

Registries Stakeholder Group Statement



Public Comment* : **EPDP Phase 2 Policy Recommendations for Board Consideration**

Date statement submitted: **30 March 2021**

Reference url: <https://www.icann.org/public-comments/epdp-2-policy-recs-board-2021-02-08-en> .

Background¹

- This Public Comment proceeding is seeking input on a subset of the final GNSO approved recommendations that relate to a proposed System for Standardized Access/Disclosure to non-public registration information ("SSAD"), prior to Board action.
The GNSO Council approved the policy recommendations on [24 September 2020](#).
- Document : [EPDP Phase 2 Final Report](#) (.pdf)
-> RySG Statement the EPDP Phase 2 Final Report on p.137-145.
- Related RySG comments
[RySG comment on the EPDP Phase2 Initial Report](#) (14 April 2020).

Registries Stakeholder Group comment

The Registries Stakeholder Group (RySG) welcomes the opportunity to provide feedback on the EPDP Phase 2 Policy Recommendations for ICANN Board Consideration.

I. Overarching comments

The Registries Stakeholder Group (RySG) would like to acknowledge that these Phase 2 Priority 1 recommendations were the result of a great deal of hard work by many people and would like to thank all the working group members for their dedication, the tireless efforts of staff, and the leadership team, in particular Janis Karklins for chairing the effort.

* *Registries Stakeholder Group (RySG) Comment - In the interest of time, we did not conduct a vote on these comments. We did discuss them on our mailing list and during a biweekly conference call, and no member opposed their submission.*

¹ *Background: intended to give a brief context for the comment and to highlight what is most relevant for RO's in the subject document – it is not a summary of the subject document.*

These recommendations form the basis for the creation of a System of Standardized Access and Disclosure (SSAD) to non-public gTLD registration data. The RySG engaged in Phase 2 in good faith to develop a system for the benefit of third parties who have a legitimate interest to access a registrant's personal data. To be clear, registries currently fulfil their obligations to protect a registrant's personal data and respond to third party requests to obtain that personal data without such a system. Throughout the EPDP phases 1, 2, and 2A our members have continued to regularly and responsibly respond to data requests without the SSAD system, in line with the requirements of the Phase 1 report and our obligations under law. We will continue to do so even once the SSAD is operational. Unfortunately, in many ways the SSAD will make our task more difficult by introducing additional processing and risks to a registrant's personal data, as well as increasing legal impact to contracted parties. We have, however, continued to support and engage with both ICANN and the community under the assumption that the community saw value in a standardized system in addition to contracted parties current processes and mechanisms.

As the RySG has previously noted, despite concerns with individual aspects of some recommendations, which we have outlined, at length, in our RySG Statement on the EPDP Phase II Final Report, the RySG nonetheless made the decision to support the entire SSAD package of recommendations (as reflected in Annex D - consensus designations), to best support the work of the community in this effort.² The RySG encourages the Board to consider these recommendations as a single package (like the GNSO council did).

The RySG is well aware of the criticism that SSAD recommendations have received from some portions of the community, including those whose members helped craft the recommendations. In participating in the working group, registries have stood firm on the principles that this system must:

- (i) reflect the reality of data protection law as it is today,
- (ii) prioritize and appropriately protect a registrant's personal data ahead of third party interests, and
- (iii) retain our ability, as controllers, to fulfill our legal obligations to protect personal data.

Registries and registrars are a cornerstone of the DNS system, and it is incumbent on us, as key operators in functioning of the DNS, to ensure that in all our actions, especially relating to the handling of data, we are able to remain within the boundaries of data privacy law. We firmly support the concept that our policies should be aimed to support real compliance with legal obligations, not simply targeting standards of the bare minimum of compliance, especially considering that any enforcement against an ICANN accredited entity will have potential knock on effects on all other contracted parties.

Policy should not therefore support 'accepted' risks of non compliance, and should certainly not have any such identified risk embedded in a uniform consensus policy. Non compliance with data privacy legal obligations has real potential to cripple our industry's ability to process personal data. We remain 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 RySG advocated for a financial assessment of a proposed SSAD in order to provide important data to guide the EPDP Team's decision-making. We appreciate the work that the ICANN team performed providing us with a cost assessment at that stage and we appreciate that the Board voted to initiate an Operational Design Phase (ODP) to continue that in depth review and analysis given the potential implications and costs. The RySG continues to observe other constituencies advocate that users of the SSAD should bear the costs of operating the system. We have noted previously, and reiterate, that

² Registries Stakeholder Group Statement on EPDP Phase II Final Report, see p. 137-145 of the Final Report, <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-phase-2-temp-spec-gtld-registration-data-2-31jul20-en.pdf>.

under no circumstances should a data subject subsidize the ability of a third party to access their personal data. The SSAD must be a balance of expectations, and as such was intended to provide predictable and standardized data disclosure and should be funded by those who directly enjoy the benefits of such a service, but not unnecessarily impact those who do not.

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

The RySG continues to note, 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. Although unfortunate, given the time and effort expended, we urge the Board to consider such inputs in assessing the overall feasibility of the SSAD. However, we caution the Board on allowing 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. Nothing has changed since the EPDP agreed to reject centralization as not meeting the prerequisite of diminishing liability for contracted parties, 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.

To further consider questions of whether SSAD remains feasible, given the already established processes, we would also urge the Board to consider any available reliable data relating to the existing processes, so as to highlight whether or not the expected costs of the SSAD indeed continue to outweigh the perceived benefit of the SSAD, given the contracted party responses to requests for disclosure in the nearly three years since the implementation of the Temporary Specification, and given the noted intentions of key third parties to NOT use the SSAD.

To restate some data previously noted in the RySG Statement on the EPDP Phase II Final Report, 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.³ 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.

³ See Privacy and Lawful Access Privacy and Lawful Access to Personal Data at Tucows, 13 March 2020, (accessed 29 March 2021), available <https://opensrs.com/blog/2020/03/privacy-and-lawful-access-to-personal-data-at-tucows/> .

II. Comments on individual recommendations

Recommendation #3: Criteria and Content of Requests

RySG Comment:

There remains a lack of clarity as to the potential need of a disclosing entity to request additional information to ground the requests. The determination of the Central Gateway regarding 'completeness' is not final. Each request continues to be a separate and individual consideration of the circumstances as they apply to that request. The recommendation continues to assume that the central gateway continues to be in a position to deem requests as 'complete' in a definitive manner. Although we welcome the acceptance that a request MUST be complete, the requirements of the disclosing party are vital, and thus that the recommendation remains silent as to such reasonable expectations, remains shortsighted. This may be as simple as acknowledging or signposting Recommendation 8.6 regarding prima facie request reviews. This will also have impacts in SLAs, response rates, time limits and ensuring proper and complete reviews to best support disclosure where appropriate.

Recommendation #5: Response Requirements

RySG Comment:

Regarding 5.1, 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. Where we appreciate that the recommendation does not need to be followed, the expectation remains to add in procedural steps for the disclosing party to 'educate' the central gateway, without revealing any PII, about a decision that the central gateway cannot possibly understand without actual access to the underlying data. While we can understand the need for clarity to the requester, the 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.