

Summary Report of Public Comment Proceeding

EPDP Phase 2 Policy Recommendations for Board Consideration

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Section I: General Overview and Next Steps

This Public Comment proceeding sought to obtain community input prior to ICANN Board action on a subset of final policy recommendations of the Generic Names Supporting Organization Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data (EPDP) – Phase 2. Specifically, this Public Comment proceeding sought input on a set of final recommendations related to the System for Standardized Access/Disclosure (“SSAD”). ICANN org has prepared a summary of the submissions received, and this report, along with the full text of the comments received, will be transmitted to the ICANN Board for its consideration.

It should be noted, however, that during its meeting on [25 March 2021](#), the ICANN Board directed ICANN org to initiate an Operational Design Phase on the Phase 2 policy recommendations related to SSAD. Accordingly, the ICANN Board will consider the policy recommendations related to the SSAD following the Operational Design Phase.

Section II: Contributors

At the time this report was prepared, a total of eight (8) community submissions had been posted. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in Section III, such citations will reference the contributor’s initials.

Organizations and Groups:

Name	Submitted by	Initials
Registries Stakeholder Group	Elizabeth Bacon	RySG
Registrar Stakeholder Group	Zoe Bonython	RrSG
Business Constituency	Steve DelBianco	BC
Intellectual Property Constituency	Brian King	IPC
Tucows	Reg Levy	Tucows
Non-Commercial Stakeholder Group	Tomslin Samme-Nlar	NCSG
International Trademark Association	Lori Schulman	INTA
Namecheap, Inc.	Owen Smigelski	NI

Section III: Summary of Comments

General Disclaimer: This section intends to summarize, broadly and comprehensively, the comments submitted to this Public Comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Submissions).

Overarching Comments and Concerns

Some commenters, including NI, RySG, and RrSG support the EPDP Phase 2 Final Report as a complete package. In other words, these commenters recommend the Board consider the Phase 2 recommendations as a whole and avoid assessing or interpreting recommendations independently.

NI noted a perceived lack of good faith participation by several participants on the EPDP Team, noting that some EPDP members submitted minority statements that may have been supported by their respective constituency but “are not reflective of the collective efforts of the EPDP team.” NI goes on to question “the commitment of these parties to the ICANN process and multistakeholder model”. NI is concerned with participants who (i) advocate for government intervention to circumvent ICANN policy and (ii) “resort to legal action to address perceived inadequacies”.

The RrSG notes its disappointment that “that the EPDP Team worked for almost one and a half years to develop the policy for the SSAD only for the intended users of the SSAD to withdraw their support at the very end and now indicate that they do not intend to use the SSAD.”

Tucows also notes the intended users “attempt to undermine the multistakeholder process now that the Final Report has been published and sent to the Board for review is an attempt to redraft the Policy Recommendations for the SSAD.” Tucows notes that the Board must not allow this; specifically, Tucows provides, “if the Board rejects the SSAD, whether on the basis of stakeholder-beneficiaries’ comments or not, no further PDP on the subject is required.”

Several commenters including BC, IPC, and INTA note concerns with the consensus levels noted within the Phase 2 Final Report. For example, INTA notes “it is clear from the Minority Statements submitted to the EPDP by the ICANN community Advisory Committees and Constituencies that the SSAD-related Phase 2 recommendations lack such community consensus.” Similarly, BC provides “the SSAD proposed by the Final Report lacks the support of its intended users, lacks consensus among EPDP members and the ICANN community at large, and ultimately fails to serve the public interest by failing to support the security and stability of the Internet.”

INTA goes on to note particular concern that the lack of community consensus “relates to the recommendations which are most critical to the successful operation of SSAD and [...] the dissenting voices come from the very stakeholders that would be users of the SSAD.” INTA also notes the inability of intellectual property owners, among others “to legitimately obtain domain registrant data in a timely and cost-effective manner would only diminish ICANN’s efforts to ensure the safety, security, and stability of the DNS.”

INTA urges the Board to remand the recommendations to the EPDP Team for further work as the adoption of these recommendations “would set a dangerous precedent for ICANN and its policy development and implementation role,” and the adoption of the recommendations would not be in the public interest.

The BC also urges the Board to “[remand] the SSAD recommendations back to the EPDP for further work to properly define a model for access to registration data that ensures that disclosure is

proportionate and limited to the legitimate interest of the requesting party. Anything less is nothing at all.” The BC goes on to note the Final Report “falls dramatically short of ICANN’s goal and that the Board must intervene in order to realign the system for standardized access with the interests of the community and the public. To be clear, the Board must not hide behind majority approval within the GNSO Council as a proxy for community consensus given the strong opposition to the SSAD amongst its intended users within the EPDP. Nor should the Board use the GNSO Council’s vote as an excuse to move forward in dereliction of ICANN’s core value of protecting the global public interest.”

The BC goes on to note, “the inability of Internet users to identify with whom they are doing business with online, and the increasingly pervasive inability of law enforcement, cybersecurity, and legal professionals to identify criminal actors online through their domain name registration data, severely undermines the security and stability of the Internet. This comment is not made lightly and is not offered to the Board as hyperbole; if the Board approves the SSAD in its current form, then BC members will not use it and will recommend that other commercial entities also not use it. Furthermore, a decision by the Board to move forward in spite of all of the stated community opposition to the SSAD will serve as a strong signal to national regulators that more concerted intervention and direct regulation through administrative, legislative and judicial means are all necessary within the domain name industry. Put another way, the EPDP’s experimentation in providing legitimate access to non-public registration data will be viewed as a failure of the multistakeholder model, and it will be taken entirely out of the community’s hands.”

The IPC asks the Board to remand the recommendations to the GNSO “for the development of a centralized registration data access model which will work for its intended users.” The IPC bases its request off of the following, “the SSAD recommendations do not follow the advice of the Belgian DPA and Bird & Bird, lack centralized decision making, lack a sufficient mechanism for evolution, and lack enforceability. We reiterate that the SSAD contemplated by the EPDP Phase 2 will neither provide data predictably nor sufficiently timely access for its intended users.” The IPC notes the Board should not adopt the SSAD recommendations “because [i] the recommendations lack the requisite consensus to be adopted and enforced as consensus policy; [ii] adopting these recommendations is not in the public interest; [iii] and the Board should first seek to fully understand how the NIS2 Directive impacts the relationship between GDPR and domain registration data.”

The RySG notes the concerns of many groups, including several groups that participated on the EPDP Team, but the RySG noted that the eventual system must conform to the following key principles “(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.” The RySG further notes it remains “firm in our belief that the solution proposed reflects the reality of what is possible under law today, and is the best means not only to protect registrants’ personal data, but to comfortably fulfill our legal obligations, in support of the fundamental foundations of security, stability and resiliency.”

The NCSG notes the focus during the EPDP was on the “rights” of the requestor to access data; however, NCSG maintains third party access to data is not a right, but a privilege.

Concerns related to Accreditation of Users and Governmental Entities

NI notes specific concerns related to the accreditation of law enforcement entities; namely, the SSAD will need to accommodate jurisdictional restrictions for contracted parties. For example, there may be restrictions regarding the disclosure of personal information to non-local law enforcement, and the SSAD would need to accommodate this.

The NCSG notes that while there was EPDP Team discussion regarding individuals applying for SSAD accreditation to gain access to their information, “the SSAD would be a very clumsy way to deal

with data subject access requests under the GDPR or any other data protection law because it does not control any of this data. Furthermore, the Contracted Parties or their resellers are better able to authenticate individuals who are their customers.”

With respect to the accreditation of governmental entities, the NCSG notes its “hope that contracted parties continue to exercise due diligence and do not provide personal/entity information relating to persecuted individuals or entities merely because the Governmental Entity has obtained accreditation. This is one of the potential slippery slopes inherent in the establishment of a centralized system: reliance of contracted parties on remote systems to ensure the rights of customers are maintained.”

Criteria and Content of Requests

The RySG comments that there remains a lack of clarity as to the potential need of a disclosing entity to request additional information to ground the requests, noting recommendation 3 wrongly assumes that the central gateway is in a position to deem requests as “complete” in a definitive manner. Although the RySG welcomes the acceptance that a request must be complete, it notes “the requirements of the disclosing party are vital, and thus that the recommendation remains silent as to such reasonable expectations, remains shortsighted.”

Response Requirements

The RySG notes concerns with Recommendation 5; specifically, “it remains unclear how the central gateway can make recommendations on disclosure, where it continues to have no access to, nor can it consider, the underlying data. [...] [T]he continued expectation that some form of machine learning on the part of the Central Gateway will somehow supplant a subjective consideration of data not actually available to it, is a third wheel process that merely complicates and interferes, rather than adding any meaningful impact to the benefit of any party.”

Contracted Party Authorization (Manual Review of Disclosure Requests)

NI does not support Recommendation 8.5 because “many registrars lack the ability to determine whether or not alleged claims of intellectual property infringement are valid and properly documented due to the significant experience and expertise required to make such a determination”. NI goes on to note that registrars rely on established processes such as the UDRP and subpoenas to make these determinations because the minimal legal standard required for a UDRP filing or subpoena ensure proper due process has been followed prior to disclosure.

NI notes that it believes Recommendation 8.8.1 and 8.9 do not comply with the GDPR, as it believes these recommendations are drafted contrary to the principle of privacy by design.

INTA writes, “the recommendations fail to guarantee any meaningful access for even the clearest and most compelling needs.” Based on cited studies, INTA notes that non-compulsory requests for data are denied “approximately 75% of the time”. INTA goes on to note that Recommendation 8 “would effectively grant contracted parties the unilateral ability to deny any and all requests on the grounds that they subjectively felt that the data subject’s rights outweighed the legitimate interests of the data requester, no matter how grounded in law or fact, objectively important, or compelling those legitimate interests are.”

In contrast, the RySG notes, “most appropriately formed queries to our members 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. The

SSAD will not fix either of these requestor mistakes. The RySG continues to be willing to provide pertinent data relating to such requests to aid the Board in its considerations.”

The BC notes, “on a substantive level, the SSAD proposed by the Final Report lacks a centralized disclosure mechanism and provides no meaningful framework regarding when disclosure should occur, leaving this determination up to the discretion of over two thousand separate contracted parties.” The BC goes on to note its aim to strike a balance between the individual right of privacy and other legitimate interests; however, it notes, “instead of engaging in the work to outline the parameters of these interests, the Phase 2 Final Report merely provides for a central location to submit requests. It is a mere ticketing service that does not provide any meaningful access or disclosure function; as such, the SSAD will almost certainly become a black hole. Expensive window dressing that no one actually uses.”

Automated Disclosure

Tucows provides, “for disclosures handled in an automated manner, the Registrar–Controller must have the right and opportunity to review and there must be recourse in cases of disagreement with the Central Gateway Manager’s disclosure decision. Similarly, if the Central Gateway Manager relays a request to the Registry Operator instead of to the Registrar, it must also notify the Registrar at the same time.”

With respect to recommendation 9.4.2, the NCSG notes, “the investigation must be by the authorized data protection commissioner or their representative, or a duly authorized representative of the individual whose data is the subject of the complaint.”

Disclosure Requirement

NCSG notes that the notice of potential release of information should accompany annual Whois Data Reminder Policy (WDRP) notices. The NCSG goes on to note that “many years ago, there was an effort at ICANN to produce a document of Registrants’ Rights. This morphed into a document on Registrants’ Obligations. It is high time that a thorough document which details registrants’ rights, risks, and responsibilities is produced that will help with the onerous task of educating them on this topic.”

Query Policy

NCSG notes particular concerns with the seemingly lenient language towards abusive requestors, writing, “taking a lenient approach with requestors who are attempting to ‘game’ the system and get access to personal data they are not entitled to receive, could potentially lead to a finding of data breach or inadequate security controls. Criminal behavior such as stealing credentials or identities should be reported to the appropriate authorities.”

Financial Sustainability

NI expressed concerns over the costs of creating and maintaining the SSAD, specifically noting that the users of the SSAD, in large part, indicate that they are not willing to pay for or use the SSAD. NI notes, moreover, that “it was understood throughout the process that [the SSAD users] would pay for the operation of the SSAD.”

The RrSG noted similar concerns, writing, “as the SSAD is intended to operate on a cost recovery basis (e.g., funded through user fees), it is concerning that the main intended users of the SSAD have expressed hesitation to use and/or pay for the SSAD.” The RrSG goes on to note that it is imperative for the ICANN Board to “determine whether the SSAD is financially sustainable without

the need for increased ICANN org contribution beyond what is currently estimated.” The RrSG also noted that “the ICANN Board that has the fiduciary responsibility to ensure that the cost of creating and maintaining the SSAD does not outweigh any benefits (especially if the planned users do not intend to use the SSAD). Under ICANN bylaws and California’s Nonprofit Integrity Act, fiduciary duty rests with the ICANN Board and cannot be abrogated by claiming that the responsibility falls instead upon the community.” The RrSG urges the ICANN Board to work closely with the GNSO Council “to ensure that the cost of building and maintaining the SSAD do not impact the ICANN budget beyond the estimated amounts, and if it does, to take steps to ensure that registrants are not further burdened by new costs which benefit only third-party users of the SSAD.”

INTA expressed concern that the shortcomings of the SSAD could dissuade intended users from using the system altogether. INTA notes that “without sufficient uptake in the community, the continuing operation of the SSAD will not be financially sustainable.” Accordingly, INTA notes the SSAD-related recommendations should not be adopted in their current form.

RySG notes that, “under no circumstances should a data subject subsidize the ability of a third party to access their personal data.” The RySG goes on to note that Phase 1, Recommendation 18 already establishes a standardized process for third parties to request data directly from contracted parties, and, accordingly, “no party (data subject or third party requestor) is without a predictable process for requesting personal data [...] which is provided at no cost to the requestor.”

The RySG noted, with interest, “statements that support the understanding that some third parties (including those involved in the process) do not actually intend to use the system as recommended.” The RySG urges the Board to consider this input when assessing the overall feasibility of the SSAD. The RySG cautions the Board not to allow “a minority of dissatisfied members of the community to reopen policy debates that have been resolved through the mechanism of the multistakeholder policy development process. While their input is welcome as to the feasibility of a system intended for their benefit, the proposal on the table represents the community’s best efforts at a solution [...] and reopening these debates would set a bad precedent for allowing parties to disrupt the multistakeholder model when policy outcomes don’t meet their own preferences.

Tucows notes, “the SSAD is intended to be a centralized system to handle a function which already exists in a distributed model. We have not yet seen a full cost/benefit analysis and it is not at all clear that the significant expenditure of resources required to build, operate, and maintain the SSAD is in the best interests of the global Internet community or even of the stakeholders involved in the EPDP Phase 2 Team. This lack of confidence is exacerbated by the fact that the primary users of the SSAD, its stakeholder–beneficiaries, have voted against the EPDP Phase 2 Priority 1 Recommendations specifically with regard to the SSAD and, further, have indicated that the SSAD is not fit for their purpose.” Tucows also notes, “the fundamental necessity of having such a centralized system remains arguable.”

The NCSG maintained, throughout the course of the EPDP, that the costs of the SSAD should be covered by the users of the system, through a combination of accreditation and usage fees. Specifically, The NCSG goes on to note, “the registered name holder MUST NOT be charged a fee in any form for third parties gaining access to his/her data.” Finally, NCSG notes, “NCSG believes that if we can achieve a standardized and consistent application of the disclosure policy without building a new system, we should do so. This would involve leaving third party access to RNH data in the hands of the data controllers, that is, the contracted parties. If third party seekers of access are unwilling to shoulder the costs of supporting an SSAD, they are de facto telling us they do not value it enough to justify its implementation.”

New Regulatory Guidance

INTA notes that new EU regulatory guidance “makes clear that there are issues that need to be reconsidered by the community policy development efforts”. Specifically, INTA notes, “NIS2 presents new information that was not available at the time of EPDP Phase 2 discussions [...] and further community policy development work is warranted, rather than moving ahead with the implementation and expenditure of resources on policy recommendations that may be inconsistent with the further guidance provided within NIS2.” The BC also expressed concerns with pending legislation, noting the SSAD is inflexible, “lacking the ability to evolve with updates in data privacy laws, including pending legislation that may have a significant impact on obligations to disclose registrant data.”

The RrSG noted its position “that it is premature for the ICANN community to review current (or future) ICANN policies in light of planned or draft legislation or regulations. These are subject to modification, implementation, and may ultimately not become law (or may not be effective for many years in the future). The ICANN community should focus its limited time and efforts on existing laws and regulations, while remaining flexible enough to adapt for legal changes in the future from around the world.”

Accuracy

INTA notes its expectation that the issue of data accuracy would be taken up by the EPDP Phase 2 Team, even though it was designated as a “priority 2 topic”. INTA references previous comments from the GAC representatives from the European Commission to the ICANN Board that have confirmed that accuracy under the GDPR is understood as relevant to the data subject and third parties with legitimate interests in the data, and “it is not enough that the data subject claims it data is accurate; data cannot be false or fictitious, otherwise it is not personal data to the data subject.”

The BC notes the SSAD “fails to provide guidance to contracted parties as to how to address data accuracy and distinctions between legal and natural persons.”

Data of Legal Persons

INTA notes the EPDP Phase 1 Final Report recommends that contracted parties may opt to voluntarily differentiate between data of natural and legal persons (but are not required to), and this issue was to be further discussed during Phase 2. INTA is not aware of any contracted party that currently voluntarily chooses to differentiate between such data sets; in effect, this results in both non-personal and personal data being redacted, and the GDPR does not protect non-personal data. While Recommendation 8 provides that contracted parties must disclose non-personal data following review of request, “all non-personal data should be made publicly available in RDS in the first instance, without the need to request access to nonpersonal data via the SSAD.”

The BC notes the SSAD “fails to provide guidance to contracted parties as to how to address data accuracy and distinctions between legal and natural persons.”

Implementation

Tucows notes that some significant aspects of the SSAD were not developed by the EPDP Team and will therefore be considered by Implementation Review Team. For example, “the essential question of to whom exactly the data are disclosed and by what means is an important one: the data should be disclosed directly from the relevant Contracted Party to the Requestor in a secure manner.” Tucows also notes the query policy, acceptable use policy, privacy policy, terms and conditions, etc., should be “developed with a holistic view of the complete landscape of agreements for SSAD participants,

with input from the CPH members of the EPDP Legal Committee.” Tucows goes on to note the implementation work, “will necessarily require the completion of current work on the Data Protection Agreements being done by the Roles and Responsibilities Team, as required by the EPDP Phase 1 Final Report, including acknowledgement on ICANN’s part of their status as a Data Controller.”

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

The comments represent a clear divergence of views; namely, the BC, INTA, and IPC request the Board to remand the recommendations for further policy work, while the RrSG, NI, RySG, Tucows, and NCSG note concerns with the intended users of the SSAD withdrawing their support of the report. INTA, for example, “urges the Board to remand the recommendations to the EPDP Team for further work as the adoption of these recommendations would set a dangerous precedent for ICANN and its policy development and implementation role, and the adoption of the recommendations would not be in the public interest.” INTA also called out the lack of community consensus for the “recommendations which are most critical to the successful operation of SSAD and, secondly, that the dissenting voices come from the very stakeholders that would be users of the SSAD.” For clarity, INTA refers to “community consensus” because the recommendations received the required supermajority support from the GNSO Council during its meeting on [24 September 2020](#). The GNSO Council’s vote in favor of these items satisfies the voting threshold required by Section 11.3(i)(xv) of the ICANN Bylaws regarding the formation of consensus policies. Under the ICANN Bylaws, the Council’s Supermajority support for the EPDP recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

In contrast to the views expressed by BC, INTA and IPC, the RySG notes that “reopening these debates would set a bad precedent for allowing parties to disrupt the multistakeholder model when policy outcomes don’t meet their own preferences” and Tucows notes, the “attempt to undermine the multistakeholder process now that the Final Report has been published and sent to the Board for review is an attempt to redraft the Policy Recommendations for the SSAD. This must not be allowed.”

The BC, IPC, and INTA note the SSAD represents a failure to provide the intended users with a predictable and ultimately usable system. These groups note the SSAD lacks a centralized disclosure mechanism and provides no meaningful framework regarding when disclosure should occur; instead, the SSAD is a “ticketing system” that will not be used by the intended users, nor will its creation justify the significant predicted costs. Similar concerns were expressed during the EPDP Team’s deliberations, but the legal guidance received indicated that automated disclosure through a centralized disclosure mechanism was only lawful in a limited number of instances, and these instances are all included in Recommendation 9. As the RySG noted in its comment, the EPDP Team’s recommendations must ultimately “reflect the reality of data protection law as it is today.” The RySG goes on to note that an ICANN consensus policy should not have identified risks imbedded within it.

Many commenters expressed concerns with the ultimate financial sustainability of the system based on many groups’ acknowledgement that the intended users will not use the system if it goes forward in the way the Final Report describes. To that end, commenters ask the Board to carefully consider its fiduciary duty when reviewing the financial considerations of the SSAD. The GNSO Council noted many of these concerns, which were highlighted in the minority statements. In recognition of the concerns, the GNSO requested a consultation with the ICANN Board and included the request in its

[motion](#) approving the EPDP Team’s Phase 2 Final Report; specifically, the GNSO Council requested “a consultation with the ICANN Board as part of the delivery of the GNSO Council Recommendations Report to the ICANN Board to discuss these issues, including whether a further cost-benefit analysis should be conducted before the ICANN Board considers all SSAD-related recommendations for adoption.” It is also worth noting that the Board voted to initiate an Operational Design Phase for the SSAD, and the [scoping paper](#) for the SSAD ODP includes a section related to financial considerations and risks.

The full text of the comments received, along with this summary, will be transmitted to the ICANN Board for its consideration.