

# Summary Report of Public Comment Proceeding

## Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Team – Phase 2A

<b>Publication Date:</b>	04 Aug 2021																		
<b>Prepared By:</b>	Caitlin Tubergen																		
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<b>Staff Contact:</b>	Caitlin Tubergen	<b>Email:</b>	<a href="mailto:policy-staff@icann.org">policy-staff@icann.org</a>																

### Section I: General Overview and Next Steps

This Public Comment proceeding seeks to obtain input on the Initial Report of the Phase 2A EPDP on the Temporary Specification for gTLD Registration Data Team. Phase 2A was tasked to address the following two topics: 1) the differentiation of legal vs. natural persons' registration data and 2) the feasibility of unique contacts to have a uniform anonymized email address.

ICANN org has prepared a summary of the submissions received, and the EPDP Team is currently in the process of [reviewing](#) the public comments. Following this review, the EPDP Team will update its recommendations accordingly for inclusion in its Final Report, which will be submitted to the GNSO Council for its consideration.

### Section II: Contributors

*At the time this report was prepared, a total of seventeen (17) community submissions had been posted to the forum. 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 the foregoing narrative (Section III), such citations will reference the contributor's initials.*

#### Organizations and Groups:

Name	Submitted by	Initials
Blacknight	Michele Neylon	BN
Hunan Academy of Social Science	Zhou Heng	HASS
Registries Stakeholder Group	Elizabeth Bacon	RySG
Non-Commercial Stakeholder Group	Manju Chen	NCSG
INTA	Lori Schulman	INTA
ICANN org	Brian Gutterman	ICANN
Internet Service Providers and Connectivity Providers Constituency	Lars Steffen	ISPSP
eco - Association of the Internet Industry	Lars Steffen	ECO
Business Constituency	Steven DelBianco	BC
Security and Stability Advisory Committee	Danielle Rutherford	SSAC
The Tucows family of registrars (Ascio (IANA 106), Enom (IANA 48), EPAG (IANA 85), and Tucows.com, Co. (IANA 69))	Reg Levy	TUCOWS
Registrar Stakeholder Group	Zoe Bonython	RrSG

Governmental Advisory Committee	GAC	GAC
Intellectual Property Constituency	Brian King	IPC
At-Large Advisory Committee	Alan Greenberg	ALAC
Namecheap, Inc.	Owen Smigelski	NC

### Individuals

Name	Initials
Quentin	Q

### **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 Comments Submitted](#)).*

#### **Concerns related to Preliminary Recommendation #1**

*No changes are recommended, at this stage, 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”).*

The following commenters indicated that all relevant information related the differentiation between registration data of legal and natural persons has been considered by the EPDP, and none of the information or options discussed by the EPDP Team warrant a change from the EDPP Phase 1, Recommendation #17: BN, HASS, Q, ISPCP, ECO, TUCOWS, RrSG, RySG, and NC.

In particular, NCSG noted that the distinction between legal and natural persons is not as straightforward as some seem to assume; for example, not all countries and their respective legislative systems recognize or apply the concept of legal or natural persons, particularly concerning independent contractors and single person businesses.

The following commenters do not support Preliminary Recommendation #1 and believe ICANN’s contracted parties should be required to differentiate between the registration data of legal and natural persons: INTA, BC, GAC.

Specifically, IPC and INTA note that the EPDP Phase 1 Final Report contemplated that contracted parties would provide registration data in response to disclosure requests. Unfortunately, however, IPC and INTA note that empirical evidence indicates this is not the case, with some groups reporting disclosure rates in the range of 10-14%. Due to the low disclosure rates, IPC and INTA note this weighs in favor of requiring a distinction and publishing legal entity data. Since the data is generally redacted and not provided upon request, IPC and INTA argue mandatory publication seems to be the only way for ICANN to ensure this data is available for those with legitimate interests.

BC notes publishing legal persons’ data based on differentiation instead of consent significantly reduces the Contracted Parties’ liability, and following proper safeguards also lowers the risks associated with publishing registration data for legal entities. SSAC notes from a security practitioner’s perspective, the maximum amount of registration data needs to be available for investigation, either through an effective differentiated access system, or through making it available in the public RDDS.

GAC notes the EPDP Team must further discuss the public interest and benefits of differentiation against the known risks. GAC goes on to note that there has not been an objective and acceptable justification provided so far as to why unprotected information has been redacted by ICANN's contracted parties in RDS outputs; accordingly, further information is needed to assess the benefits to law enforcement and other parties of properly differentiating between data of legal persons and data of natural persons in light of the different risks and costs for contracted parties.

Lastly, as an argument against Preliminary Recommendation #1, IPC notes the distinction between legal and natural person data in the RDDS is already required by the EPDP Phase 2 Recommendation 9.4.4. An update to the recommendation would assist in making that requirement public. This would also help the public know whether an SSAD request would even be necessary, since the public RDDS record would indicate whether the data was redacted because it contained natural person data or merely out of convenience to the registrar.

### **Concerns related to Preliminary Recommendation #2**

*The EPDP Team recommends that the GNSO Council monitors developments in relation to the adoption and implementation of relevant legislative changes (for example, NIS2), relevant decisions by pertinent tribunals and data protection authorities, as well as the possible adoption of the SSAD to determine if/when a reconsideration of this question (whether changes are required to the EPDP Phase 1 recommendation "Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so") is warranted. The GNSO Council is expected to consider not only input on this question and any new information from GNSO SG/Cs but also ICANN SO/ACs to help inform a decision on if/when this question is expected to be reconsidered.*

The following commenters indicated that Preliminary Recommendation #2 is unnecessary: BN, RrSG, NC, NCSG, TUCOWS, and GAC.

Specifically, BN noted that if there are changes to laws that impose different obligations on contracted parties, contracted parties must comply with them as needed, irrespective of this recommendation. RySG, NCSG, and TUCOWS noted this recommendation is out-of-scope for the EPDP Team, and the recommendation does not add any substantive value since ICANN Org is already monitoring draft legislation that is relevant to its policies and how they are implemented by contracted parties. NCSG and RrSG note that asking the GNSO Council to monitor legislative development is asking it to perform tasks outside its remit.

GAC notes that current processes should capture the need for additional policy scoping should new laws or regulations require it. GAC also noted to the extent there is further guidance and legislation that impacts topics within the EPDP, the GNSO should be able to act via the existing processes.

The following commenters indicated support for Preliminary Recommendation #2: INTA, ISPCP, ECO, BC, IPC, and ALAC.

INTA notes, however, the recommendation could be more specific in terms of providing the triggering events or timelines at which points reengagement on this issue would be appropriate. ISPCP and ECO note the recommendation is a useful mechanism to ensure that the GNSO Council takes action if and when required by legislative changes.

BC notes that it is important for the GNSO Council to continue this work; NIS2 legislation may be the most prominent, but will not be the only, clarification from regulators when it comes to domain name registration services requirements. IPC notes that failing to monitor the situation would be a failure of due diligence, and the GNSO can facilitate the monitoring of legislative initiatives through mechanisms it already has in place, including its relationships with the GAC, ICANN org's government engagement team, and the Cross-Community Engagement Group on Internet Governance. Lastly, ALAC notes the

recommendation may technically be unnecessary, but, given multiple factors, including the high workload of the GNSO and the importance of this issue to many stakeholders in the ICANN community and beyond, it is prudent to formally require that the GNSO Council do this.

In its comment, ICANN org noted the ICANN Board has previously passed through recommendations that are made to other ICANN structures. It is also ICANN org's understanding that this recommendation is for the GNSO Council, thus this will not require Board action. If adopted as a recommendation, this recommendation would not result in implementation or enforcement.

### **Concerns related to Preliminary Recommendation #3**

*The following additions are made to the EPDP Phase 1 recommendations: Recommendation #5.*

*The following optional data element (optional for the Registrar to offer to the Registrant and collect) is added to the data elements table: [Please refer to the Data Elements Tables on pp. 5-6.] (Note: shortened for brevity)*

The following commenters indicated support for Preliminary Recommendation #3: INTA, ISPCP, ECO, BC, SSAC, GAC, IPC, and ALAC.

INTA notes a flag is already required pursuant to EPDP Phase 2 Recommendation 9.4.4 and believes a flag will result in greater efficiency for automated responses from contracted parties, greater transparency for requestors and ICANN org in terms of percentage of legal vs. natural registrants, and greater flexibility and compliance with new legislation such as NIS2, which, when enacted, will require the publication of non-personal data of legal persons. ISPCP and ECO noted the availability of a standardized data element is a useful option for the contracted parties as it will help foster consistency in the treatment of data across the industry.

BC noted that harmonizing this data element will create a more consistent and reliable RDDS database, which may be accessed by third parties for legitimate purposes. This will facilitate more effective and prompter responses to DNS abuse, intellectual property violations, cybercrime activity, and other activity that threatens consumer welfare. Similarly, SSAC noted that a data element should be defined that denotes the legal status of the registrant.

GAC notes that providing this harmonized approach ensures that relevant protection for personal data is considered and applied consistently across all parties responsible for complying with this policy. IPC notes that given future regulation (e.g., NIS2) will require the distinction of legal and natural persons, a standardized RDS data element will ensure a consistent mechanism for RDS users to reliably ascertain if a registrant is a legal or natural person.

Lastly, ALAC notes a standardized data element is consistent with ICANN RDDS Consistent Labeling and Display Policy, and that policy's aim is to align the way registries and registrars label and display registration data outputs. Data standardization (i) improves the quality of the data and (ii) creates consistency across the systems and makes it easy to use. ALAC goes on to note that it is possible that legal v. natural differentiation may be required in the future, and formulating this element now means there will not need to be a future PDP to address this when it becomes required. EPDP Phase 1 recommendations already required contracted parties to make modifications to the existing RDDS fields; therefore, adding this standardized data element during the implementation of EPDP Phase 1 recommendations makes sense. Some registrars may choose to differentiate, and having this element allows the SSAD or other tools to know that the distinction is made.

The following commenters do not support a mandatory additional data element: BN, RySG, NCSG, TUCOWS, RrSG, and NC.

BN, RrSG, and NC note that if a contracted party wants to distinguish between natural and legal persons' registration data, then a standardized data element should be available to be used. However, BN does not think such a complex issue can be determined through the use of a single data element.

RySG notes an obligation of adding new data elements to the RDDS is also out-of-scope for this EPDP; additionally, RySG notes that it cannot support a significant mandatory change based on the rationale provided by the groups in favor of requiring a new data element. Similarly, TUCOWS notes that investment in creating a new data element results in very little value other than the ability to track information which ought not to be tracked and, as such, TUCOWS does not consider this requirement to be in the best interests of the ICANN Community or Internet users as a whole.

NCSG notes that requiring a new data element could be seen as ICANN encouraging contracted parties to differentiate between legal and natural persons, and this would be problematic for many non-commercial registrants.

ICANN org notes that if it is expected to provide a field that contracted parties may use, it will require; for example, clear policy language requiring said implementation.

#### **Preliminary Recommendation #4**

*The EPDP Team recommends that Contracted Parties who choose to differentiate based on person type SHOULD follow the guidance below and clearly document all data processing steps. However, it is not the role or responsibility of the EPDP Team to make a final determination with regard to the legal risks, as that responsibility ultimately belongs to the data controller(s). (Note: shortened for brevity).*

When asked to consider if the draft guidance provided sufficient information and resources for contracted parties who choose to differentiate, the following commenters answered no: BN, RySG, NCSG, TUCOWS, RrSG, and NC.

Specifically, BN noted that the guidance might be a starting point; however, it would be incumbent on each contracted party to seek their own legal advice. RySG noted the guidance ultimately falls short, of what is necessary to be of specific and practical operational use to a registry operator. The RySG went on to note that in order to be useful, the guidance should be created by the contracted parties themselves and believes that publication of any such practices, without the full agreement of the affected controllers, serves minimal purpose.

The following commenters noted the advice is generally sufficient but did note where the guidance could be appended or improved: INTA, ISPCP, ECO, BC, GAC, and IPC.

Specifically, GAC noted the information contained in the recommendation should be referred to as a "best practice" rather than mere "guidance". BC and IPC noted the use of a flag is important to streamline the processing of both manual and automated disclosure requests. BC went on to note guidance #7 is not necessary, as the importance of defining a legal person has been laid out clearly in points #1-6.

SSAC noted that registrants should be classified as either natural or legal persons, and this should be required at the time of registration for all new domain registrations. For existing registrations, the value can remain "Unspecified" until it is filled at a later time such as upon domain renewal and/or the annual accuracy inquiry, with the goal of eventually obtaining that data for all registrants and reducing "Unspecified" to the lowest practical level.

ICANN org noted that if the EPDP Team intends for a contracted party to be required, as a matter of consensus policy, to follow these best practices under any circumstances, the Team must make a recommendation to this effect and clearly specify when and how these best practices would become

requirements and, in addition, whether a contracted party would be able to follow only a subset of these practices, or must adopt all of them, whether the contracted party could later decide to stop differentiating among registrant types, etc.

When asked if additional elements were needed for the guidance, the following commenters answered no: RySG, NCSG, ISPCP, ECO, and BC. The following commenters answered yes: INTA, TUCOWS, and GAC.

Specifically, INTA noted that contracted parties may also choose to build in a reasonable two business day waiting period between registrant self-identification and publication in the RDDS in order to allow registrants time to correct erroneous or inadvertent self-identification as a legal entity. TUCOWS noted if this guidance is intended to be a complete representation of GDPR Principles then it must include lawfulness, fairness and transparency; purpose limitation; data minimization; accuracy; storage limitation; integrity and confidentiality; and accountability.

GAC noted the guidance should recognize more explicitly that the differentiation between legal and natural persons is not contrary to the EU GDPR, but actually in conformity with the legislation. It should be highlighted that the protection afforded by the GDPR only applies to natural persons in relation to the processing of their personal data. The guidance should state the benefits of differentiating between data of legal persons and data of natural persons, in addition to the risks.

When asked if there are there legal and regulatory considerations not yet considered in this Initial Report, that may inform Registries and Registrars in deciding whether and how to differentiate, and if so, how, commenters responded with the following:

RrSG and TUCOWS highlighted local laws and possibly advice from the local DPA. RySG also noted that each contracted party must take into account any legal and regulatory considerations that are applicable to it. These might not be uniform across all contracted parties, which further demonstrates how the proposed guidance may or may not be helpful to the parties it is meant to assist.

HASS noted that according to Article 24/61 of China Cyber Security Law, the service provider of domain name registration is obligated to require registrants to provide their real identity, and if contracted parties fail to comply with this obligation, the China Network authority is entitled to shut down the domain name registration service. Accordingly, HASS notes that ICANN and its contracted parties should not only allow the registrants to self-identify as natural or legal persons, but should require the registrants to provide their true identification. Otherwise, ICANN and its contracted parties might face compliance risk from China.

NCSG noted that “consent” is not the key that opens all doors to personal data; “consent” or “explicit permission” is not the only basis for processing personal data under GDPR.

INTA noted that EPDP legal memoranda have not yet analyzed situations in which contracted parties contractually proscribe the submission of personal data by registrants, either as an across-the-board prohibition, or as a prohibition that applies only to registrants who self-select as legal entities. EPDP legal memoranda have also not yet analyzed the impact of contractual releases, covenants not to sue, and indemnification from registrants covering claims or regulatory actions resulting from the erroneous, inadvertent, or mistaken provision of personal data by data subjects.

BC noted that NIS2 legislation, when enacted, will offer further legal protection to contracted parties regarding differentiation. Other countries active in the DNS, such as Japan, USA, and U.K., also may consider regulatory changes that would provide clarity to contracted parties about possible legal exposure when differentiating between legal and natural persons, and how to minimize or even eliminate such exposure. ALAC went on to note that at the time of publication, if there is more specificity on NIS2, it must be factored into the report.

RrSG and NC referenced Section 3.7.2 of the RAA (“Registrar shall abide by applicable laws and governmental regulations”) and noted registrars will conform to any and all laws that come into effect in their jurisdictions but cannot always anticipate them in advance. Proposed or unadopted laws and regulations should not form the basis of Consensus Policy, as they are subject to significant change before finalization.

GAC noted that there is no legal requirement under the GDPR to protect the data of legal persons and there are benefits for releasing this data to the public. IPC went on to note contracted parties should consider the benefits of embracing a minimum voluntary (binding through ICANN compliance) threshold for differentiation in the interest of eliminating the need for varying legislation across the various jurisdictions where they operate, which are sure to have different standards, requirements, and associated penalties for noncompliance.

Lastly, when asked if a Registrar or Registry Operator decides to differentiate, should this guidance become a requirement that can be enforced if not followed (“MUST, if Contracted Party decides to differentiate”)?

The following commenters responded with yes: INTA, ISPCP, ECO, BC, SSAC, IPC, and GAC.

The following commenters responded with no: BN, RySG, NCSG, TUCOWS, RrSG, ALAC, and NC.

#### **Preliminary Recommendation #5**

*The EPDP Team recommends that Contracted Parties who choose to publish a registrant- or registration-based email address in the publicly accessible RDDS should ensure appropriate safeguards for the data subject in line with relevant guidance on anonymization techniques provided by their data protection authorities and the appended legal guidance in this recommendation (see Annex E).*

In response to Preliminary Recommendation #5, the EPDP Team posed the following question: Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to publish a registrant- or registration-based email address? If not, what is missing and why?

The following commenter answered yes: BC.

The following commenters answered no: BN, RySG, NCSG, INTA, ISPCP, ECO, TUCOWS, RrSG, GAC, IPC, ALAC, and NC.

Specifically, BN and ALAC noted the recommendation is lacking both practically and functionally. TUCOWS noted it is impossible to encompass all possible legal and regulatory obligations for all contracted parties worldwide within one recommendation, and it is appropriate for ICANN Org to provide non-binding guidance to aid contracted parties, including the legal advice to the EPDP Team.

RySG noted a concern that the wording of this guidance implies that anonymization of email address contacts is possible, when the legal guidance concludes that this data is pseudonymous, not anonymous, even from the perspective of third parties. NCSG went on to note that the legal memo makes clear that publishing or automatically disclosing either registrant-based or registration-based email addresses would be considered to be processing personal data under the GDPR, and that there has been very little discussion of the rights of the individual, and how best to protect registrants’ privacy.

INTA noted that the assessment of whether “appropriate safeguards” are in place requires a risk-based assessment of: (i) whether to use a registrant-based or registration-based email address; and

(ii) whether such addresses should be available through web publication or automatic disclosure. INTA notes that the EPDP Phase 2A team should make the guidance more prescriptive about the solution.

ISPCP and ECO noted that it would be preferable if the guidance was stronger in encouraging registration-based e-mail addresses versus registrant-based e-mail addresses.

RrSG and NC noted that if the recommendation is to stay in its current form, it would need to be supplemented. For example, it should include a notification to registrars that they should consult their own legal counsel or request information from their Data Protection Authority in addition to sharing the legal memos.

GAC noted that the guidance is a helpful first step for providing information to contracted parties; however, more could be added to provide best practices better supporting those who do wish to publish an anonymized registrant-based or registration-based email address. GAC requests further consideration of a recommendation for publication of a uniform anonymized email address in light of the benefits that publication of such emails would provide, considering minimal impact experienced by many data subjects when such techniques are used in privacy/proxy services.

SSAC notes that registrars should deploy (or continue to deploy) methods to support registrant-based email contact. SSAC further recommends uniform requirements for safeguards be developed for the registrant-based email contact. The requirements should include maintaining the privacy of the registrant as appropriate and service level commitments to set expectations for the use of the service. These safeguards are independent of the method chosen (e.g., unique email addresses or web-based forms). SSAC recommends the EPDP Phase 2A not specify a method for correlating registrations with a common contact at this time.

Lastly, ICANN org noted that if EPDP Phase 2A team did decide to recommend that registrant-based emails be required, Contractual Compliance foresees hurdles in enforcing such a requirement without full access to non-public Registration Data. Contracted parties will use the pseudonymized emails for domain names that are redacted; therefore, without obtaining the non-public Registration Data from the contracted party, there is currently no way for Compliance to determine whether the same pseudonymized email is displayed in the RDDS for domain names registered by the same RNH.

#### **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 EPDP Phase 2A Team is responsible for the review and analysis of comments and will be reviewing all comments via the [Public Comment review tools](#), the discussion tables, and further deliberations during meetings. Please note at the time of publication of this report, review of the comments by the EPDP Team is still underway.