ICANN
Transcription
GNSO Temp Spec gTLD RD EPDP Small Team Meeting #3
Wednesday, 10 October 2018 at 13:00 UTC
Note: Although the transcription is largely accurate, in some cases it is incomplete or
inaccurate due to inaudible passages or transcription errors. It is posted as an aid to
understanding the proceedings at the meeting, but should not be treated as an authoritative record. The
audio is also available at: https://audio.icann.org/gnso/gnso-epdp-gtld-registration-data-specs-10oct18-
en.mp3
Adobe Connect recording: **https://participate.icann.org/p4vtgefqcqa/**

Attendance of the call is posted on agenda wiki page: https://community.icann.org/x/8AO8BQ

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar
page http://gnso.icann.org/en/group-activities/calendar

ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the GNSO EPDP Small Team #3 meeting taking place on the 10th of October 2018 at 13:00 UTC. In the interest of time, there will be no role call. Attendance will be taken by the Adobe Connect room. If you are only on the telephone bridge, could you please let yourself be known now? Thank you. Hearing no further names.

We have apologies from [Georgio Polenti], Matt Serlin, and James Bladel. They have formally assigned Chris Lewis-Evans, Lindsay Hamilton Reed, and Volker Greimann as their alternate for this call and for remaining days of absence.

During this period, the members will have read-only rights and no access to conference calls. Their alternates will have posting rights and access to conference calls until the members' return date. All documentation and information can be found on the EPDP Wiki space. There is an audiocast and view-only Adobe

EN

Connect for non-members to follow the call, so please remember to state your names before speaking. Recordings will be circulated on the mailing list and posted on the public wiki space shortly after the end of the call. Thank you, and over to our chair, Kurt Pritz.

KURT PRITZ: Hi, everyone. Thanks for joining. Today's discussion centers around specific charter questions having to do with reasonable access by third parties to date and what does reasonable access mean. The charter questions that we're obliged to answer get very specific on the definition for this. So, in preparation for this meeting, you'll see the typical staff-prepared document, but it's chockfull of good information.

First, just to scroll through it, is the charter questions could be addressed that are long-ish. Then, we have specific advice from the EPDP that outlines for them when access to third parties can be given and then the relevant temporary specification section.

Then, we asked, as part of our effort, we have ICANN. What the heck does reasonable access mean? There's the ICANN response here which is pretty much on point, which defines reasonable access on a case-by-case basis but within the meaning of the temp spec.

There's also a second document here that you've been sent that you could bring up on your own that's all the input that's been gathered on this question, pages of it from each of the groups here. So, you have that in hand.

EN

To me, there's a little bit of a tricky discussion because we're not redlining the temp spec as it is, but rather we're rewriting it into a policy, and in that policy, so far we've created definitions for what we think lawful access is, lawful purposes for processing registration data and we're taking up the issues of when it is lawful or to disclose that information to third parties, whether the third parties might be registries in some cases or law enforcement and others.

So, we're sort of overriding this reasonable access, but then there's other facets to reasonable access, too. Timeliness, the form in which access is provided and such.

So, I'd ask us to, in our discussion – and I'm going to turn this over to David for some additional elaboration before we get started and set up, is let's focus on the charter questions themselves and try to answer them and in the spirit of the work we've done so far. We've done really good work in creating a lawful basis for disclosing data to third parties. Then, how that information will be actualized is part of our discussion here.

I think the other thing I want to touch on here is we've made a commitment to ourselves not to have the access discussion here, but postpone that until all the gating questions are answered, just like the charter says. I note here that in the second question, J2 of the charter questions, that seems to get into access. So, we want to do the best job of answering these questions in a way that really helps our work going forward in the policy we've devised. That's kind of murky. It's kind of a murky area. I'll let David. David, are you taking over from here?

DAVID PLUMB:	Yes. Thanks, Kurt. This is David Plumb speaking. Thanks, Kurt, for the introduction. Thanks, everybody, for getting on the call again. Another call this week on ICANN.

As Kurt says, we are flirting with something very delicate today because we've been asked not to take up an access model conversation until we're done with the gating questions, but it turns out one of our gating questions gets at this question of what's reasonable in terms of access. So, we're going to be dancing with this fine line, this whole conversation about not going into a real conversation about full-fledged access model, while at the same time, we're going to be talking about the elements or the criteria. We'll figure out the right word. But something about the nature of what makes access reasonable. So, we're going to have to help each other dance along this fine line, not get sucked into the full-fledged access model conversation. But at the same time go right up to that line and start to talk about these criteria for reasonableness or reasonable access.

I'm hopeful about this conversation because some of you I believe on this call were at the front of the room in LA, the very end when we're going through the final throws on purpose B.

At the front of the room, there were registry and registrar folks, and everybody said, "You know what? We're eager to have this conversation about these criteria for access, these elements of what makes this work." So, I'm hopeful that we can do this today to go right up to that edge of the fine line, without crossing it, but really start to dive into these questions about what are the criteria?

What are the elements that are going to make something around reasonable access work?

Alright. So, that's all I have for introduction. My thought on how to move into this is to really laser us into the questions that are being asked of us. So, if you'll look at the screen and you look at the gating question that's been offered here where it says, "Should the existing requirements in the temporary specification remain in place until a model for access is finalized?" And if you say yes to that, it still asks you for some criteria around deciding whether to disclose non-public registration data. So, we still need to look at criteria.

If you think the existing requirement should not remain in place until an access model is finalized which is our future conversation in the months ahead, then we need to talk about not just criteria but some kind of framework for disclosure.

So, I'd like to start out in that place and get people to start to talk about if I had to answer this question about keeping the temp spec pieces in place for now, if the answer is, yes, let's talk about some criteria. If your answer is no, let's talk about things that look more like a framework. Let's see where people are at right now and start the conversation. Alan Woods, your hand is up. You've got the floor.

ALAN WOODS: Thank you. You can hear me okay?

DAVID PLUMB: Yes, it's great.

ALAN WOODS: Perfect. Excellent. So, I did [inaudible]. Okay. So, I'm going to jump in [inaudible]. Yes, the way that it's currently phrased within the temporary specification itself is, in my opinion, actually as far as it can be [inaudible]. It really comes down to one thing. We should keep the concept that the [actors] must be reasonable, but we can't actually delve into that much further for one major reason. That is to test what reasonable is. And at the end of the day, if we put something into the policy, we really need to ask the question of who is going to enforce that policy? Who is going to enforce the contracted parties to provide that reasonable access?

I mean, the obvious answer to it to provide people would be ICANN, but in reality, it's not ICANN's place to interpret what is effectively a legal obligation and the legal obligation is that under section – actually, [inaudible] and others – that we must do the balancing test and we must provide access to data to third parties with a legitimate interest in that.

So, really, what you're talking about is if I, as the registry, do not give access to a particular requestor, a third-party requestor, who do they complain to? Because if they complain to ICANN, all ICANN say is, "Is it reasonable?" I think Kurt talked about things such as talking about time limit. Yeah, that's one of the reasonable things that maybe ICANN can look at. Things that are manifestly reasonable or manifestly unreasonable.

But, when we get into that other element of was the [inaudible], well, that's completely different and that complaint should go to a DPA or to a court, not necessarily to ICANN. ICANN is not in a position to actually adjudicate on that.

So, when we're looking at reasonable, I think we really should be looking at what are the very high-level requirements that can be put on that don't [spray in] with the legal arena, basically, that says was the registry operator or the registrar being manifestly reasonable in their approach to it? Did they have a proper way of getting the request through? Was it a simple request? Do they have a request form? Do they respond? Do they ignore it? Did they respond with a full reasoning? But again, not as to [inaudible] because I really don't think that ICANN has the ability to have any say on [inaudible] because it is individually between the DPA, the requestor, or maybe a court.

So, I'm just [setting my stone] on that one. Obviously, I assume that you all disagree with that, but that's where I'd be coming from.

[DAVID PLUMB]:   Okay. Great. Thanks, Alan. Before I jump to Volker, just one second to really make sure we're nailing and understanding each other. You're basically saying let's distinguish between what would be a legal set of issues, which is the balancing test and all that, with other issues that are more practical or high level. And you named a couple. One was timing. Another was … I don't know if you can, Alan, just one more click through those issues that might fall into things that you would want to make a policy about from an

ICANN standpoint. Can you just tick through those one more time, Alan, before we jump to the next person?

ALAN WOODS: Sure, absolutely. So, the ones that I [inaudible] were time limits, to an extent. [inaudible]. So, time limits. [D4], was there an ease of making such a request? Was it an open and clear way of making such a request? Was there response issues to the request? Was the request just ignored? Again, what's manifestly unreasonable in a response? Where reasoning perhaps given for the not giving of access or indeed was access given in a reasonable manner? As in, is this digestible? And you can look at things, like take guidance from things like is the [inaudible] budget request for … It has to be in a readable format and it has to be understandable and legible. I mean, there's no point giving access that is not able to be seen.

But, again, [inaudible] the list in the sense of has to also be taken into account things like [inaudible]. I'm going into a big of legal here. But again, from ICANN's point of view, they need to look at what would be reasonable to accept registry operator to functionally do as opposed to legally do. I hope that helps.

DAVID PLUMB: Great. Thanks. Thanks, everyone, for your patient on that. Volker, you're up next.

EN

VOLKER GREIMANN: Yes. Thank you. Ultimately, I would be supportive of carrying forward something similar to the access provisions that are currently included in the temporary specification. Of course, there are certain elements where it would seem to see more clarification. For example, when it comes to access that also involves cross-border transfers of data or when it comes to section 4.2, we might want to clarity that just because there is a court order – for example, relevant [inaudible] jurisdiction, considering the GDPR – that might not be binding on the contracted party.

So, there should actually be some … There would be more requirements that I would like to add to that, but setting those aside for now, I think the question of what reasonable access means can vary between contracted parties on the one hand, because obviously response times are going to be different for a registrar, for example, that has five employees altogether and a registrar that has 10,000 employees. Okay, that's maybe more than GoDaddy has, but 10,000 employees in the abuse department alone. Just saying a number of colleagues, not less. But, you see the difference here. So, [inaudible] in response time, it may vary.

On the other spectrum, the requestor is now, it may be reasonable to have, to accept for example a one-week turnover for an IP [inaudible]. It may not. I don't know. But, on the other hand, if it's a life or death matter, a law enforcement request, a 24-hour turnaround may be what's reasonable.

So, reasonable access is probably already the perfect wording that we have. Clarifying it, nailing it down to days, hours, what have you, would probably do injustice to [inaudible] on the

EN

requestor's side and on the contracted party side as well. I would prefer this language not to be [inaudible] when it comes to reasonable access, [inaudible]. Thank you.

DAVID PLUMB: Okay. Thanks, Volker. Again, I'm going to be making a couple follow-up questions. For instance, Volker, if your preference is fundamentally to carry forward the temporary specification language, the questions that are being asked of the group in the charter is that question A2, which is what criteria must a contracted party be obligated to consider.

I don't know, Volker, if there's things you want to talk about, criteria, if they're similar to what Alan put out there or they're different, but just quickly, Volker, the things that come to mind when someone said, "Well, what criteria should be considered?"

VOLKER GREIMANN: Like I said, that probably depends on the party that's asking for access and the party that has to provide access and must therefore look at whether they are able to legally provide that access. So, I think nailing it down to special criteria further than the words "reasonable access" is a very difficult undertaking. I'm willing to consider [inaudible].

DAVD PLUMB: Okay. Thanks, Volker. Alex, you're up next.

EN

ALEX DEACON: Thanks. It's Alex for the record. To answer the first question, I think we do need this reasonable access regime, if you will, to remain in place until we nail down all of the details for access.

In this regime today, the folks that I represent do get access to WHOIS data from several registrars. There are others where we don't get any response. So, I think there is clearly a need to put a framework, if you will, around what reasonable access means.

I don't think we need to nail it down. I agree with Volker there. But, I think we need to create a framework around what this means. So, there is some type of … So, we know what the process is and what to expect in the process. There's some methods, if you will, to ensure that there's a response.

For example, the framework. What would it include? It would include some type of timeliness criteria with regards to responding that the registrar actually, one, received the request and then a second timeliness, a second time period for actually responding to the request.

I agree with Alan. We don't need to get into how the balancing test was done here, but I think we need to put some parameters in a framework around how long these things will take, so the requestor knows what's happening.

We could put a framework and some criteria around what is required in a request. Currently, each registrar has their own set of hoops to jump through and we're jumping through them, but it would help a lot of that was … The information required from a requestor was somehow the same or close to the same across

EN

registrars. And then, finally, with regard to response, if the request is rejected or for any reason that the response contained enough information for us to understand why that was made and I think that's about it.

So, I think really here we're not asking, or I'm not asking, to define exactly how this balancing test is done. We're just asking for a framework around the current reasonable access regime to give some transparency to those who are using it today. Thanks.

DAVID PLUMB: Thanks, Alex. That's great. Just a couple things, Alex, real quick. I heard a lot of echoes, curiously, from what Alan said in terms of the functionality piece. You both talked about timeliness. You both talked about what is required in a request and you both talked about reasons for a rejection of a request.

One thing I want to try, Alex, just going forward, since they used the word framework very specifically in the gating questions, and [inaudible] you think that the temporary specification language should not be carried forward, I want to test with you, Alex. Instead of using that word framework which might be confusing, let's just talk about those as criteria for disclosure of third-party data, if that's okay with you, Alex, because I'm worried if we use that word framework, it draws us into that section B piece.

ALEX WOODS: Yeah. Criteria is fine.

DAVID PLUMB: Awesome. Okay. Ashley, you're up.

ASHLEY HEINEMAN: Thank you. Ashley from the GAC. I wanted to say I'm very pleased in that I agree with much, if not everything, that Alan said and much of what Alex said. I'll do my best not to repeat what they said. But, just to be specific to the question. A1, the GAC's answer would be yes. And two, to follow-on with what you're saying, we agree that framework would be confusing, so sticking to criteria I think is the most constructive term to use at this point.

But, to echo a little bit of what Alex said in terms of having timeframes, I think there's a reference to 90 days in the existing temp spec. I would argue that's a bit long, but I won't open up that debate at this point. But, I think having timeframes.

As to the predictability, and I think that's essentially what those requesting access are looking for, just an understanding of the rules of the game and to actually make the registry and registrar's job a lot easier in terms of we're not just constantly in a loop of requesting the information and not doing it correctly or our expectations are different.

So, just to add to what Alex said, what would also be helpful to have in here is references to the need to have, a mechanism by which to make the request obvious or available on the registrar's webpage and perhaps even instructions for what to do, so the requests are made in a way that is clear and it provides all the information that is necessary to do whatever needs to be done behind the curtain, whatever the balancing task that's being done

EN

so it doesn't have to result in a lot of denied requests, just because the right information wasn't provided.

So, I think that pretty much wraps up. Oh yeah, then rationale. If a request is denied, a rationale for why it was denied would be really helpful. Not so much to question the decision, but if a follow-up request needs to be made, at least it's understood as to what questions need to be made and the follow-on requests. I'll stop there. Thanks.

DAVID PLUMB: Excellent. Thanks, Ashley. Again, very much aligned and what we're hearing, the three big pieces being timeliness, being somewhat clearer or more standardized in how you make a request and what information is needed, and the third piece being some kind of explanation on if there is a denial. Okay, Mark S, you are up.

MARK SVANCAREK: This is Mark for the record. Can you hear me?

DAVID PLUMB: Yes.

MARK SVANCAREK: Good. I never know on Adobe Connect if my microphone works. So, I have a list of criteria to define reasonable access. Some of this you will have heard before. I'm hoping that this particular bulleted form will be useful. The first thing is that have you

EN

informed to local law and passed the balancing test? So, this has been said already by multiple people on the call, but I think we have a tendency as a group to interject things, like, "But it has to be lawful." So, let us assume going forward that everything we're talking about is lawful and has passed a balancing test somewhere. We've already acknowledged we don't know who is doing that or how it was done. So, let's just move on from there, number one. It conforms to local law and passes the balancing test.

Number two, it should be appropriate [inaudible]. This is slightly different from the balancing test. It's related. So—

DAVID PLUMB: Hey, Mark. I'm just going to interrupt you for one second because a bunch of people, including myself, are having a hard time hearing. You, indeed, are a little bit low. I don't know if there's a way to get closer to the mic.

MARK SVANCAREK: Does this work?

DAVID PLUMB: That's better.

MARK SVANCAREK: Okay. I'm getting right up next to the mic. Okay. The second thing, it has to be appropriate to the purpose, and by that I mean a purpose has been sent forward in order to perform the balancing

test. At that point, you can provide whatever subset of the data is required for that purpose or it can even be a derivative form of the data. That might be more reasonable. For example, if you only need to reach a technical contact, only the technical contact field might be required. It's even possible that the technical contact field need not be required if the anonymized version of the technical contact field could be provided instead. So, whatever is returned has to be appropriate. That would be the second thing.

The third thing is it has to be responsive. So, answers have to be returned in a timely fashion. We have to decide what that timely fashion is. I agree with Ashley that if I have to wait 90 days to do some copyright work, I'm just going to escalate immediately because 90 days is crazy. I might as well just go to URS, I guess. But, also, if this is an RDAP call or something like that, the performance has to be good. So, it has to be timely.

The fourth thing is it has to be legible. So, an established format should be used. You shouldn't change your formats all the time. RDAP defines the format, so that's good. Port 43 doesn't and we know that historically people use a variety of formats or change their format from time to time for various reasons.

Five, it should be transparent. By that, I mean it should be clear how to do it. How to do it should be discoverable. If a request is received, that should be acknowledged. If access is denied, there should be a clear error code indicating why it was denied.

Six, it should be auditable. Right now, we have a situation where requests come in and they may not be logged anywhere. There may be no way to form a backwards trail to determine who looked

at what or why, for what purpose, etc. And [inaudible], a lot of this work is done using the Domain Tools set, which means that the data was collected in a massive anonymous fashion and then nobody knows who looked at it or what they used it for. So, reasonable access would be auditable, and I think this needs to apply to law enforcement as well. We can make the logging of law enforcement requests obscured, but that doesn't mean that we shouldn't log the request in the first place.

I think that's it. This was originally seven bullets, but I've compressed them. Those are my six attributes for reasonable access.

DAVID PLUMB: Excellent. Thanks, Mark. Could you name one more time the fourth one, which is something about the format? I missed that one.

MARK SVANCAREK: Legible.

DAVID PLUMB: Legible, okay. Great. So, another way of looking at it, a lot of similar echoes of the previous comments [stated out] in a slightly different format and perhaps in more a progressive way of looking at it. Okay, Hadia, you're up next.

HADIA ELMINIAWI: Okay. So, [inaudible].

DAVID PLUMB: Hadia, you're a little fuzzy, so if you can speak as clearly as possible.

HADIA ELMINIAWI: Okay. So, to be quick, with regards to the first [inaudible] one day, [inaudible] place, well, the answer would be yes because we have no other alternatives and you cannot keep everything on hold until we have an access model.

As for the criteria for access, definitely we should not get into the access model as the [charter] says. However, we do need some principles. My understanding of reasonable access is access to data that is required to fulfill the purpose for which we are [granted]. And that will differ depending on the case of the [inaudible]. So, for some [inaudible], immediate access must be required to fulfill the purpose, and for other cases, maybe once a month would be fine. So, I would use the 90 days mentioned in the temp spec as an upper limit because, definitely, we need to have an upper limit. We cannot leave it open. That does not mean that, in some cases, reasonable access would mean access to some specific data within a day or two or maybe less, I don't know.

So, my [inaudible], we could put some examples for purposes and start putting a criteria based on the [case], but I'm not sure that this is something that is required at this point from the team. [inaudible] very general principles, some of which were mentioned by Mark and others.

EN

DAVID PLUMB: Okay. Thanks, Hadia. I really feel like we're circling around a set of ideas here that we could call criterium. I'm also trying to keep one eye on the chat and seeing if people – there seems to be some confusion about what actually is that question two about criteria. Let's keep moving forward and see how we do. Thomas, you're up next.

THOMAS RICKERT: Thanks very much, David. Hi, everyone. In principle, I like the language as it is in the temp spec, but I think we need to make minor tweaks to it and I should also say that I agree with much of what Alan, Alex, and others have said.

As I mentioned in the chat, I think the word access is misleading in this regard because access suggests that folks can go through contracted parties and access data. This is not the case. They can request data and then these requests need to be processed in a fashion and responded to.

So, access sounds like it's a fast service and it is not. Also, access sounds like you can get to as many data sets as you want to, but in fact, what we're talking about is a one by one request that needs to be responded to. This is why I would prefer language capturing this. I'm not [inaudible] to the proposal that I made in the chat, parameters for responding to lawful disclosure requests, but actually we're not talking about access, but responses to disclosure requests that need to follow certain criteria.

EN

Then, the current plan was just the temp spec only makes reference to responding to disclosure requests based on a legitimate third-party interest and that is not the full story. As we've discussed in other areas, we have the possibility to disclose data for UDRP and URS. That would be covered by 6.1b. We have responses to law enforcement requests. That will be done according to 6.1c. So, it might be emergency cases where a contracted party will disclose data to save somebody's life. That would be 6.1e, I guess. So, basically, to protect [inaudible] interests.

So, what I'm saying is that we have a catalog of legal bases for such disclosure. We can either [inaudible] those or just change the language to cover lawful disclosure requests because that suggests that we need to have a legal basis for such disclosure. Thank you.

DAVID PLUMB: Thanks, Thomas. Alan Woods, you're back up.

ALAN WOODS: Thank you. So, Thomas is still on the old [inaudible], which is great because that means I agree. I actually agree with everything Thomas said there, so that was brilliant. But I still [inaudible] everybody who agrees with me, I also think that we need to be very careful with how we are looking at our scope here as well. If we are to say that we are confirming the words with the changes that Thomas suggests, we are looking at making that which is an attempt that we are assessing whether or not that is sufficient to

ensure our ongoing compliance, until such a time that we can put in [inaudible] in place by a normal pace and [inaudible] highly stakes game of EPDP.

So, the criteria, [inaudible] that you make a distinction to [include] criteria as well as framework because I don't think our job is to do a framework. I definitely think that we should pave the way for the framework. I think it's very important [inaudible] that we do because it is good to have some sort of a uniformity in the sense of how we wanted to access or how we wanted to apply for – sorry, not to use the word access, then – to apply for a disclosure request because that would help both the [inaudible] of the field and people on the registry/registrar and on the other side as well.

So, I just want to say that if we are going to go down the [inaudible] of making criteria in as part of our scope, we need to be very mindful of the fact that [inaudible] but if it is something that you really need to be able to move forward, I think that is possibly one of those areas we could compromise on in order to get our process moving much swifter, much faster. Again, as long as it's at a high enough level and its not, in its own sense, unreasonable. So, I will end there. I just want to say one more time, though, that I really agree with everything Thomas said.

DAVID PLUMB: Thanks. Okay. My queue got a little bit weird and I'm going to privilege quickly going to people who haven't spoken yet. So, let's hear from Farzaneh and then Benedict and then I'll come back to Ashley and Mark S. So, Farzaneh, you're up.

FARZANEH BADII: Hi. I'm sorry, you put me on the spot. Thank you, David. So, basically, I just put my opinion in chat, but I also want to just briefly mention the background of the section J. When they were drafting the charter, we did raise our objection to the section to be placed here before all the gating questions are answered and they're very, very similar to talking about access, like a framework. Anyway, that's like a done deal now. We are here discussing the question, so I'm just going to answer.

My opinion is that, for J1, should everything requirement in the temporary spec remain in place until a model for access is finalized, then I think the response is that, okay, yes. [inaudible] support what Thomas said about using the right term and something that is used in GDPR which is disclosure is a processing activity in GDPR, I believe.

Then, then the question Ja and Jb asks, under section 4a, what is meant by reasonable access and non-public data. I think this question is very broad. That's good. It gives us all room to play with the board. However, reasonable is a word that isn't in a court. They have trouble defining it. Under the [inaudible] court cases that tried to define reasonable and they have not. So, I don't think in EPDP we can actually come up with the definition of reasonable and what it is meant. What we can do is that we can say that, at the moment, reasonable should be considered as legal, what is legally allowed.

Then, for Ja2, what criteria must contracted be obligated to consider in deciding whether to disclose, I think these questions

EN

about criteria we really cannot respond now. And as Alan said, later on, we could [inaudible] overarching framework. We cannot go to the details of what criteria because it varies. There are jurisdiction by jurisdiction. There has to be set up like basic standards. I don't think we can in this team at the moment at this stage come up with a set of criteria. Also, I don't like the word criteria. I think it's the wrong word to use here. Thank you.

DAVID PLUMB: Farzaneh, before you go back on mute, I just want to test with you some of the things that have been said on the call, whether we use the word criteria or we come up with a better word than criteria. What has been said on the call is there's a fair amount of agreement that there's some sort of functional issue, to borrow Alan's word, that this policy group could name. Even if it doesn't come up with the number, like, oh, it's 10 days or whatever. But, this group can say, "Hey, here's at least three things that are really important," that there needs to be some criteria around timeliness, there needs to be some criteria about the elements that are required to make a report and make that – excuse me, request and how that request is successful, and there needs to be some criteria around how to respond in ways that provide enough detail that people can understand if their request is rejected, for instance.

So, those are the kinds of things that people are saying and there are some additional ones that were said. But, Farzaneh, does that feel right to you? Do you get to the right level of naming these as elements or criteria while not actually getting down to the nitty-gritty of saying, well, it's going to be ten days?

FARZANEH BADII: So, David, I am very hesitant accept at the moment, before answering all the questions about processing [inaudible] collection and going through all the purposes. I am very hesitant to come up with this overarching framework of how it should be dealt with, but if the group really insists that we have to now set the [inaudible] field that it can in such a short amount of time set up criteria that is, first of all, legal, and all the registries, registrars can agree to it, then I don't know what to say. I don't think that would matter, really. But, I don't think that we can now do that. We have not answered fundamental question.

So, I think my answer would be in the end no, but that's not because I am against legal access. That's only because we have not gone through our purposes, our data elements. We have not analyzed them and I don't think coming out with a set of overarching criteria now can even happen. But, if the group thinks that we can do that, then let's do it.

DAVID PLUMB: Okay. Excellent. Thanks. I'm going to quickly jump to Benedict who hasn't had the floor yet and then I'll go back to Ashely. So, Benedict?

BENEDICT ADDIS: Thanks, David. Hello, everyone. Farzaneh, I'm actually good with reasonable instead of legal. My thinking behind that is I don't want to validate, automatically validate, requests from every country based on this word legal. Reasonable, you're absolutely right

talking about. I think it's more of an idea from common law and [inaudible] kind of law that we chew over what's reasonable.

I know it's vague and I know it doesn't give [inaudible]. But, what it does enable – and this is getting into the question J2 discussion – is for us to start to think about case law, so we can actually start to build up a bunch of requests that we are all agree are stupid and a bunch of requests that we all agree are kind of sensible and then to really – and this is, obviously, for a future model, to start to chew over – have a body or have a panel that can chew over the tricky question. And to me, this comes back to the question we come back to again and again which is what's ICANN role in all of this?

I think ICANN's role is to then log or insist that contracted parties log all requests, which to my mind, suits [inaudible] for transparency [inaudible] the registries and registrars to avoid egregious requests and I don't think law enforcement really objects and others will object to having their requests logged in a transparent way. That's my pitch [inaudible] ICANN's role to make sure that we record all the requests that go in and out, both refused and accepted, and that we have a panel of some sort to look at those. Not compliance. It needs to be something more adjudicatory.

Separate point. Thomas, you blatantly said law enforcement requests will be covered under 6.1c, although we haven't made, written a purpose of those. That applies to law enforcement in jurisdiction and within EU. It doesn't apply to law enforcement out of jurisdiction, so I [inaudible] law enforcement as part of this access discussion that we're not having. Thanks very much.

DAVID PLUMB: Great. Okay. Benedict, thanks. Ashley?

ASHLEY HEINEMAN: Thanks. This is Ashely from the GAC. Not to disagree with everything that was just said, but I just wanted to reiterate that there are opportunities in which something besides legitimate interest will be the lawful interest. So, I agree with Thomas in that we probably should be, respond more in a broader sense or at least say "or other lawful basis" because whether or not … I mean, even if it's European law enforcement, that they're still accountable to GDPR and they will likely have other lawful basis besides 6.1f.

That being said, just wanted to also know, out of an abundance of clarity, that at least from the GAC perspective, we are not looking to get into the details of the criteria for determining access. That is not at all our interest. Our primary goal is to put into place predictability as to how requests for access is done and this is in by no means what we would expect out of a unified access model. These are just basics in terms of the rules of the road in terms of seeking or requesting information. So, just to make that abundantly clear. Thanks.

DAVID PLUMB: Great. Thanks, Ashely. I'm confused about some old hands or some new hands. Mark S, is that an old hand or is that a new hand? New hand, okay. Mark, go ahead. And Benedict, if that's a

EN

new hand, just keep it up. If it's old, take it down please. Thanks. Mark S?

MARK SVANCAREK: Okay. I think, following Thomas's intervention, I'm going to use the term disclosure most of the time rather than access because it does feel like it's more appropriate to the conversation. Regarding lawfulness, please recall that my very first criteria for reasonable disclosure was that it be lawful. So, I don't think we need to go back to that and I would not replace reasonable with lawful because lawful is merely one criteria of what makes things reasonable.

Regarding the term reasonable, I agree with Benedict that it's actually not an unusual term. Within certain contracts, the phrase reasonable commercial efforts is very common, and within certain situations, that term is well-understood. So, going back to case law in precedence, in this particular case, it is not well-understood. So, I understand it is an undefined term at this time, and that is why we are in fact here.

And regarding what can this group determine right now, I think it's limited to things like the transparency and timeliness criteria that I laid out. So, for instance, is 90 days really appropriate or not? Is it okay if I make the request and I get no response? That's not very transparent. Is it okay if people can't figure out how do I even go about asking? I used to use anonymous Port 43 and now everything is redacted. How do I even ask? So, lack of transparency, lack of timeliness, I think those are the types of things we can discuss right now here without having to worry

about the more complex issues of how to determine legality, how to determine a balancing test. I hope that makes sense.

DAVID PLUMB: Great. Yes. Thanks, Mark. I'm just going to go in the order I see it on my screen, which is, Alex, you're up next.

ALEX DEACON: Thanks. I'm hearing actually a lot of agreement here, which I think is great. As I mentioned in the chat, I think it'll be quite easy for us to come up a set of criteria or whatever word we want to use that is a win-win for both the registries and the registrars and for those asking for disclosure. I think really the important criteria is around, as we discussed, timeliness, request specificity, and response rationale. We've talked about how we don't want to or may not want to actually define specific timeframe for these things, but I'll note on previous PDPs that I've been a part of, that in fact we have set these timeframes and time periods. So, I think it's something we could do, but I agree, in terms of making more progress, we should probably set the criteria first and then determine the details, specific time periods at a later point in this process. Thanks.

DAVID PLUMB: Excellent. Okay. Thanks, Alex. Alan Woods, you're up.

ALAN WOODS: Thank you. So, I just want to have a quick … I'm not disagreeing with anything [inaudible]. I feel like I keep saying this. But, something that Benedict said, it's something that he said before and I think, because we're having such a good conversation here today, that I just wanted to raise this with regards to this specifically. You said this regulation will only apply to [inaudible] is what I'm saying will apply only to European law enforcement.

Can we just be very, very careful in how we're talking about this? It's not the job of the EPDP to [inaudible] the means by which people such as law enforcement are able to get access to our data outside and around the GDPR. I'm sure that the law enforcement people are very, very, very aware of the requirements of due process and following the specifics of their individual treaties or requirements and I'm sure that [inaudible] sharing of this data in some way. I don't think we can take into account absolutely every aspect of every single [inaudible] in the world in this concept. So, I just want to be clear that it's not our job to think of specifically the FBI, just law enforcement who have a legal basis to access and is written in specifically to the GDPR under 6.1e, should be able to access [inaudible]. I don't think we need to go further than that.

DAVID PLUMB: Okay. Thanks, Alan. Mark S, and then I'm going to do an attempt to name where we're at and see how we're doing. So, Mark S.

MARK SVANCAREK: Yeah. I realize that law enforcement is largely going to be discussed elsewhere, but one of the criteria I set out for reasonable disclosure is that there be an audit trail and I do think that an audit trail applies to law enforcement access [inaudible] as well as non-law enforcement access and disclosure.

DAVID PLUMB: Thanks. Okay, great. Okay. So, folks, there's a lot of circling around some big ideas here that I think are important and I'm going to name what I've heard and then we'll see if we're headed in the right direction and maybe we can just set off a couple of you to do a little drafting.

So, what I'm hearing, first of all let's get the terminology as precise as possible. I think when we're talking about these criteria and things like that, let's try to use what Thomas said around using the term disclosure rather than access. Disclosure with third party. So, let's try to, in the way we're writing this up and you all as a group, let's use the terms that feel most comfortable for you and that feels most comfortable. Okay, so that's point number one overarching piece.

Then, in terms of the questions that have been posed in the charter, everyone had said yes to that first J1 question [inaudible]. There's been talk about some tweaks to language, but in general, there was an answer of yes. There's some difficulty in defining reasonable beyond reasonable. However, you all made some very concrete suggestions about let's call them criteria for now, but the way that contracted parties should be thinking about and all other parties should be thinking about this process of disclosing non-

public data to lawful third-party requests. And the way you talked about it was that lawfulness, a balancing act, whatever you need to do for 6.1f or whatever your right lawful basis is, that needs to be there and that's step number one and that's something that needs to happen and the registrars, the registries, the contracted parties need to do that. And that's a given, but it's important to name it.

Then, beyond the lawful issues or the legal issues become a set of more functional or practical issues that you, as a group, are comfortable naming now. I'll say a quick caveat. So, Farzaneh, who is saying, "I really want to see how we make progress in the purposes and processing activities," but in general, you're feeling comfortable naming a set of functional criteria that would help give some context to this concept of reasonable.

The ones that keep coming up again and again are this issue about timeliness and responsiveness, this issue about providing some more standardized guidance about what needs to go into a request to maximize its chances of being successful. And this issue about responsiveness and when you get a response, particularly for a denied request, so it's clear enough to understand the reasons why.

There are some other things that have come up that we haven't debated as strongly, such as the auditable trail, such as the general steps on logging. We haven't really gone all around on those. But, the three I mentioned initially are three that clearly everyone who has spoken feels comfortable with.

So, my question to you all is if someone, some of you or staff or somebody writes this up, is this going to be feeling like we're in the right space, we've hit that right fine line between not talking about an access model, but yes, addressing these questions in the charter question and, as somebody said – I can't remember who it was, maybe Alan – pave the way for framework but not actually do that because it's not our job.

Does anybody feel uncomfortable if somebody takes the pen and tries to write up a little bit of my rambling synthesis right now? Does anybody feel uncomfortable if we start to capture this on a piece of paper? [inaudible]. Okay. Yeah.   So, great.

So, how about this. I wonder if folks who are feeling the least comfortable about it maybe become more close to the drafting moment. So, maybe Farzaneh, maybe you and staff and myself, I don't know, could do a quick summary of this call that says, "This is what we spoke about. There were some concerns, but basically this is where we were circling around. Great.

So, here's my feeling, folks. I really feel like we might be spinning our wheels if we go around this a whole other time, but let me turn it back just for a second. Oh, Marika has her hand up. Great. I was going to say Kurt and Marika. Marika, go ahead, please.

MARIKA KONINGS: Yeah. Thanks, David. I may be jumping ahead here, but staff has actually been taking notes in the background and I actually took a first stab at kind of writing up, but I think I heard or what you seem to have summarized as well. So, I'm happy to put that up, or

EN

alternatively, just include that as part of the notes so it could serve as a starting point for further work this small group may want to do before it turns it back to the larger team.

Just a note for those that may not have been on some of the other calls, in a similar way how I think we've worked with the other small teams where we've tried to write up a potential recommendation that could be included in initial report, for a small team to review and [inaudible] to the larger group. I'm happy to put it up on the screen now or if you think it's more productive to actually include it as part of the notes so people can digest it a bit further and then kind of comment on it. We can put it up as a Google doc, so people can work on it as they want.

DAVID PLUMB: I'd say, Marika, thank you very much. I'd say put it up right now folks. Let's look at what Marika's got in terms of summary. Let's throw it on the screen and then we can … Let's do one more round. If we need to help Marika improve that summary. Then, let's really dive into it in a calmer moment maybe later today or tomorrow so that we can work on it on a Google Doc. So, let's look at this. I see something happening on the screen. There it is. Okay, great. Let's just take a moment and read this, folks. I'm just literally reading it and I think we should all read it in real-time, so just tune me out and read, please.

So, thanks, Marika. That's helpful. I'm not seeing on there the issue about a response for rejected requests having a clear rationale or some kind of answer to why it's rejected. Oh, there it is. Sorry. Rationale for rejection request. My bad.

Okay, folks. When you read this, how close is this? What's not in this? The word timeline. So, for those who might be opposed to the word timeline, that is something we spoke about quite a bit on this call right now. We called it timeliness criteria, so maybe timelines isn't the right word there, Marika, but timeframe, timeliness. Okay. There we go. Great. Other things, folks? I see hands. Volker, is that hand for that issue or do you have another issue you want to bring up? Volker, you have the floor if you have another issue.

VOLKER GREIMANN: Yes. It's relating to this issue. Depending on how [inaudible] frame, this could be problematic. Like I said in my opening statement earlier today, one of the reasonable and timeliness criteria might be different for a five-person registrar than for a registrar with 1,000 person [inaudible]. So, we note that once we start naming such criteria, this could put some registrars in hot water with compliance, through no fault of their own, simply because of not having enough staff to deal with these requests. So, I would not like to include any reference to timeliness in this at all.

DAVID PLUMB: Okay. So, thanks, Volker, for that. I feel like there was a lot of talk on this call about timeliness and the importance of that. So, I think what we need to put then in the notes is that there were concerns expressed that timeliness not be translated into standards that are impractical for different registrars or registered contracted parties. So, what we're not doing here is putting a straightjacket on

EN

contracted parties. We need to recognize there's different capacities and sizes.

So, Volker, my suggestion [inaudible] say we have to leave timeliness in because it's been a big part of this conversation today and we can add in this issue that let's be very careful here that we're not creating straightjackets for folks because we've recognized that contracted parties are different in size and scale. Okay. Farzaneh, I see your hand up.

FARZANEH BADII: Yes. Thank you, David. [inaudible] generally okay with this, but I think there are too many objectives in the criteria. For example, you have clear communication, then we go on later on to say we have to define clear. Then, also, requirements for what information response should include. So, what do we mean by requirements? I think we just want the rationale for rejection or for even be the rationale for delaying the request.

So, I think we should go a little bit broader than what we have here, but I am generally okay with it. And then what we have – yeah, that's it. I'm done. Thanks.

DAVID PLUMB: Great. Thanks. I hear you on the adjective thing. Adjectives are dangerous words. So, perhaps we can do this a little bit more cleanly in that way. Alex? You're still on mute, Alex.

ALEX DEACON: Thanks, David. Yeah. I just wanted to quickly respond to Volker's last comment. I appreciate and totally understand that whatever policy we create here needs to account registrars of varying capabilities and staff sizes. I think that's important.

I'm also having déjà vu because I think, Volker, we spent a lot of time talking about timeframes and the privacy-proxy implementation. We may want to look at where we ended up there with regard to timeframes. But, I think what's important for me is that we don't end up in a spot where 90 days after a request was sent we get a response that says we'll get to it when we get to it. I think that's unreasonable. It seems to me that the tools exist today for even a one-person registrar to basically autorespond to a e-mail received that says, "Hey, thanks for your e-mail. We received it." Today. I think that's reasonable. Today, sometimes we don't even get that type of response.

So, I think, again, there's a happy medium we could find here, and again, taking into account the needs, making sure it's a win-win for registrars of all sizes and also those that are requesting access – sorry, disclosure – to this data. Thank you.

DAVID PLUMB: Great. I do want to note that you had said that in the chat, and now together, when we talk about timeliness, there are components of that. It could be recognition of receipt of a request, which could be an auto thing. And then the other piece of timeliness is when you actually get back and answer the question. Okay, Alan Woods.

ALAN WOODS: Thanks. I feel like I'm [inaudible]. I agree with Alex. Hadia had put into the chat and she talked previously about the upper time limit. I would shy very much away from having that concept of an upper time limit because these requests are usually not a one-size-fits-all, and from the ones that I even I've received to date, there are varying considerations for each one. So, to actually put an upper time limit is probably too much and unnecessary. So, I'm not going to say much more on that because I think [inaudible] exactly what I was thinking.

DAVID PLUMB: Okay. Great. I'm going to suggest something here, folks, which is I'm going to suggest that we don't spend our time today talking about how you resolve this practical timeliness criteria. Let's just say you're interested in exploring that and that probably is going to be a good enough answer for this period of time where we are.

The other thing that's not in this summary right now is Farzaneh's concern that let's make sure we have some great clarity about our purposes and processing activity, particularly related to third parties, before we lock things down here. So, that may need to go in the summary and I think it also suggests why it's a good moment to pause and not try to go into details on some of these timeliness or format or what communication really is required, etc.

Mark S, you have a nice green check which I like. Did you want to say something, too?

EN

MARK SVANCAREK: No. There was a question. How many people agree that we can – what was the phrase? Discuss this later. Interested in exploring it. So, I put the green check and said, "Yes, I'm interested in exploring it."

DAVID PLUMB: Great. Awesome. Okay. Alright, folks. I think this is going to be one of these instances where we did our work. I think we just did it in an hour and less than 15 minutes, hour and 10 minutes. I just want to double check if there's anything else people need to say before we get off the phone, do a little tweak on this and put it in a Google doc and let you all work on it. Anything else that needs to be said before we get off the phone on these issues? Kurt, please go ahead.

KURT PRITZ: Thanks, David, and thanks to everybody. I don't think we need to keep this in this small group. I think that if you want to take this back to your stakeholder group or constituency or advisory committee, I think that would be okay, too. If we're going to consider this or anything else online, feel free to share it with your group so we can get it into an acceptable shape quickly. Thanks, David.

DAVID PLUMB: Great. Wonderful. Marika, you've got your hand up. Did you want to chime in about some next steps or other issues?

MARIKA KONINGS: Yes. If staff will go ahead and put up the notes with this recommendation on top into a Google Doc so you can work on it, the question I have is what will be a reasonable – dare I say reasonable – deadline for you all to review this before we can take this back to the full team? Would it be okay if we leave this open until Sunday, so that early next week this can go to the full group, so again everyone has a chance to look at this before people start traveling and hopefully even sign up on this or at least raise, flag issues that people may want to discuss further in Barcelona so we can plan accordingly? Is that okay with everyone?

DAVID PLUMB: I'll take that silence as a yes. Great. Anything else, Marika?

MARIKA KONINGS: No, thanks, David, I think from my side.

DAVID PLUMB: Okay, folks. Great. Thanks. Wonderful. Have a great day and please do look in on this Google Doc and remember, as you go work on it, remember what was said on this call. Remember how we circle around pieces in which you all felt fairly comfortable. Try to keep that spirit together as we go back into the big group. There's going to be some wins that [inaudible] this as the big group also has to do the thinking process you guys just did on the call.

Okay, great. Alright. Enjoy your 45 minutes, everybody. Take care. I imagine we'll be hearing you tomorrow morning or tomorrow afternoon on the call. Thanks, everybody.

ANDREA GLANDON: Thank you. This concludes today's conference. Please remember to disconnect all lines and have a wonderful rest of your day.

[END OF TRANSCRIPTION]