate address have to be considered as personal data of the data subject under the GDPR and what would be the legal consequences and risks of this determination with regard to the proposed publication of this string in the publicly accessible part of the registration data service (RDS)?

Bird & Bird's Summary Answer

We think either option ((a) or (b)) would still be treated as the publication of personal data on the web. This would seem to be a case covered by a statement made in the Article 29 Working Party's 2014 Opinion on Anonymization techniques [ec.europa.eu]: "when a data controller does not delete the original (identifiable) data at event-level, and the data controller hands over part of this data set (for example after removal or masking of identifiable data), the resulting data set is still personal data." The purpose for making this e-mail address available, even though it's masked, is presumably to allow third parties to directly contact the data subject (e.g. to serve them with court summons, demand takedowns, etc.) – so it's quite clearly linked to that particular data subject, at least so far as ICANN/Contracted Parties are concerned. However, either option would be seen as a valuable privacy-enhancing technology (OPET) / privacy by design measure.

Question 6 (Consent)

Registration data submitted by legal person registrants may contain the data of natural persons. A Phase 1 memo stated that registrars can rely on a registrant's self-identification as legal or natural person if risk is mitigated by taking further steps to ensure the accuracy of the registrant's designation. As a follow up to that memo: what are the consent options and requirements related to such designations? Specifically: are data controllers entitled to rely on a statement obligating legal person registrants to obtain consent from a natural person who would act as a contact and whose information may be publicly displayed in RDS? If so, what representations, if any, would be helpful for the controller to obtain from the legal person registrant in this case?

As part of your analysis please consult the GDPR policies and practices of the Internet protocol (IP address) registry RIPE-NCC (the registry for Europe, based in the Netherlands). RIPE-NCC's customers (registrants) are legal persons being displayed publicly in WHOIS. RIPE-NCC places the responsibility on its legal-person registrants to obtain permission from those natural persons, and provides procedures and safeguards for that. RIPE-NCC states mission justifications and data collection purposes similar to those in ICANN's Temporary Specification. Could similar policies and procedures be used at ICANN?

Also see the policies of ARIN, the IP address registry for North America. ARIN has some customers located in the EU. ARIN also publishes the data of natural persons in its WHOIS output. ARIN’s customers are natural persons, who submit the data of natural person contacts.

Bird & Bird’s Summary Answer

This document analyses the consent requirements set out in the GDPR and examines consents options for the purpose of publishing in RDS personal data provided in the context of the registration of legal person registrants.

Consent requirements

Pursuant to the GDPR, consent must be freely given, specific, informed and unambiguous. Also, it needs to be obtained prior to the processing taking place. Controllers must be able to demonstrate that valid consent has been given and individuals have the right to withdraw consent at any time. Under the GDPR, the obligation to obtain consent lies with the controller. The controller may instruct a third party to obtain consent from individuals on its behalf; however, doing so will not relieve the controller from its obligations under the GDPR.

Consent options

On the basis of the above requirements, this document examines the following options of obtaining consent for making personal data public in RDS and sets out the compliance considerations of each option:

1. Controllers seek valid consent directly from individuals
    - Making personal data public in RDS is optional.
    - Prior to making personal data public, the controller contacts individuals directly to seek consent in line with the GDPR.
    - In the event of refusal to consent or failure to respond, the personal data will not be made public

2. Registrant obtains valid consent and provides evidence to controller
    - Making personal data public in RDS is optional.
    - Prior to making personal data public, the controller requires the registrant to:(a) obtain individuals' consent; and (b) provide to the controller evidence that consent has been obtained.
    - In the event of refusal to consent or failure to receive evidence, the personal data will not be made public

3. Registrant obtains valid consent and controller confirms this with the individual
    - Prior to making personal data public, the controller requires the registrant to:(a) obtain individuals' consent; and (b) provide to the controller evidence that consent has been obtained.
    - Controller follows up with the individual directly: it informs them that the registrant has confirmed they have granted consent.

4. Registrant undertakes the obligation to obtain consent
    - Registrants are allowed to provide non-personal contact details.
    - Registration data is made public by default (irrespective of whether or not personal data is included).
    - By means of a statement, registrants undertake to ensure they have obtained individuals' consent if they choose to provide personal data.

Question 7 (Accuracy)

Question 1a

Who has standing to invoke the Accuracy Principle? We understand that a purpose of the Accuracy Principle is to protect the Data Subject from harm resulting from the processing of inaccurate information. Do others such as contracted parties and ICANN (as Controllers), law enforcement, IP rights holders, etc. have standing to invoke the Accuracy Principle under GDPR? In responding to this question, can you please clarify the parties/interests that we should consider in general, and specifically when interpreting the following passages from the prior memos:

- Both memos reference "relevant parties" in several sections. Are the "relevant parties" limited to the controller(s) or should we account for third-party interests as well?
    - "There may be questions as to whether it is sufficient for the RNH or Account Holder to confirm the accuracy of information relating to technical and administrative contacts, instead of asking information of such contacts directly. GDPR does not necessarily require that, in cases where the personal data must be validated, that it be validated by the data subject herself. ICANN and the relevant parties may rely on third-parties to confirm the accuracy of personal data if it is reasonable to do so. Therefore, we see no immediate reason to find that the current procedures are insufficient." (emphasis added) (Paragraph 19 – Accuracy)
    - "In sum, because compliance with the Accuracy Principle is based on a reasonableness standard, ICANN and the relevant parties will be better placed to evaluate whether these procedures are sufficient. From our vantage point, as the procedures do require affirmative steps that will help confirm accuracy, unless there is reason to believe these are insufficient, we see no clear requirement to review them." (emphasis added) (Paragraph 21-Accuracy)
    - "If the relevant parties had no reason to doubt the reliability of a registrant's self-identification, then they likely would be able to rely on the self-identification alone, without independent confirmation. However, we understand that the parties are concerned that some registrants will not understand the question and will wrongly self-identify. Therefore, there would be a risk of liability if the relevant parties did not take further steps to ensure the accuracy of the registrant's designation." (emphasis added) (Paragraph 17 –Legal v. Natural)

1.b Similarly, the Legal vs. Natural person memo refers to the "importance" of the data in determining the level of effort required to ensure accuracy. Is the assessment of the "importance" of the data limited to considering the importance to the data subject and the controller(s), or does it include the importance of the data to third-parties as well (in this case law enforcement, IP rights holders, and others who would request the data from the controller for their own purposes)?

- “As explained in the ICO guidance, "The more important it is that the personal data is accurate, the greater the effort you should put into ensuring its accuracy. So if you are using the data to make decisions that may significantly affect the individual concerned or others, you need to put more effort into ensuring accuracy.” (Paragraph 14 –Legal vs. Natural)

<u>Bird & Bird’s Executive Summary</u>

This document examines further considerations in relation to the Accuracy Principle (the parties with the obligation to comply with this principle, persons that have the standing to invoke it, and the basis on which data accuracy is to be assessed). It sets out the factors to be considered when assessing data accuracy and provides recommendations of measures to enhance the accuracy of registration data held by contracted parties.

<u>Parties subject to Accuracy Principle and “relevant parties”</u>

The obligation to comply with the GDPR’s Accuracy Principle lies with the controller(s). References to “relevant parties” in the Accuracy and the Legal vs. Natural memos were to the relevant controller(s) of WHOIS data.

<u>Parties having the right to invoke the Accuracy Principle</u>

The GDPR provides for a range of remedies: complaints to supervisory authorities, judicial remedies and right to compensation from a controller or processor. Data subjects (and where allowed by national law, their representatives) have the right to exercise all remedies set forth in the GDPR. In some instances, these rights may also be exercised by other – natural or legal- persons, for example, those affected by the decision of a supervisory authority or those suffered damage as a result of an infringement of the GDPR.

<u>Interests of various parties when considering accuracy</u>

The purpose for which personal data is processed is relevant to determining the measures required to ensure data accuracy. The data subject’s interests must be taken into account when assessing data accuracy. In some circumstances, the controller’s interests will also be relevant. Although there are a few references to rights of "others" in ICO’s accuracy guidance, this point is not illuminated further in our review of guidance, case law or literature. Given the lack of guidance, we do not recommend placing too much emphasis on this point.

<u>Reasonable measures for data accuracy</u>

The Accuracy Principle has not been extensively examined in literature and case law and references to it are limited. The reasonable and appropriate character of accuracy measures should be considered in the light of the GDPR’s risk-based approach, taking into account, among other things, the purpose and impact of processing. A list of suggested accuracy measures is set out in this document.

Question 8 (Automation Use Cases)

Background

1. Under the first scenario, the automation would be carried out within a Central Gateway tasked with receiving requests from accredited users. The Central Gateway would make an automated recommendation on whether or not the requested data should be disclosed whilst the ultimate decision of disclosing data would rest with the Contracted Parties, which could either follow the recommendation or not (Scenario 1.a.). Contracted Parties with enough confidence in the Gateway may choose to automate the decision to disclose the data (Scenario 1.b.).

2. Under the second scenario, the decision to disclose the registrant data would be taken by the Central Gateway without the Contracted Party being able to review the request. The Central Gateway would take this decision either (i) after obtaining the relevant data from the Contracted Party and evaluating the data as part of its decision-making (Scenario 2.a.), or (ii) without obtaining the registrant data (in which case, the decision would be based solely on information about the Requestor and the assertions made in the request) (Scenario 2.b.). One example given of the latter scenario would be automated disclosure of registration data for microsoft-login.com to the verified owner of the trademark MICROSOFT, in response to a request alleging trademark infringement and asserting intent to process the data for the establishment, exercise or defence of legal claims. We have been asked to assume that each scenario would be subject to a set of safeguards which are included in this memo as Appendix 1.

A. Use cases under Scenario 1:

In light of the advice previously provided in the memos on Question 1&2 (Liability) and Question 3 (Automation), please provide the following analysis for each use case in Exhibit 1:

1. Please describe the risk of liability for the Central Gateway and Contracted Parties ("CPs") related to automating this recommendation, and to automating the decision to disclose personal information to a third-party. If there is additional information required to assess the risk, please note the additional information needed.

2. Is the decision to disclose personal information to a third-party a decision "which produces legal effects concerning [the data subject] or similarly significantly affects him or her" within the scope of Article 22?

3. Are there additional measures or safeguards that would mitigate the risk of liability?

4. Does automated decision-making performed in this manner impact your analysis on the roles/liability of the parties described in the Question 1&2 memo (e.g., Contracted Parties

remain controllers with liability where “disclosure takes place in an automated fashion, without any manual intervention.” 1.1.4).

B. Use cases under Scenario 2:

In the second -alternative- scenario, where the Central Gateway has the contractual ability to require the Contracted Parties to provide the data to the Central Gateway:

1. How do the alternative scenarios impact the analysis provided in Questions 1 through 4 above?

2. Which scenario involves the least risk of liability for Contracted Parties? In responding to this, please state your assumptions regarding the respective roles of ICANN and contracted parties, including a scenario where the Centralized Gateway has outsourced decision making to an independent legal service provider.

C. Additional automation clarifications

1. If the decision to disclose personal data to a third party is automated, in what manner must the Controller(s) provide the registrant with information concerning the possibility of automated decision-making in processing of his or her personal information? How should this information be communicated to the registrant, and what information pertaining to the automated decision-making must be communicated to the registrant in order to ensure fair and transparent processing pursuant to Article 13?

2. Does the provision of the information in the answer to question C.1 above by the Controller(s) affect the registrant’s right to obtain confirmation as to whether or not automated decision-making to disclose their personal information to a third-party has taken place? Does it affect the registrant’s right to obtain associated meaningful information as per Article 15.1(h)?

3. Does the manner in which the decision making is performed above impact the way in which this information must be provided?

4. What role does proximate cause play in determining whether a decision to disclose produces a legal or similarly significant effect (i.e. how related must the decision to disclose a registrant’s personal data be to the ultimate legal or similarly significant effect of personal data processing)? Please describe the risk of liability to the Central Gateway or Contracted Party if, after receiving personal data, the Requestor engages in its own processing which has a legal or similarly significant effect.

5. In Section 1.12 in the previous memo on Automation, Bird & Bird stated: It may also be possible to structure the SSAD so that it does not involve "a decision based solely on automated processing". To expand, rather than the SSAD requesting information from requesters and

evaluating if the relevant criteria for release of non-public registration data are met, the SSAD could publish the categories of requests which will be accepted and ask Requestors to confirm that they meet the relevant criteria. In this case, there would be no automated processing leading to a decision to release the data. The SSAD could ask requesters to provide additional information about the nature of their request for audit purposes –but it would not be used to evaluate the request itself. Could you please elaborate on how (i) publishing the categories of requests that will be approved and (ii) requiring a Requestor to manually select the applicable category and confirm that they meet the criteria for that category of requests would make the decision to disclose "not automated"?

Bird & Bird's Executive Summary

This document examines the scenarios and use cases presented by the EPDP Team in relation to automated decisions for disclosure of non-public registrant data. It identifies the cases of fully automated decisions that would fall under the scope of Art. 22 GDPR, challenges associated with Art. 22 and available alternatives. The document further suggests data protection safeguards and examines transparency considerations in the SSAD context. Finally, it examines the status of the parties under each scenario and the associated risk of liability.

Art. 22 decisions and alternatives

Art. 22 GDPR applies to fully automated decisions which produce legal or similarly significant effects. Art. 22 decisions are only allowed in limited cases, which are not likely to apply to the SSAD context. Fully automated decisions will only be allowed if they: (a) do not include the processing of personal data; (b)do not produce legal or similarly significant effects; (c) are authorised by applicable EU or Member State law which lays down suitable measures to protect individuals; or (d) are covered by a national derogation from Art. 22 (for example, for the purpose of detection of criminal offences). In all other cases, there needs to be meaningful human involvement in the decision making process.

Do Art. 22 criteria apply to SSAD?

(a) Solely automated processing: For Art. 22 to apply, there needs to be some processing of personal data, but there is no requirement that only personal data is processed for the decision. The decision examined here will in most cases involve the processing of personal data – this will be the case irrespective of whether or not the Central Gateway has access to the requested data and takes account of such data in the decision making. Apart from Scenario 1.a where the SSAD would only issue an automated recommendation, all other scenarios would include a decision (to disclose registrant data to third parties) based solely on automated processing.

(b) Legal or similarly significant effect: the term is not defined in the GDPR; however, it indicates an elevated threshold. Whether or not the disclosure of registrant data has such an effect, will depend on the circumstances of the request: the document assesses the nature of the effects of disclosure under each use case. We have given clear yes and no answers where possible: some use cases would benefit from further discussion. The role of proximate cause in determining the effects of a decision has not been examined by courts or supervisory authorities. There is some discussion in German literature; however, given the lack of wider discussion, the views of supervisory authorities on this topic could be useful, as this may permit automation of the SSAD on the basis that the Central Gateway/CPs are only taking a preparatory decision.

Safeguards

A list of suggested data protection safeguards is set out in Appendix 2 of this document. This includes among other things: engaging with supervisory authorities, clearly scoping each use case and establishing a legal basis, imposing appropriate terms of disclosure on the Requestor, implementing appropriate security measures, taking measures to comply with the accountability principle, establishing policies for satisfying individuals' rights, and entering into appropriate data protection clauses with processors.

Transparency

The manner of providing information is not affected by the existence of automated decision making; but the content of the information is.

- The information will typically be provided through the privacy notice; given the importance of the SSAD in the Domain Name system, it would be appropriate to present it in a prominent manner.
- It would be most efficient for registrars to provide the relevant information (given their direct relationship with registrants), irrespective of whether not they are considered controllers in the SSAD context. If they are not controllers, but provide the information on behalf of the controller, this should be made clear to registrants.
- In terms of the content, for Art. 22 decisions only, the notice must also include information about: the existence of automated decision, the logic involved and the significance and envisaged consequences of the processing.
- The elements of Art. 15 GDPR (right of access) need to be provided on request even if they have already been included in the notice.
- The right of access requires controllers to provide information on the recipients to whom the data "have been or will be disclosed": this indicates that, absent applicable exemptions, registrants exercising their right of access must be informed about disclosures of their data to third parties.

Status of parties

(a) Under Scenario 1, the ultimate decision to disclose registrant data rests with the CPs. The analysis carried out in the Liability memo would also apply here and most likely CPs would be considered by supervisory authorities as joint controllers along with ICANN.

(b) Under Scenario 2, the situation is less clear. Depending on whether a macro-or micro-level approach is adopted, the CPs may be found to be (joint) controllers for the automated decision making and the disclosure of data to Requestors or merely for the disclosure of data to the Central Gateway. We think the second option (controllers just for the disclosure of data to the Central Gateway) is the better analysis, but the point is not clear. The outsourcing of the decision making to an independent legal service provider would be unlikely to alter the above position.

In both scenarios, it would not be plausible to argue that CPs are processors.

Liability of CPs is examined in respect of:

(a) status of CPs: where CPs are joint controllers, it is important to clearly allocate tasks and responsibilities by means of an agreement;
(b) type of liability:

- Liability towards individuals: the rule is joint and several liability and CPs can be held liable for the entire damage caused by processing they are involved in, irrespective of their status. They can only avoid this by demonstrating that they were not in any way involved in the event giving rise to the damage. Otherwise, they have the right to claim back from the other controllers the part of compensation corresponding to their responsibility.
- Liability to supervisory authorities: joint and several liability is less clear here and there is scope to argue that enforcement action should be imposed based on the "degree of responsibility" of the party.

In terms of risk, Scenario 2 seems to present lower risk of liability both in respect of compensation to individuals and of enforcement action by supervisory authorities.