

EPDP Team Responses to Charter Questions & Preliminary Recommendations

DISCLAIMER: ALL CONTENT, AND ESPECIALLY THE DRAFT RECOMMENDATIONS, WILL NEED TO BE CROSS-CHECKED WITH THE FINAL LANGUAGE AGREED TO BY THE EPDP TEAM BEFORE PUBLICATION.

From the EPDP Team Charter:

“The EPDP Team is being 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. As part of this determination, the EPDP Team is, at a minimum, expected to consider the following elements of the Temporary Specification and answer the following charter questions. The EPDP Team shall consider what subsidiary recommendations it might make for future work by the GNSO which might be necessary to ensure relevant Consensus Policies, including those related to registration data, are reassessed to become consistent with applicable law”.

Part 1: Purposes for Processing Registration Data

a) Purposes outlined in Sec. 4.4.1-4.4.13 of the Temporary Specification:

- a1) Are the purposes enumerated in the Temporary Specification valid and legitimate?
- a2) Do those purposes have a corresponding legal basis?
- a3) Should any of the purposes be eliminated or adjusted?
- a4) Should any purposes be added?

EPDP Team considerations and deliberations in addressing the charter questions:

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- In addition, the EPDP Team reviewed the feedback that the European Data Protection Board provided in relation to lawful purposes for processing personal data and took specific note of the following:

“Nevertheless, the EDPB considers it essential that a clear distinction be maintained between the different processing activities that take place in the context of WHOIS and the respective purposes pursued by the various stakeholders involved. There are processing activities determined by ICANN, for which ICANN, as well as the registrars and registries, require their own legal basis and purpose, and then there are processing

activities determined by third parties, which require their own legal basis and purpose. The EDPB therefore reiterates that ICANN should take care not to conflate its own purposes with the interests of third parties, nor with the lawful grounds of processing which may be applicable in a particular case.”¹

- All of the aforementioned input has been captured in the Discussion Summary Index for section 4.4 which can be found here: <https://community.icann.org/x/ExxpBQ>.
- The EPDP Team deliberated on the purposes listed in the Temporary Specification as a starting point, but decided to reformulate the text and further specify the relevant legal basis (if any) and the party/parties involved in the processing.

EPDP Team Preliminary Rec #1.

The EPDP Team recommends that the following purposes, with the identified legal basis and party/parties involved in the processing, form the basis of the new policy for gTLD registration data: [to be updated with final table]

Purpose	Legal Basis	Controller / Co-Controller
Establish the rights of a Registered Name Holder in a Registered Name and ensuring that the Registered Name Holder may exercise its rights in respect of the Registered Name	6(1)(b)	ICANN, Registries, Registrars
Provide for lawful disclosure of registration data to third parties with legitimate interests to data that is already collected	6(1)(f)	Registries, registrars
Enable communication or notification to the Registered Name Holder and/or their delegated parties of technical and/or administrative issues with a Registered Name	6(1)(b)	ICANN, Registrars
Provide mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical	6(1)(f)	ICANN

¹ See <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf>

failure, or other unavailability of a Registrar or Registry Operator		
Handle contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users.	6(1)(f)	ICANN
Coordinate the development and implementation of policies for resolution of disputes ² regarding the registration of domain names (as opposed to the use of such domain names). (ICANN bylaws Annex G and 1(1) section I(a	6(1)(b)	ICANN
Enabling validation of Registered Name Holder satisfaction (fulfillment) of registration policy eligibility criteria.	6(1)(b)	Registries

Note that additional processing activities in relation to these purposes may fall under a different legal basis. If so, this has been outlined in the relevant data elements workbook which can be found in Annex [include reference].

Part 2: Required Data Processing Activities

b) Collection of registration data by registrar:
<p>b1) What data should registrars be required to collect for each of the following contacts: Registrant, Tech, Admin, Billing?</p> <p>b2) What data is collected because it is necessary to deliver the service of fulfilling a domain registration, versus other legitimate purpose as outlined in part (A) above?</p> <p>b3) How shall legitimacy of collecting data be defined (at least for personal data collected from European registrants and others in jurisdictions with data protection law)?</p> <p>b4) Under the purposes identified in Section A, is there legal justification for collection of these data elements, or a legal reason why registrars should not continue to collect all data elements for each contact?</p>

² Further consideration to be given whether RDDRP, PDDRP and PICDRP need to be added here or considered separately.

EPDP Team considerations and deliberations in addressing the charter questions:

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- In addition, the EPDP Team reviewed the feedback that the European Data Protection Board provided in relation to the collection of registration data and took specific note of the following:

“The EDPB considers that registrants should in principle not be required to provide personal data directly identifying individual employees (or third parties) fulfilling the administrative or technical functions on behalf of the registrant. Instead, registrants should be provided with the option of providing contact details for persons other than themselves if they wish to delegate these functions and facilitate direct communication with the persons concerned. It should therefore be made clear, as part of the registration process, that the registrant is free to (1) designate the same person as the registrant (or its representative) as the administrative or technical contact; or (2) provide contact information which does not directly identify the administrative or technical contact person concerned (e.g. For the avoidance of doubt, the EDPB recommends explicitly clarifying this within future updates of the Temporary Specification³”.

- All of the aforementioned input has been captured in the Discussion Summary Index for Appendix A which can be found here: <https://community.icann.org/x/ExxpBQ>.
- As a starting point, the EPDP examined data elements required to be collected today. The data elements workbooks in Annex [include reference] outline in detail which data elements are required to be collected for which purpose, and which data elements are optional for a registered name holder to provide. Similarly, the data elements workbooks identify the applicable legal basis. Those as identified as art. 6.1(b) are considered necessary for the performance of a contract.

EPDP Team Preliminary Rec #2.

The EPDP Team recommends that the data elements defined in the data elements workbooks in Annex [include reference] are required to be collected by registrars. In the aggregate, this means that the following data elements are to be collected: [to be updated with final list of data elements]

³ See <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf>

Data Elements to be Collected or Generated	Fields to be Collected (1) denotes optional collection
Domain Name	1
Registrar Whois Server	1
Registrar URL	1
Updated Date	1
Creation Date	1
Registry Expiry Date	1
Registrar Registration Expiration Date	1
Registrar	1
Registrar IANA ID	1
Registrar Abuse Contact Email	1
Registrar Abuse Contact Phone	1
Reseller	1
Domain Status	1
Registrant Fields	
• Name	1
• Organization (opt.)	(1)
• Street	1
• City	1
• State/province	(1)
• Postal code	(1)
• Country	1
• Phone	1
• Phone ext (opt.)	(1)
• Email	1
Admin Fields	
• Name	(1)
• Organization (opt.)	(1)
• Street	(1)
• City	(1)
• State/province	(1)
• Postal code	(1)
• Country	(1)
• Phone	(1)
• Phone ext (opt.)	(1)

Data Elements to be Collected or Generated	Fields to be Collected (1) denotes optional collection
• Email	(1)
Tech Fields	
• Name	(1)
• Organization (opt.)	(1)
• Street	(1)
• City	(1)
• State/province	(1)
• Postal code	(1)
• Country	(1)
• Phone	(1)
• Phone ext (opt.)	(1)
• Email	(1)
NameServer(s)	1
DNSSEC	1
Name Server IP Address	1
Last Update of Whois Database	1

In addition, the EPDP Team recommends that the following data elements may, but are not required, to be provided by the registered name holder. Furthermore, per the EDPB advice, registrars are to advise the registered name holder at the time of registration that the registered name holder is free to (1) designate the same person as the registrant (or its representative) as the administrative or technical contact; or (2) provide contact information which does not directly identify the administrative or technical contact person concerned. [Registrars must ensure that the personal data of the technical and/or administrative contact is not published absent GDPR-compliant consent].

c) Transfer of data from registrar to registry:

- c1) What data should registrars be required to transfer to the registry?
- c2) What data is required to fulfill the purpose of a registry registering and resolving a domain name?
- c3) What data is transferred to the registry because it is necessary to deliver the service of fulfilling a domain registration versus other legitimate purposes as outlined in part (a) above?
- c4) Is there a legal reason why registrars should not be required to transfer data to the registries, in accordance with previous consensus policy on this point?

c5) Should registries have the option to require contact data or not?

c6) Is there a valid purpose for the registrant contact data to be transferred to the registry, or should it continue to reside at the registrar?

EPDP Team considerations and deliberations in addressing the charter questions:

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- For each of the purposes, the EPDP Team has identified where and which data is transferred from the registrar to registry as well as the legal basis involved – see the data elements workbooks for further details. Those processing activities identified as having as a legal basis GDPR Art 6.1(b) are those that are considered necessary for the performance of a contract, i.e., to deliver the service of fulfilling a domain registration.

EPDP Team Preliminary Rec #3.

The EPDP Team confirms that the following data elements are transferred from registrar to registry, for the following purposes and with the following legal basis:

[Include table of purposes & processing that require registrar to registry transfer following completion of data elements workbooks, incl. legal basis]

d) Transfer of data from registrar/registry to data escrow provider:

d1) Should there be any changes made to the policy requiring registries and registrars to transfer the data that they process to the data escrow provider?

d2) Should there be any changes made to the procedures for transfer of data from a data escrow provider to ICANN Org?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- [Update following the completion of the data elements workbooks for purpose E Registry – Registrar Escrow]

EPDP Team Preliminary Rec #4.

The EPDP Team recommends that [no changes or these changes be made] [update following completion of data elements workbooks for purpose E]

See also recommendation #18 [update reference as needed]

e) Transfer of data from registrar/registry to ICANN:

e1) Should there be any changes made to the policy requiring registries and registrars to transfer the domain name registration data that they process to ICANN Compliance, when required/requested?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- [Update following the completion of the data elements workbooks for purpose F]

EPDP Team Preliminary Rec #5.

The EPDP Team recommends that [no changes or these changes be made] [update following completion of data elements workbooks for purpose F]

f) Publication of data by registrar/registry:

- f1) Should there be any changes made to registrant data that is required to be redacted? If so, what data should be published in a freely accessible directory?
- f2) Should standardized requirements on registrant contact mechanism be developed?
- f3) Under what circumstances should third parties be permitted to contact the registrant, and how should contact be facilitated in those circumstances?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- For each of the purposes, the EPDP Team has identified in the data elements workbooks in Annex [include reference] which data is to be published in a freely accessible directory and what data elements should be redacted.

EPDP Team Preliminary Rec #6.

The EPDP Team recommends that the following data elements must be redacted:

[include table of data elements to be redacted following completion of work on data elements workbooks]

EPDP Team Preliminary Rec #7.

The EPDP Team recommends that the following data elements must be published in a freely accessible directory:

[include table of data elements which must be published following completion of work on data elements workbooks]

g) Data retention:

- g1) Should adjustments be made to the data retention requirement (life of the registration + 2 years)?
- g2) If not, are changes to the waiver process necessary?
- g3) In light of the EDPB letter of 5 July 2018, what is the justification for retaining registration data beyond the term of the domain name registration?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- In addition, the EPDP Team reviewed the feedback that the European Data Protection Board provided in relation to data retention and took specific note of the following:

“personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (article 5(2) GDPR). This is a matter which has already been addressed repeatedly by both the WP29 and the EDPS.¹⁹ It is for ICANN to determine the appropriate retention period, and it must be able to demonstrate why it is necessary to keep personal data for that period. So far ICANN is yet to demonstrate why each of the personal data elements processed in the context of WHO IS must in fact be retained for a period of 2 years beyond the life of the domain name registration. The EDPB therefore reiterates the request ICANN to re-evaluate the proposed retention period of two years and to explicitly justify and document why it is necessary to retain personal data for this period in light of the purposes pursued”⁴.

- For each of the purposes, the EPDP Team has identified in the data elements workbooks in Annex [include reference] the desired data retention period, including a rationale for why data needs to be retained for that period.

EPDP Team Preliminary Rec #8.

The EPDP Team recommends the following data retention period(s):

[to be updated following the completion of the work on the data elements workbooks]

h) Applicability of Data Processing Requirements
--

- | |
|---|
| <ul style="list-style-type: none"> h1) Should Registry Operators and Registrars (“Contracted Parties”) be permitted or required to differentiate between registrants on a geographic basis? h2) Is there a legal basis for Contracted Parties to differentiate between registrants on a geographic basis? h3) Should Contracted Parties be allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status? h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently? |
|---|

⁴ See <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf>

h5) What are the risks associated with differentiation of registrant status as legal or natural persons across multiple jurisdictions? (See EDPB letter of 5 July 2018).

i) Transfer of data from registry to Emergency Back End Registry Operator (“EBERO”)

i1) Consider that in most EBERO transition scenarios, no data is actually transferred from a registry to an EBERO. Should this data processing activity be eliminated or adjusted?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- [Update following the completion of the data elements workbook for purpose E - EBERO]

EPDP Team Preliminary Rec #9. T

The EPDP Team recommends that [update following completion of workbook for purpose E – EBERO]

See also recommendation #18 [update reference as needed]

j). Temporary Specification and Reasonable Access

j1) Should existing requirements in the Temporary Specification remain in place until a model for access is finalized?

A. If so:

1. Under Section 4 of Appendix A of the Temporary Specification, what is meant by “reasonable access” to Non-Public data?
2. What criteria must Contracted Parties be obligated to consider in deciding whether to disclose non-public Registration data to an outside party requestor (i.e. whether or not the legitimate interest of the outside party seeking disclosure are overridden by the interests or fundamental rights or freedoms of the registrant)?

B. If not:

1. What framework(s) for disclosure could be used to address (i) issues involving abuse of domain name registrations, including but not limited to consumer protection, investigation of cybercrime, DNS abuse and intellectual property protection, (ii) addressing appropriate law enforcement needs, and (iii) provide access to registration data based on legitimate interests not outweighed by the fundamental rights of relevant data subjects?

j2) Can the obligation to provide “reasonable access” be further clarified and/or better defined through the implementation of a community-wide model for access or similar framework which takes into account at least the following elements:

1. What outside parties / classes of outside parties, and types of uses of non-public Registration Data by such parties, fall within legitimate purposes and legal basis for such use?
2. Should such outside parties / classes of outside parties be vetted by ICANN in some manner and if so, how?
3. If the parties should not be vetted by ICANN, who should vet such parties?
4. In addition to vetting the parties, either by ICANN or by some other body or bodies, what other safeguards should be considered to ensure disclosure of Non-Public Personal Data is not abused?

Part 3: Data Processing Terms

k) ICANN's responsibilities in processing data

- k1) For which data processing activities undertaken by registrars and registries as required by the Temporary Specification does ICANN determine the purpose and means of processing?
- k2) In addition to any specific duties ICANN may have as data controller, what other obligations should be noted by this EPDP Team, including any duties to registrants that are unique and specific to ICANN's role as the administrator of policies and contracts governing gTLD domain names?

l) Registrar's responsibilities in processing data

- l1) For which data processing activities required by the Temporary Specification does the registrar determine the purpose and means of processing?
- l2) Identify a data controller and data processor for each type of data.
- l3) Which registrant data processing activities required by the Temporary Specification do registrars undertake solely at ICANN's direction?
- l4) What are the registrar's responsibilities to the data subject with respect to data processing activities that are under ICANN's control?

m) Registry's responsibilities in processing data

- m1) For which data processing activities required by the Temporary Specification does the registry determine the purpose and means of processing?
- m2) Which data processing activities required by the Temporary Specification does the registry undertake solely at ICANN's direction?
- m3) Are there processing activities that registries may optionally pursue?
- m4) What are the registry's responsibilities to the data subject based on the above?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- Through its work on the data elements workbooks, the EPDP Team has identified the following for each of the purposes: (1) responsible party/parties, and (2) which party/parties is/are involved in the relevant processing steps.
- [Include table to provides overview of different purposes as well as owners of processing steps]

Part 4: Updates to Other Consensus Policies

n) URS
n1) Should Temporary Specification language be confirmed, or are additional adjustments needed?

o) UDRP
o1) Should Temporary Specification language be confirmed, or are additional adjustments needed?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- The EPDP Team noted that as of the Team’s deliberations, no significant issues have been reported in relation to the functioning and operation of the URS and UDRP following the adoption of the Temporary Specification. The EPDP Team also took note of the fact that an existing GNSO PDP WG, namely the Review of All Rights Protection Mechanisms in All gTLDs (RPMs) PDP WG, is currently tasked with reviewing the URS and UDRP and is expected to factor in any changes resulting from GDPR Requirements.
- The EPDP Team observed that the reference in the Temporary Specification to ‘in another mechanism’ was unclear. As such, this should be clarified, possibly by adding ‘determined by the EPDP Team’ to clarify that the EPDP Team may develop or recommend as part of its discussions on a standardized access framework (once the Charter’s gating questions have been addressed) another mechanism by which full Registration Data is expected to be made available by the Registry Operator.

EPDP Team Preliminary Rec #10.

The EPDP Team recommends that for the new policy on gTLD registration data the requirements of the Temporary Specification are maintained in relation to URS and UDRP until such time as these are superseded by recommendations that may come out of the RPMs PDP WG.

EPDP Team Preliminary Rec #11.

The EPDP Team recommends that the GNSO Council instructs the review of all RPMs PDP WG to consider as part of its deliberations whether there is a need to update existing requirements to clarify that a complainant must only be required to insert whatever publicly-available RDDS data exists for the domain name(s) at issue, and must be given the opportunity to file an amended complaint upon obtaining the full RDDS data post-filing.

EPDP Team Preliminary Rec #12.

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.

EPDP Team Preliminary Rec #13.

The EPDP Team recommends that ICANN Org should enter into data processing agreements with dispute resolution providers in which [,amongst others,] the data retention period is addressed, considering the interest in having publicly-available decisions.

p) Transfer Policy
p1) Should Temporary Specification language be confirmed or modified until a dedicated PDP can revisit the current transfer policy? p2) If so, which language should be confirmed, the one based on RDAP or the one based in current WHOIS?

- The EPDP Team considered both the input provided by each group in response to the triage surveys as well as the input provided by each group in response to the request for early input in relation to these questions.
- The EPDP Team noted that as of the Team's deliberations, no significant issues have been reported in relation to the functioning and operation of the Transfer Policy, although some indicated that based on anecdotal evidence, the number of hijacking incidents may have gone down as the result of the registrant email address no longer being available, while others pointed to increased security risks as a result of those changes.
- The EPDP Team also took note of the fact that a review of the Transfer Policy has commenced which, in addition to including an overall review of the Transfer Policy is also includes additional information as to how the GDPR and the Temporary Specification requirements have affected transfers.

EPDP Team Preliminary Rec #14.

The EPDP Team recommends that for the new policy on gTLD registration data, the requirements of the Temporary Specification are maintained in relation to the Transfer Policy until such time these are superseded by recommendations that may come out of the Transfer Policy review that is being undertaken by the GNSO Council.

EPDP Team Preliminary Rec #15.

The EPDP Team recommends that the GNSO Council, as part of its review of the Transfer Policy, specifically requests the review of the implications, as well as adjustments, that may be needed to the Transfer Policy as a result of GDPR.

q) Sunsetting WHOIS Contractual Requirements q1) After migration to RDAP, when can requirements in the Contracts to use WHOIS protocol be eliminated? q2) If EPDP Team’s decision includes a replacement directory access protocol, such as RDAP, when can requirements in the Contracts to use WHOIS protocol be eliminated?
--

Other recommendations

EPDP Team Preliminary Rec #16.

The EPDP Team recommends that requirements related to the accuracy of registration data under the current ICANN contracts and consensus policies shall not be affected by this policy.

EPDP Team Preliminary Rec #17.

[The EPDP Team recommends that identification of Data Controllers & Processors or other recommendations made in this report will not affect “No Third-Party Beneficiary” clauses in existing ICANN-Contracted Party agreements.]

EPDP Team Preliminary Rec #18.

The EPDP Team recommends that ICANN Org enters into the required data protection agreements such as a Data Processing Agreement (GDPR Art. 28) or Joint Controller Agreement (Art. 26), as appropriate, with other entities involved in registration data processing such as Contracted Parties, escrow providers and EBERO providers. These agreements are expected to set out the relationship obligations and instructions for data processing between the different parties.

1.1 EPDP Team’s Policy Change Impact Analysis

[If the WG concludes with any recommendations, the EPDP must include a policy impact analysis and a set of metrics to measure the effectiveness of the policy change, including source(s) of baseline data for that purpose (from the EPDP Team Charter:

- Determine the policy goals for this exercise, within the parameters set by the Temporary Interim Specification.
- Identify potential policy goals that were omitted in the Temporary Specification and set aside for further Council deliberation.
- Determine a set of questions which, when answered, provide the insight necessary to achieve the policy goals.
- Determine the types of data that may assist the WG in better scoping the issues and identify whether it can be collected within the timeframe, and assemble or substitute information that can be analyzed to help answer each question.
- Determine a set of metrics which can be applied to the data, analysis, and achievement of policy objectives. Collect this data to the extent feasible, and determine a process for ongoing metric analysis and program evaluation to measure success of this policy process.