

The EPDP Team was tasked by the GNSO Council to address the following two questions:

- i. Whether any updates are required to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”);
- ii. What guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.

In addressing these questions, the EPDP Team started with a review of all relevant information, including (1) [the study](#) undertaken by ICANN org,<sup>1</sup> (2) the [legal guidance](#) provided by Bird & Bird, and (3) the substantive input provided on this topic during [the public comment forum on the addendum](#). Following the review of this information, the EPDP Team identified a number of clarifying questions, that, following review by the EPDP Team’s legal committee, were submitted to the Bird & Bird (see <https://community.icann.org/x/xQhACQ>).

As part of its approach in dealing with these two questions, the EPDP Team agreed to commence with identifying possible guidance to Registrars and/or Registries who decide to differentiate between registrations of legal and natural persons.

Definitions (note, these are derived from previous EPDP-related work, as indicated below):

- EPDP-p1-IRT: “Publication”, “Publish”, and “Published” means to provide Registration Data in the publicly accessible Registration Data Directory Services.
- EPDP-p1-IRT: "Registration Data" means the data element values collected from a natural or legal person or generated by Registrar or Registry Operator, in either case in connection with a Registered Name in accordance with Section 7 of this Policy.
- EPDP-P1 Final Report: Disclosure: The processing action whereby the Controller accepts responsibility for release of personal information to third parties upon request.

### **Background Information and EPDP Team Observations**

In developing the guidance below, the EPDP Team would like to remind the Council and broader community of the following:

#### *Scope of GDPR and other data protection legislation*

- A. GDPR and other data protection legislation set out requirements for protecting personal data, not non-personal data.

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<sup>1</sup> As part of its Phase 1 Policy Recommendation #17, the EPDP Team recommended, “as soon as possible ICANN Org undertakes a study, for which the terms of reference are developed in consultation with the community, that considers:

- The feasibility and costs including both implementation and potential liability costs of differentiating between legal and natural persons;
- Examples of industries or other organizations that have successfully differentiated between legal and natural persons;
- Privacy risks to registered name holders of differentiating between legal and natural persons; and
- Other potential risks (if any) to registrars and registries of not differentiating.

ICANN or delivered the [study](#) to the EPDP Team in July 2020.

- B. Distinguishing between legal and natural person data alone may not be dispositive, as the data provided by legal persons may include personal data that is protected under data protection law, such as GDPR.

#### *Relevant EPDP Phase 1 Recommendations*

- C. Per EPDP Phase 1<sup>2</sup> Recommendation #6, “as soon as commercially reasonable, Registrar must provide the opportunity for the Registered Name Holder to provide its Consent to publish redacted contact information, as well as the email address, in the RDS for the sponsoring registrar”.
- D. Per the EPDP Phase 1 recommendation #17 “Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”.

#### *Relevant EPDP Phase 2 Recommendations*

- E. Per Phase 2<sup>3</sup> Final Report Recommendation #9.4.4, which addresses automation of SSAD processing: “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 (...) No personal data on registration record that has been previously disclosed by the Contracted Party.” In other words, if a Contracted Party manually reviews a disclosure request pursuant to EPDP Phase 2 Recommendation 8, and determines there is no personal data present, the Contracted Party must disclose the requested data to the third party. Following disclosure, the Contracted Party must mark the domain name for automated disclosure for future disclosure requests associated with that domain name.<sup>4</sup>
- F. Per Phase 2 Final Report Recommendation #8.7.1, if the Contracted Party receives a request from the SSAD Central Gateway Manager and the Contracted Party has determined this to be a valid request, “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”.

#### *Registrar Business Models*

- G. Registrars operate different business models (Retail, Reseller, Brand Protection, Others), and one-size-fits-all or overly prescriptive guidance does not properly consider the range of registrar business models and the various process flows the different business models may require. Instead, Registrars desire flexibility to implement differentiation in a manner that best suits their business model and reduces the risks associated with differentiation to an acceptable level for that particular Registrar.

## **Proposed Guidance**

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<sup>2</sup> For further information about the status of implementation of the EPDP Phase 1 recommendations, please see <https://www.icann.org/resources/pages/registration-data-policy-gtlds-epdp-1-2019-07-30-en>.

<sup>3</sup> Note that the EPDP Phase 2 recommendations are with the ICANN Board for its consideration / approval.

<sup>4</sup> Please note that the exact details of how this recommendation will be implemented are to be determined by ICANN org in collaboration with the Implementation Review Team, once the ICANN Board has approved the recommendations.

The EPDP Team would like to put forward the following guidance to assist Registrars who want to differentiate between registrations of natural and legal persons, or those of legal persons containing personal and non-personal data.

1. Differentiation between the data sets of natural and legal persons could typically occur at the time of registration. However, some EPDP Team members have indicated that this may not be possible or practical in all circumstances, including for certain registrar business models.
2. As part of the implementation, Registrars should consider using a type of flag in the RDDS or their own data sets that would indicate the type of data it concerns (personal or non-personal data) as this could facilitate review of disclosure requests via SSAD and the return of non-personal data of legal persons by systems other than SSAD (such as Whois or RDAP). A flagging mechanism could also assist in indicating changes to the type of data in the registration data field(s).
3. In all of the below scenarios, clear communication and guidance should be provided to the registrant (data subject) by the Registrar concerning the possible consequences of both identifying a data set as being of a natural or a legal person, and confirming the presence of personal data or non-personal data. This is also consistent with section 3.7.7.4 of the Registrar Accreditation Agreement (RAA).

#### Example scenarios

The EPDP Team has identified three different high-level scenarios for how differentiation could occur based on who is responsible and the timing of such differentiation. It should be noted that other approaches and/or a combination of these may be possible.

1. Data subject self-identification at time of data collection / registration
  - a. The Registrar informs the Registrant (per guidance #3 above) and requests the Registrant (data subject) at the moment of Registration data collection to designate legal or natural person type. The Registrar must also request the Registrant to confirm whether only non-personal data is provided for legal person type.<sup>5</sup>
  - b. If the Registrant (data subject) has selected legal person and has provided a confirmation that the registration data does not include any personal data, the Registrar (i) sets the registration data set to automated disclosure in response to SSAD queries and (ii) Publishes the data (to provide Registration Data in the publicly accessible Registration Data Directory Services).
  - c. If the Registrant (data subject) has selected natural person or has confirmed that personal data is present, the Registrar does not set that registration data to automated disclosure and Publication, unless the data subject consents to Publication.<sup>6</sup>

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<sup>5</sup> Note that the confirmation that only non-personal data is provided could also happen at a later point in time. However, until the Registrant confirms that no personal data is present in the registration data, the Registrar does not set the registration data to automated disclosure.

<sup>6</sup> Note that the data subject may not be the party executing the process but may have requested a third party to do so. In such circumstance consent may not be possible.

- d. If the Registrant (data subject) makes any substantive change to the registration data, the Registrar is expected to confirm that these updates do not result in changes to the registrant type or the previous confirmation of whether only non-personal data is provided for legal person type. If the updates do result in changes, Registrar must repeat Steps a-c above.
2. Data subject self-identification after initial collection
    - a. The Registrar collects Registration Data and provisionally redacts the data.
    - b. The Registrar informs the Registrant (per guidance #3 above) and requests the Registrant (data subject) to designate legal or natural person type. The Registrar must also request the Registrant to confirm whether only non-personal data is provided for legal person type.<sup>7</sup>
    - c. Registrant (data subject) indicates legal or natural person type and whether or not the registration contains personal information after registration is completed. For example, the Registrant may confirm person type at the time of initial data verification, in response to its receipt of the Whois data reminder email for existing registrations, or through a separate notice requesting self-identification.<sup>8</sup>
    - d. If the data subject identifies as a legal person and confirms that the registration data does not include personal data, the Registrar (i) sets the registration data set to automated disclosure in response to SSAD queries and (ii) Publishes the data.
  3. Registrar determines type based on data provided
    - a. The Registrar collects Registration Data and provisionally redacts the data.
    - b. The Registrar uses collected data to infer legal or natural person type.<sup>9</sup>
    - c. If legal person is inferred by the Registrar and subsequently the Registrant (data subject) is informed (per guidance #3 above) and confirms that no personal data is present, the Registrar (i) sets the registration data set to automated disclosure in response to SSAD queries and (ii) Publishes the data.
    - d. If the Registrar has inferred natural person or has detected personal data, the Registrar must not disclose registration data unless the Registrant provides consent for publication or the Registrar Discloses the data in response to a legitimate disclosure request.

Registrars shall not be prohibited from voluntarily utilizing a third party to verify that a registrant has correctly identified its data, provided that provided such verification is compliant with applicable data protection regulations.

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<sup>7</sup> Note that the confirmation that only non-personal data is provided could also happen at a later point in time. However, until the Registrant confirms that no personal data is present in the registration data, the Registrar does not set the registration data to automated disclosure.

<sup>8</sup> Note, the implementation of EPDP Phase 1, recommendation #12 (Organization Field) may facilitate the process of self-identification.

<sup>9</sup> Some EPDP Team members have noted that there may be risks for the Registrar to infer a differentiation without involvement of the Registrant (data subject).

The EPDP Team recognizes that in all of the above scenarios, there is the possibility of misidentification, which may result in the inadvertent disclosure of personal data. However, the EPDP Team recommends that Contracted Parties who choose to differentiate based on person type SHOULD follow the guidance above and clearly document all data processing steps. It is not the role or responsibility of the EPDP Team to assess the legal risks, as that responsibility ultimately belongs to the data controller.