
ICANN Transcription
GNSO Temp Spec gTLD RD EPDP – Phase 2 LA F2F Day 2-AM
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JANIS KARKLINS: So, good morning. I hope you had a good rest after delicious dinner. Thank you, ICANN, for arranging this one for us.

UNIDENTIFIED MALE: [inaudible].

JANIS KARKLINS: No, I just walked [inaudible] dinner, and I had a feeling that I earned it. We have distributed proposal for agenda today. Yesterday, we I think progressed quite a bit. We agreed in principle on the modalities of the SSAD model and that preliminary agreement has been now reflected in the updated version of the draft initial report. There are a few issues that still need to be discussed prior, we could say that the draft is finalized, and those issues we will take up this morning.

And after that, we would allow groups some time to go through the updated version of the draft report and formulate or identify places that they cannot live with. And in that respect, I maybe will ask Marika who

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has developed a rather elaborate template how to register those things that team members or groups think that they cannot live with, which then would allow us in going through the text in the second part of the day. So, that is more or less what we are planning today and I think that by applying the same spirit of flexibility, cooperation, and desire to cooperate and compromise, we may conclude today's work at 5:30.

So, if we will not be able to do that, then we will see probably in the afternoon, we'll have a better idea whether we need to stay longer today and how much longer. So, I'm leaving tomorrow at 5:00 PM which means I have all time until then and I hope that, if need be, we can use it.

But jokes apart, I think yesterday has proven that we are at the last finishing line and we have, as we tend to say in [Latvia], we have stepped over the dog and now we need to step over the tail. And this is what we will be doing.

So, with this, I will ask Marika to outline the method that we will be using today in preparation for discussion of the draft initial report.

MARIKA KONINGS:

Thanks, Janis. So, you should have an email in your inbox that has an addition to the updated agenda that you see here on the screen, two versions of chapter four of the draft initial report, which is basically the core of the report that includes the draft of the preliminary recommendations and responses to the charter questions.

So, as Janis noted, we have a couple of issues that we first want to run through that were a result from yesterday's discussion and as well the preliminary recommendation in relation to third-party purposes and justifications that the group still needs to deal with.

But after that, everyone will get some time with their respective groups to review the latest version. And like per yesterday's meeting and going through the issues, we would hope to set a pretty high bar for bringing issues back to the group which would really do something that your group cannot live with if it's included in that way in the initial report. It could, of course, also be if there's something that is not included that you really would like to see in there.

In order to make that as efficient as possible, we've also included a kind of worksheet with the email that went. So, the idea is Terry is in the process of printing copies of the clean version with line numbers. So, as you review with your group, and please especially focus—and that's why we've also included a redline. Don't reopen issues that were previously closed and weren't flagged before. Those we've probably discussed already extensively. But focus on those items where we've made changes. And then [inaudible] indeed initiate, you should include the line number where the issue can be found, an explanation of the rationale, why your group cannot live with that. Also, include proposed language that would address the issue.

Again, per yesterday's discussion, of course, it should factor in the conversations that the group has had and other positions. And we really would like to encourage you to provide that proposed language to avoid

on the fly or very lengthy conversations on how something could or should be changed.

So, once we've received from all the groups your lists—and our hope is that we can wrap that part up before the lunch break—staff will try to collate all the issues received so we can also see are there certain areas where four groups have indicated they cannot live with? Obviously that's one that needs to be discussed. And kind of organize it in a way and maybe prioritizing what are the big issues that groups have concerns around in what are maybe lesser areas.

I think then we would kind of redistribute that list to all the groups, so you can have a look, and we follow basically the same process as we did yesterday. You can see the proposed changes that have been made. If your group has a concern about that, you flag it, so again, we can do a walk through and see which of the issues need further conversation. There may be changes that can be made without anyone else objecting or where there won't be concerns addressed to changes made.

So, that's a bit the idea. So, we have carved out business the afternoon for that conversation and of course it will depend a bit on the number of issues that get flagged and how easy or difficult it will be to find a compromise on how to address those issues.

And as we noted in the email as well, there are still a couple of items remaining in the document where some people have action items from previous conversations. I think Caitlyn has already sent a reminder to come back with their suggestions and recommendations for those. They're also flagged in the report I think that specifically relates to audit

and financial sustainability. So you can also have a look in there. I think there is already some proposed language in there that the group has discussed but we probably just need to settle on there are a couple of versions I think of one thing and some comments that need to be resolved.

So, I think that's in a nutshell at least what we're proposing. The redline version basically includes updates that are made as a result of the chameleon model, those changes that we already made, the thread of conversations yesterday, the run through of this issues list. You may recall as well in the original issue list, there were also a couple of items that staff had marked as green, as considering minor changes. So those have all been applied. There's also a bit of reorganization on the recommendation of several of you to create some consistency and cross-referencing. So the redline version has really a lot of redlines, so you may want to focus on the clean version.

Of course, any kind of minor edits, just come to us. If you spot something, just send it to us directly or give us your mark-up sheet. Those we can easily address in that way.

So, I think that's what we're suggesting basically for later this afternoon. I hope that's helpful.

JANIS KARKLINS:

Okay. Thank you, Marika. I think it is helpful, and certainly that will help us to get through the issues that we will identify, if any, during the readout of the draft initial report.

I also would like to thank Mark SV for submitting the ten use cases which are potentially be considered for immediate automation of disclosure decisions. What I was then thinking, we maybe need not— unless we have additional time—to go through that list now, but we will certainly look at it once the report will be out for initial comment and see whether [inaudible] identified and indicated in the final report as potential for automated response already from day one of operation of SSAD.

Finally, during today’s lunchtime, for those who are interested, there will be opportunity to [inaudible] an update on the study that is commissioned or ICANN Org is tasked to do on the legal versus natural and [inaudible] will come to us and brief on the state of play and we will have a chance to ask questions.

So, with this, may I take that group is in agreement to follow the agenda and methods as outlined? So, I’m looking to Zoom room. No hands up. I take it this is what we will do. So, thank you very much.

So, let us now then turn to outstanding issues [inaudible] yesterday. We identified that there are three of them, namely issue 58, 62, and 63. And we will take one by one. I will call now on Marika to kickstart the discussion.

MARIKA KONINGS:

Yeah. Thanks, Janis. So, 58 is a section in the query policy section that would read “unless otherwise required or permitted, not allow bulk access wild card requests nor Boolean search capabilities”. So, the changes that were made here is to remove the reference to reverse

lookups [inaudible] agreement from the 23rd of January call and to add a footnote to refer to the relevant provision in the RAA that describes bulk access. This is basically in response to the suggestion that was made by the IPC.

There was also another question from the NCSG where the reference “unless otherwise required or permitted” came from but a response was provided by the IPC that this is the language that’s also used in the new gTLD agreement. So, I think it was the Registry Stakeholder Group that flagged a concern with this, so they may want to speak to that.

JANIS KARKLINS:

Okay, thank you very much. Please.

ALAN WOODS:

Yeah. So, we flagged this just purely because of the conversations that we’ve been having today, specifically with regards to the reverse lookups. We just thought that it was worth flagging that if we were removing reverse lookups because it’s out of scope, then we also probably should be removing wild card [requests] and search capabilities because they themselves are also not technically then in scope. So, just to make sure that we are on the same level going forward. Probably practice what we preach sort of a thing.

JANIS KARKLINS:

Okay. So then proposal is to remove wild card request, reverse lookups, and Boolean search from the text.

ALAN WOODS: Just to say, obviously, the proposal then is to ensure it's a one-for-one as opposed to anything else. You're searching for a particular domain. That's what is in scope as far as we're concerned.

JANIS KARKLINS: So, you're suggesting reword completely this point or we still can leave it as is unless otherwise required and permitted not allow bulk access, with asterisks explaining the meaning of bulk access.

ALAN WOODS: That's correct. Yes.

JANIS KARKLINS: Any issue with that? So, then we're—yes?

UNIDENTIFIED MALE: I probably should have done the Zoom hand. Sorry. It's a little difficult for me personally to follow along. It's hard to see the context because, I don't know, are we editing a building block, the draft report, the chameleon model? I don't know. You can't see ... This is just number 58. I don't see what's above and below it and it's a little difficult to ...

JANIS KARKLINS: Yeah. That is in the building block. [inaudible] policy, that is also part of the initial draft report. You need to open the document itself—the

initial draft report—and then you will see the context in the [query clause].

UNIDENTIFIED MALE: Okay. I just didn't see that. How do you know that from looking at ... Like, number 58, it wasn't clear to me.

UNIDENTIFIED FEMALE: Query policy section.

UNIDENTIFIED MALE: Query policy section, okay. Then just find the sentence that's being quoted. Okay.

What I'm confused about right now is, if we remove that, is that allowing it? Because this language was saying you don't do that and now we're taking out the language that says you don't have to do that. So, does that mean you can do that? Is that the intent?

MARIKA KONINGS: This is what my understanding has been from at least a conversation on reverse lookups, that people accept that if there's no recommendation to that end, that it's permissible. That's at least what, from our side, we've pointed out. If there's no recommendation that prohibits something and it's not called out, it basically makes it permissible. That's my understanding at least from how it works.

ALAN WOODS: No, that is not the intent at all. We're saying that it is not currently available and it is not in scope for us to discuss it. Therefore, if it was to me made permissible, that would have to be done through a separate GNSO process, not It's just out of scope and not to be discussed by [inaudible].

MARIKA KONINGS: So, what would prevent someone from offering it if it's not precluded by the agreement? Again, that would be ... That's at least, I think, the point that we made before. if you don't specifically address something and it's not prevented by any kind of other contractual obligations, what prevents a contracted party from offering that service?

ALAN WOODS: As a sole controller decision in that sense, that would be up to the individual contracted party. Fair enough, yeah. But again, it's just we want to avoid it as being some sort of an almost that we are tacitly permitting it from this. We are not. We are saying it's outside of our wheelhouse. It is just not there is what we're saying.

MARIKA KONINGS: Right. But if a contracted party would decide to offer it, they can. There's nothing preventing it. That's I think the point we're trying to make. No one is saying that you must offer it, but if a contracted party somewhere says, "I want to offer a reverse lookup because I think it's a great service to provide," they are permitted to do so because it's not prevented here or anywhere else at this point in time. That's at least ...

UNIDENTIFIED MALE: The point we're trying to make is this is policy recommendations for the SSAD. So, we're not making policy recommendations outside of SSAD that otherwise ... That make any changes to anything that was currently allowed outside of SSAD or forbidden outside of SSAD. That should still be the case. And I think that was the intent of the original language when we put it in there is we wanted to make it clear that we weren't changing the status quo. If contracted parties were allowed to do it before, they should still be allowed to do it. But then we had the discussion about whether it was in scope or out of scope and we thought we should remove language altogether.

But the intent is that the SSAD system itself that we're developing policy language for should be a one-to-one. One request per one domain. I hope that's a common understanding across the table. We're developing an SSAD system that will allow one request per one domain and that we're not talking about any of those other things—Boolean, reverse, bulk, anything like that. None of that is contemplated by this. So, hopefully, that's a shared understanding. I'm not getting tackled or seeing anybody running for the mic. So, I think that's right.

JANIS KARKLINS: Let's put it in context and then reading the text from the draft report that EPDP team recommends that SSAD must, unless otherwise required or permitted, not allow bulk access, have the capacity to handle expected number of requests in alignment with the established SLAs, only return current data, no historic data, receive a specific

request for every individual domain name. Actually, there is redundancy already in that. And that direct requests of the entity that is determined through the policy process to be responsible for the disclosure on the registry data.

So, this is the context, and actually there is redundancy and probably D and A could be ... One of them could be deleted [at all] in reality because it is redundant. But to remove redundancy, that is the next step after overall agreement on principle.

So, with this, can we move to the next topic? Stephanie, Thomas, and Brian.

STEPHANIE PERRIN:

I apologize for what may seem to be a digression but I think this particular discussion raises a pretty important point. If we are sending this out for public comment, we should attempt in the preamble to make it explicitly clear what we're talking about when we set a policy for registration data.

Because registration data that used to be disclosed in the WHOIS—and this is basically an exercise to construct a new WHOIS that is compliant with GDPR—because that is merely the tip of the iceberg of data that all of our contracted parties control as independent controllers, it is not even clear to me, and I've been at this a long time, how much ICANN seeks to control their behavior with respect to registrant data as it mingles with their other data, as it is accessible to registrants under the rights provided by GDPR and other global data protection policies.

So, I think it's pretty important that we describe the wheelhouse here of what we're talking about. If, as Thomas suggests, that ICANN decides to develop a code of conduct for accredited registrars, there's quite a length that ICANN might choose to go to in determining what accredited parties can do in order to keep their accreditation with client data. But my sense is we aren't going there yet, which is one of the reasons I think it'll be five years. Is everybody following me with this?

So, I think it's important, before you throw this out for public comment, that you make a very, very clear diagram of how much of that iceberg we're talking about. Thanks.

JANIS KARKLINS:

I think we will have a process diagram attached to the report or in the report and we will [see them] this afternoon. Thomas, please.

THOMAS RICKERT:

Janis, you lost me a little bit with your summary. So, just for my clarification—I hope that I'm not taking too much of your time—I think the intention of that language is to, number one, clarify that reverse lookups and all these things are out of scope, and I think that for this PDP ... And I guess what's important is that we consider this a policy question, so that if the SSAD is operational, that these types of queries can't be introduced without going to the GNSO, at least for further discussion.

Certainly, that doesn't prevent any of the contracted parties from doing things themselves, but it should be nothing that can be enforced by ICANN Compliance at this stage. Is that our shared understanding?

JANIS KARKLINS:

Look, I was just reading out what is in the recommendation on query policy recommendation 12 in order to put answering [inaudible] question, to put that in a broader context, and that is recommendation what SSAD must do.

So, now the question is [an] interpretation of what is in the scope and what is not. We had a number of occasions we had the conversation whether the [inaudible] is in the scope or not and there is a clear difference in understanding of [validation] how to resolve.

One way is to try to find a compromise and explicitly state that. Another option is not to mention in the text at all, allowing each of the groups to interpret that in its own way. So, that is by removing mentioning of the text of reverse lookup and also now the text of Boolean search and— what was the third one?

UNIDENTIFIED FEMALE:

Wild card.

JANIS KARKLINS:

Yeah, wild card. Then we're leaving that issue open and permitting interpretation of different groups in its own way. But if you look to the recommendation 12, now it says that SSAD must, unless otherwise

required or permitted, not allow bulk access with asterisks, have capacity to handle expected number of requests, return current data, and direct request entity that is determined through the policy process to be responsible for disclosure. So, that's what I understand we agreed now.

Now the question is, is there appetite to continue conversation on whether wild cards, reverse lookups, and linear search is in the scope or not. And taking into account the time at our disposal, I would suggest not to venture in that direction, but of course, I am in your hands and if you want to beat that dead horse or to continue to beat that dead horse, let's do it. But my recommendation would be not to venture in that case and leave it open for interpretation at a later stage.

So, I have Brian and Lauren.

BRIAN KING:

Thanks, Janis. I think we have consensus on getting rid of that language and leaving ... Just staying silent on that point. So, I'd say let's agree to that and move on.

JANIS KARKLINS:

Okay. Lauren? Okay. [Marc]?

[MARC ANDERSON]:

You scared me a little bit when you said stay silent and leave it open to interpretation because I think we want to be crystal clear that the SSAD system that we expect to be built supports one query per one domain

lookup. Is that? If we're not clear on that around the table, let's get clear.

UNIDENTIFIED MALE: I'm so relieved I am not the only one who is confused.

JANIS KARKLINS: Brian, please.

BRIAN KING: I want to be very careful because I think we probably do have agreement but I have a slight hesitation with the way that you said that, because if we identify two infringing domains, I don't want to preclude us being able to extend them both in at the same time. If that becomes two RDAP queries behind the scenes once it goes in the SSAD, fine. But I want to be careful with the one domain, one query thing because we fought real hard to get clarity on the bulk access means what it used to mean in the RAA and we're okay with prohibiting that but we're not okay with prohibiting two domains being [inaudible] at the same time. I think we're all clear on that but I just want to be clear.

UNIDENTIFIED MALE: Yeah. Two domains or 10,000 domains, as long as it's a separate query for each domain. That's what our expectation is. Representing the implementer, does that answer your question, too?

UNIDENTIFIED MALE: Thanks. I'm 100% with you on clarity is best. I'm a little bit ... Is it clear somewhere in the report that bulk access just means what the RA said, like downloading the whole file, and we're not going to have fights later? Is 10,000 domains okay? Can I send in a [CSV] with 10,000 domains? Is that a valid request? Bulk access is a little scary to me if it's left vague what that means because it's meant ten things to ten different people.

JANIS KARKLINS: No but we had a footnote which suggests that as described in RAA Section 3.3.6.

MATT SERLIN: It's not really described there. It just says bulk access, right? There's no actual definition.

UNIDENTIFIED MALE: I just looked at the footnote. It says bulk access as referred to in 3.3. of the RAA. So, this would say unless otherwise [inaudible] that SSAD will not allow what's required in the RAA. It doesn't directly to me address whether you can have 10 or 100 or 1,000 or 10,000 lookups at once. But at least that bulk access wording is clear.

My original question was I was confused because it sounded like we were deleting something out that said you don't have to support this, and if we deleted that, that would open the question, well, can it support that? I'm still not 100% clear on what the wording is going to look like in the report. Thanks.

JANIS KARKLINS: So, the language in the report will be unless otherwise required or permitted, not allow bulk access with asterisks.

UNIDENTIFIED MALE: And what about restricting reverse bulk access?

JANIS KARKLINS: Striking wild card requests, reverse lookups, nor Boolean search capability.

UNIDENTIFIED MALE: It seemed upside down to me that they were concerned about not allowing reverse lookups and then the result was to take out the language that says you don't have reverse lookups. That was my initial confusion.

JANIS KARKLINS: So, for me, my knowledge of English language suggests that if we say not allow bulk access which means that we do not allow bulk access and we take one request per domain. So, that's what it means for me no bulk access. I think we've just gotten really in the weeds. Anyway, I have Brian, James, Margie, Mark SV, Franck, and Alan Greenberg in that order, please.

BRIAN KING: Thanks, Janis. I had a brief caucus here. I think we are in agreement and maybe we would suggest that [Marc] and I step aside and just put language together that makes it clear that we're in agreement and what we mean. If that's not here, maybe we can wordsmith to decide as we kind of agree will be a good exercise for the face to face and get back to you in two to three minutes with suggestion.

JANIS KARKLINS: I would be [only] grateful if that would be [inaudible] possible, but I need to understand whether other people accept that by taking off their hands or if they insist to speak. That's the question. So, I still have a few hands up. James, Mark SV, Alan in that order. Alan Greenberg.

JAMES BLADEL: So, just briefly, I think Brian is right. I think we're agreeing. I think we're getting tripped up on definitions. I think we need to be very, very careful here because we could say something different, like instead of bulk, we could say bundle, which what we're talking about with the frontend user interface. But how it's processed on the back, it's not a bulk operation. It's a one to one operation. But how the SSAD presents that to the user versus how it's parsed and processed on the backend, I think we just need to get those two halves of the transaction defined because when one person says bulk, another person hears a different kind of bulk.

So, I actually think it's our terminology that's messing us up here, but we're all agreeing ... We're all visualizing the same system. We're just calling it by different names. I can help if you need help.

JANIS KARKLINS: Okay, thank you. Mark SV?

MARK SVANCAREK: Microsoft is not smart enough to use anybody else's technology. Yeah. I wanted to agree with what James said. I do think this is a terminology thing and I think it's, regardless of how we describe the frontend, I think bundling is a great way to describe it but just as long as we're clear that what the disclosing entity sees is a one name per for disclosure request. So that's what the disclosing agent always sees. What actually is submitted by the user and goes into the portal could be bundled. That's all.

JANIS KARKLINS: Thank you. Alan G?

ALAN GREENBERG: Thank you. I just put my hand up to note that we seem to be adept at going in circles of making a decision to avoid one thing, and then coming back again and deciding that was a mistake and let's do it the other way.

We took out whichever one we took out—I forget now—because we said it's out of scope so we can't mention the negative or the positive and now we're questioning "but if we don't mention it, what does it mean?" These discussions can go on forever.

JANIS KARKLINS: I'm trying to close them. Marika is next and then we will ask Brian and [Marc] to step [inaudible].

MARIKA KONINGS: Thanks, Janis. I think as well, building on [Dan's] point, if you're all agreed that this shouldn't be permitted, say it. If the council considers it's out of scope, they will tell you. From a staff's perspective, [inaudible] made the point before the charter says what rules, policy will govern users' access to the data. This is explicitly saying what governs that access.

So, if there is agreement on what it should say, be clear about it. If there's no agreement or further work is needed, say that. But not saying it may leave ambiguity and permissibility, potentially. So, that would be, at least from our side, our advice to James and Brian as you look at this language.

JANIS KARKLINS: And if I may ask Brian now and [Marc] to work on that. But if you could look also in that particular recommendation, recommendation 12 point A and point D, they're both talking about no bulk access. Just maybe we can get rid of one of them by reformulating another one.

So, with this, we would come back once proposal will be developed and we may now move to point 62. Marika, please.

MARIKA KONINGS: So, this is a comment on the terms of use section and it's a pretty long section—the comments specifically related to the entry on the privacy policy. You can see here that a couple of, at least from a staff perspective, look like minor wording changes were made to that section.

We noted as well that there were some other specific changes suggested by the ISPC to have more details on what should be in there but we noted previously the group discussed and agreed to keep it actually at a high level and not try to write the privacy policy itself there but to make sure that would be done as part of the implementation [with] directly affected parties.

So, that's I think what you basically see here, some minor language changes proposed as a result of suggestions that were made. And I believe it was the Registry Stakeholder Group that flagged this one.

JANIS KARKLINS: Thank you, Marika, for this introduction. James's hand up and Stephanie.

JAMES BLADEL: Disregard, please.

JANIS KARKLINS: Stephanie, please.

STEPHANIE PERRIN: Yes, thank you. I'm sorry to be slowing us down but I know people like the term "bundling" but it's not legally clear to me. And I was just typing if I were a DPA investigating this, I would ask you to explain the difference between bundling and bulk access.

UNIDENTIFIED MALE: We will endeavor to do so.

JANIS KARKLINS: So let's wait what will come up from the conversation of Brian and then [Marc] on that.

STEPHANIE PERRIN: Okay. Let me just put a marker in that I remain unconvinced on this. I think we need clarity, as Marika explained. Thanks.

JANIS KARKLINS: So, two members of the team are working on new language proposal. So once they will come back, we will examine that proposal and see whether there is sufficient clarity.

So, on 62. Alan?

ALAN WOODS: Thank you. This one is more as a result of now that we've chosen this particular route that we're going down, the CPH of the contracted party will affect the disclosing body and the requirements of a privacy policy

are very clear and set out in law that doesn't necessarily need to be [mirrored] within the actual policy itself.

Specifically, as well, [are you] recommending here the relevant data protection principles, for example? That wording is ... It's not necessarily needed in a privacy policy. I mean, I wouldn't go about creating a privacy policy with that wording. And I think now that we're no longer defining a particular third party and telling them that they need to put these in a privacy policy, it's really up to the individual controller to do that privacy policy. So I think this is entirely redundant now.

We're not going to cause major issue with it, but I think we need to think now we've chosen the one model. We need to make changes accordingly.

JANIS KARKLINS:

Yes. Marika, please.

MARIKA KONINGS:

Yeah. Thanks. Just a question here, because my understanding from some of the comments yesterday was that the understanding was that this privacy policy was for the SSAD for specifically in relation to the requestors that may submit personal data to SSAD as part of their request. I think someone noted that might need to be clarified in this section.

ALAN WOODS: And I apologize. Yeah. That would make a lot more sense, so I retract everything I just said.

JANIS KARKLINS: So we will [write this off to the early morning]. Anyone have a problem with 62 as suggested? So there are two old hands and no new hands, so I take that we may go with the suggestion in the middle column as it is presented by the staff.

63, Marika?

MARIKA KONINGS: So, 63, that's also in the terms of use section. The current language says: "The EPDP recommends that the [inaudible] terms of use shall address indemnification of the disclosing party and ICANN."

Some of the comments made were not only the disclosing party and ICANN, but all parties involved in the SSAD must be indemnified. Are we contemplating that requestors indemnify the disclosing party and/or ICANN as a condition of using the SSAD? And, red flag, this is likely not possible. We can discuss insurance, bonding, and other options but many requestors—example given, law enforcement and other government users—will not be able to indemnify.

We actually noted that this may be a topic that requires further discussion and input if it's not clear if this is possible or feasible in some of the suggestions. So, I think we had as well several groups flagging this. So, I think it will be really helpful for group to kind of be specific on

what they would like to see in the report, and as well if that indeed is something that is feasible or acceptable for all parties.

JANIS KARKLINS: So the floor is open. Lauren?

LAUREEN KAPIN: So, usually I would try and give a specific suggestion, but for this, we need to be very clear on behalf of governments what can't be in the agreement and indemnification can't be in the agreement. Public authorities don't have the resources and capacity to enter into indemnification agreements for unknown amounts of resources. So, we can talk about other things but that's a non-starter.

JANIS KARKLINS: Okay. Volker?

VOLKER GREIMANN: Yes, thank you. I think the easiest solution then in this case would be to have some form of insurance policy for these kinds of requestors so that the disclosing parties and the operators of the SSAD are still indemnified and have a separate agreement for the kinds of [requests] this doesn't apply for that includes these indemnification clauses. I think that would be a simple solution.

JANIS KARKLINS: Yeah. It would be good if you could think of writing up some proposal that we could reflect on. So, I have Stephanie, Alan Woods, and Franck in line.

STEPHANIE PERRIN: Thanks very much. I think I would be remiss if I did not remind people that the Non-Commercial Stakeholders Group represents individuals. As such, I was troubled by this talk of indemnification because indemnification costs a lot of money and nobody is offering to indemnify the costs of taking a lawsuit, which is of course provided for in the GDPR, on behalf of civil society.

So, what's sauce for the goose is sauce for the gander. You'd better indemnify our court costs when we sue for breaches of protection under this. Thanks.

JANIS KARKLINS: Thank you. Alan Woods, please.

ALAN WOODS: I'm going to contemplate on what Stephanie just said on that one. But my actual point was just in relation, Laureen, to ... That's why I'm kind of edging and hoping that the GAC pushes towards more of the [officialdom], the powers that they have. If you are requesting data that is under a specific power that that particular body has in legislation, in the home country, in the jurisdiction because that means for us it's less of a breach but more of an obligation again. So, indemnification doesn't

become an issue for us because we have no say-so in the provision of that data.

I think it's very difficult, again, probably just in the context that we are having these conversations, it makes it so much more difficult because we don't know the extent to which that is there.

So, I think indemnification is probably far too broad a term for this. It just doesn't encompass the delicacy of this. So I would encourage us to think of something ... I think the underlying point here is that we want to be able to, in the event that we are forcing to making a decision that is incorrect and we are then sued, that there needs to be some form of an out and I think Volker's idea of ensuring that there's just [adequate insurance cover] of sorts probably will take over from that indemnification area.

But I think we need to make sure that just specifically from a government point of view that the emphasis is on the official request as opposed to the [in passing] request from those particular bodies.

LAUREEN KAPIN:

I just want to make sure I'm understanding what you're saying. I mean, I think to the extent that governments are making requests, they are going to look to their recognized powers to make those requests. I'm not sure I understand what you mean by this other category that might create enhanced risks for you. Do you mean governments making impermissible requests or not specific requests? I'm just not sure what other category you're worried about because it strikes me if we don't

have the authority to make the request, we would be bounced out anyway.

ALAN WOODS:

If I may redirect quickly. The one that springs directly to mind, it's not perfect but it is the out-of-jurisdiction law enforcement request because that is not under a legal power. It is we are a valid law enforcement and we're asking you to do this. We can't compel you to do this, but that protection is no longer there for us. So, if we were to get that one wrong, then we have no protection in those instances. So, that's a difficult one.

LAUREEN KAPIN:

So, let me just quickly respond. The out-of-jurisdiction request raises a whole can of worms to begin with, but it strikes me that if you receive that request, we've heard all along that you are looking at these requests, you're assessing these requests. You want to make the final call.

So, what I would say is if you make the wrong final call, why is that my problem? What I hear all along is we want the discretion, we want the discretion, we're going to be the decision-makers. You are on the hook for the decision. I mean, argue with me but I'm having trouble understanding why if a government makes the request—and I'm thinking of Joe and Jane on the line. They don't know that it's the wrong request. They want the information, blah-blah-blah. It is up to then the contracting party to assess that and say, "No, you're not entitled to it." That's where it should end. And if they make the mistake, then to me

that's on them. I'm just having trouble understanding why the risk should then be on the requestor.

ALAN WOODS:

Laureen, there's absolutely no problem with that. I completely agree with what you're saying. But the flipside of that is then when we do say no, then World War 3 is not going to break out.

JANIS KARKLINS:

But look, aren't we trying to force the open door? What this part suggests is that the terms of use at the minimum should or shall address and then a number of points. And one of those points, the terms of use, shall address indemnification of disclosing party and ICANN. It does not say that there should be indemnification or not. It says that in terms of use, the issue of indemnification should be addressed.

So, are we in agreement of that? No, but we're not saying there should be indemnification in case of wrong decision. What we are saying is that issue of indemnification should be addressed and leave it for implementation to negotiate whether indemnification should be there or not. So, this is my interpretation of this policy recommendation that we are talking about. But we're not deciding here whether indemnification should take place or not in case of wrong decision, which leads then to fines and things. No? You're not in agreement with that.

LAUREEN KAPIN: Indemnification is a very specific term of art, and to me it's the wrong word. I mean, Volker's suggestion about an insurance pool or something to protect against scenarios where someone is forced into making a decision. That's the phrase I heard you use. That makes sense to me. But indemnification is demanding that an entity bear the risk for certain scenarios in an undetermined amount. So, that to me is the wrong word. Insurance or that concept, that I think is the better concept, the more precise concept. We can't live with the word indemnification and I don't think it's accurate.

JANIS KARKLINS: So, I have a number of hands up. Franck, Margie, Alan. Franck, please.

FRANCK JOURNOUD: Thank you. So, I'll use the word indemnification, although I think several people have commented already on how it's not the right word. Just for ease of use.

I think there's an assumption here that we're talking about indemnification by requestors of other parties, whether it's ICANN or the contracted party or, per Stephanie, maybe also [inaudible].

Quite frankly—and I apologize for maybe creating a problem—but I don't sort of agree with that assumption. I don't see why ... Really there's only one side that needs to indemnify another. I mean, there is liability. There can be mistakes made, misrepresentations, abuses, etc. by anyone—by the requestors. ICANN could be sloppy. Contracted party could be corrupt. A number of things can happen. Bad things can

happen because of everyone and I'm not quite sure why we're thinking of only the bad things that could be caused by requestors.

We also have to think about there's indemnification, you have to talk about sort of the action. But they also have to talk about what kind of damage are we indemnifying. Is it, well, there is nothing wrong you did, but the data subject sued and managed to find liability without fault. And I'm speaking here, as probably obvious, as a non-attorney. There can be different types of liaison. Why should I indemnify you for ... I did nothing wrong.

So, we may need to reexamine [some of] the assumptions behind this indemnification section because I'm not really on board. I mean, I'm happy to put forward the principle that certain requestors might be able to "indemnify" others for our own, as requestors, mistakes, misrepresentations, abuses, etc. I don't think that I'm really willing to go further than that. Everyone should just carry their own water and be responsible for their own you know what.

JANIS KARKLINS:

Thank you, Franck. Margie, followed by Alan G.

MARGIE MILAM:

It sounds we have at least agreement in one respect, that the policy should encourage ICANN to look into bonding and insurance because I think no matter what, whatever we [inaudible] indemnification side of things, that to me I think gives a base layer of protection for the system.

I don't see anyone objecting to that and I do think that it's not good enough to just give it to the IRT as [should be indemnification] because knowing how the IRT works, they need more clarity than that and they won't know what to do with that.

So, I agree with the proposal, that we don't use the words indemnification. We look at things like insurance and bonding to protect against abuses of the system.

The concept can be maybe even built into on the accreditation side because it might be specific to the different accreditors. For example, if someone is accrediting intellectual property folks, well they might have a different approach to indemnification than, say, someone who is accrediting law enforcement or civil society.

So, this isn't a one-size-fits all but it's I think a concept that at least we can have some agreement on with regards to bonding and insurance and that sort of thing. Thank you.

JANIS KARKLINS:

Alan G, please.

ALAN GREENBERG:

Thank you. I guess I'm echoing what Margie and what you said, Janis. I'm rather surprised ICANN Org is not commenting on this. What this says is the agreement you signed as a user agrees to indemnify ICANN or any contracted party for undefined things. No one is going to sign that. So, we're going to have to provide a lot more guidance or change it going forward, because just open indemnification for whatever anyone

wants to claim from you is just not something that's going to fly. So, I don't think what we have here is implementable. I think we need to think it through more clearly. Thank you.

JANIS KARKLINS:

I refer to recommendation 11 and you can check on that. So, recommendation 11 suggests that EPDP team recommends that appropriate agreement, such as terms of use from the SSAD privacy policy and disclosure agreement are put in place, that take into account the recommendations from other preliminary recommendations. These agreements are expected to be developed and negotiated by parties involved in SSAD, taking the below implementation guidance into account.

Then we're talking about the implementation guidance on privacy policy, implementation guidance on end user terms of use. And here is this indemnification that should be considered, whether it should be put in place or not. So, if indemnification is not acceptable as a word, shall we put insurance as a ... I mean the thing that should be considered during the negotiations of the contracts.

So, I have Stephanie, Volker, and then Thomas. And then Alan Woods.

STEPHANIE PERRIN:

I think this is a very useful conversation. However, we're on meeting 43 and this entire process of compliance with GDPR has been based on the liability of GDPR. So, it's a bit shocking that we are now trying to [parse]

at the last minute while we're on the forced march exactly what we're insuring against.

And I totally agree with Laureen. We can't use the word indemnification. It's a huge word. Governments can't do it and we as representing the end users won't pay for it, so forget it. There will be a massive pushback on that.

Now, I don't blame the contracted parties for wanting it, because if they make a right decision, they could be sued. If they make a wrong decision, they will be sued. So, are we insuring against the costs of any lawsuit, the costs of having somebody—one of our human rights defenders get killed? What is it? We haven't even teased this apart. And these are policy decisions. They are not ... We can't just punt this to the IRT and let them figure it out. I'm sorry. I'm not going to [inaudible] IRT on this. And it's really important. And that's not a promise, by the way. I might change my mind. So, we need to unpack this. It's really important.

JANIS KARKLINS:

Volker, please.

VOLKER GREIMANN:

I mean, if we look at this from the most basic perspective, it's contracted parties providing a service to the community. And when you provide a service to someone, then you usually expect that any risks of providing that service—external risks—for any abuse or misuse on the service, are indemnified.

Now, I understand that certain players in this game cannot do that because of legal restrictions and they should be excluded in some other form of protection for the contracted parties should be implemented. But those players that can provide that kind of indemnification should bloody well do so because they are taking a service. They're using a service. And if they're using a service, I think it can be expected that they indemnify the providers of that service against any damages they might suffer from providing that service. That's the end of it.

JANIS KARKLINS:

Thomas?

THOMAS RICKERT:

I sort of get the impression that we're living in parallel universes and this uproar about the indemnification really surprises me. If you look at GoDaddy's terms of service, I bet there's an indemnification clause in there. So, if you register your domain names through any of the registrars, you will most likely indemnify the registrar against claims raised against them because of what you are doing in using their service.

We've been discussing the Registrar Accreditation Agreement earlier. If you look at section 3.7.7.12, the registered name holder shall indemnify and hold harmless the registry operator and its directors, officers, employees, and agents from and against any and all claims, damages, yadda-yadda-yadda, resulting from the registered name holders domain registration. So, it is there.

It is unconceivable to me that ICANN would offer an SSAD without asking for indemnification. It is inconceivable for me that ICANN will find a contractor—they will likely outsource that—where a contractor, DeLoitte or whoever might do the job, will not ask to be indemnified against claims raised against them in performing the services.

So, I'm just ... And I guess this language originally comes from me. I've asked for that to be put into a policy so that the contracted parties, ICANN, and the agents that they might be hiring to do the job will not ask for something that comes as a surprise to us as policymakers. So, I think we need to put that into our thinking. We can be more concrete that this shall be an indemnification against the misuse or the breach of safeguards or what have you, but I think we can't get away without having something like that in our framework.

JANIS KARKLINS:

So, with this explanation of Thomas, can we add something along the lines that he said, indemnification of the disclosing party in ICANN for misuse of SSAD or—how you said, Thomas? Misuse of SSAD and—

THOMAS RICKERT:

I can suggest language but I think it should be something that this is why we have made the comment that it's not good enough just to say disclosing party and ICANN. I think it needs to be everybody involved in the operation of the SSAD. And that would be potentially a contractor that is working on behalf of ICANN. I don't think that ICANN is doing the job itself. I'll work my miracles in the background and I will send language to you guys.

JANIS KARKLINS: Yeah but the question is whether that would suffice in light of what we heard. Laureen?

LAUREEN KAPIN: What Volker suggested is a carve-out for public authorities would suffice, but a public authority is not going to be able to agree to indemnify as a condition of using the SSAD. So, that's problematic. A carve-out could solve that or there are other approaches also.

JANIS KARKLINS: But you see the public authorities are supposed to follow the rules of the game.

LAUREEN KAPIN: I'm telling you the legal rules of the game are a public authority is not going to be able to take on an undefined risk of damages. They are not allowed to do that. So, that's the rules of the game for government entities.

JANIS KARKLINS: I am also working for government and I know that I have signed things which include indemnity and I know that I would not [inaudible] if I followed the rules of engagement. And if I am in the breach of rules of engagement, a government can be sued and government can be asked

by the court to indemnify a wrongdoing of an employee of the government. So, that's nothing new. That exists.

LAUREEN KAPIN: There is a difference between agreeing in advance to indemnify and being sued, okay? Governments are always at risk of being sued and they have their defenses. That's very different from signing a contract that says, "I am going to indemnify you." We can agree to disagree on this.

JANIS KARKLINS: No but if government is registering a domain name and the contract which is kind of a [unified] contract, whether it's for government or individual, indemnification clause is in. Would you ask to take it out?

UNIDENTIFIED MALE: Yes, every single time.

LAUREEN KAPIN: That's exactly right. The fact that if people ... I mean, first of all, mistakes happen all the time but if I'm seeing an issue in advance, and as someone who would be reviewing contracts, I would always be balking at an indemnification clause for a public authority. If I'm in the private sector, very different. And I've been in both ends.

JANIS KARKLINS: Okay, Thomas, your effort will not be accepted unless there is a carve-out from public authorities. Honestly, I don't know. Why don't you give a try in consultation with Lauren to find out the formulation that may be acceptable? Alan Woods?

ALAN WOODS: Very brief points. One point directly on that one. So, in a services contract with a government body, are there carve-outs? Are there acceptable types of carve-outs? And I think we need to just discuss what would be in a usual contract with a public body? You can't just assume that people are going to enter in blindly to a contract for services with government body, knowing that if something goes wrong, it's all on the person providing the service. There must be some sort of formulation there. I don't have the experience, so perhaps we can lean on your experience on that one.

LAUREEN KAPIN: [off mic].

ALAN WOODS: Yeah. But there must be something is the thing, so we just need to find that. But what I was actually say as well is obviously when it comes to indemnification, it's not as if we get sued and we go, "Oh, no, you have to give us the money directly because it's in our contract." It's another court case for us. We will have to actually sue specifically that third party and we would need to make out our proofs and we would need to ... It's part and parcel. And I'm assuming that from [inaudible] were

going to sue a government, then there would be a defense for you there saying, well, the person who signed up for this just didn't have the authority to do that and that would probably be very good defense. I just don't want to take away this concept of [redress] for us in this.

The reason why I say there should be a bit more [redress] is in the status quo model, it is one and one. It's one controller, one requestor, and that's the connection between everyone in the status quo model.

In this one, we are all being collectively told to work under a particular framework, and therefore our risk has been somewhat enhanced because we don't have that same level of autonomy in this.

So, that's what we're calling it. I understand there's a huge issue and we need to deal with that issue, but on the greater scale of things, we are being asked to fit into a box and one of the prices for us to fit into that box is to ensure that we have some comfort in regards to maybe applying rules that we would not have normally done, had it been just one a one-to-one basis. And that's ... Stephanie doesn't agree with me on that one. But I'm not talking about indemnity. I'm just talking about that the ability for us to engage on a one-to-one basis is somewhat limited at this point and we need to take some concession on that one. We need to take into account that we are being asked to act in a very specific and certain way. And we need to make sure ...

It's not about getting away or getting out of doing this right. It's just making sure that if we all collectively have agreed that it is right, but ends being wrong, that we are not just the ones that [inaudible] on this one.

JANIS KARKLINS:

Okay. What I'm suggesting here before listening for the interventions is that Thomas and Lauren try to talk though later in the day when we will have a coffee break and see whether some common landing zone could be found.

Alternative way forward would be simply to put a footnote suggesting that GAC and the Non-Commercial Stakeholder Group objected that provision and we clearly stated there is disagreement on the question of considering indemnification in the terms of use of SSAD. Then we will see what is the way forward, because again, I don't believe that for governments, if they use commercial services, exceptions are made and some provisions are taken out from standardized use contracts. I don't believe that. But we may need to consult government lawyers and then see whether that is the case or not. So maybe we do not have sufficient information in this group.

LAUREEN KAPIN:

I'm all for consulting, but I know from my past experience, government contracts, it's a whole specialized area where often the government is going to slap a contract in front of you and say to you, "This is the only contract I'm authorized to enter into because I'm a government entity." So, as I said, we can agree to disagree and I'm happy to consult with people who have more expertise than myself. But I do know from my experience that governments are very restricted into the types of contracts they enter into and have all sorts of idiosyncratic restrictions because of the nature of what they are.

JANIS KARKLINS:

So, I agree with you, if government is a service provider or act as a service provider. But if government is buying service from third party, government is not asking to take out clauses from standardized agreements. So, even if you buy an airline ticket where probably some clauses might be in the contract, so they are there and we're—

Anyway, let's move on on this one, otherwise we are spinning our wheels here. Let's put this aside, this issue, unless ... No, let's put it aside and see whether some further consultations, and Thomas and Laureen may lead us somewhere further in our understanding. Otherwise, we will register this agreement and we'll present it in initial report as such.

Can we now go then to the purpose discussion? Which is another piece of cake. First of all, the question of third-party purposes, we have had already a number of conversations. We are not starting from scratch, from zero.

So, we have two things in the draft. We're looking at the one is language that has been sort of developed as a result of previous conversations and then we have language that was proposed by Business Constituency. So, we need to look at both and see which of them we would prefer. And if I maybe ask Marika to outline the substance and difference between them.

MARIKA KONINGS:

Yeah. Thanks, Janis. I think the group is aware that we've discussed this on a number of occasions and I think we've pointed out from the start as well that there may have been some confusion as well about using the term purposes, as we're of course talking about something different here than what we define in Phase 1 with purposes for collection of data. We've kind of labeled this as well third-party purposes, justifications, to this thing [inaudible] from the work that was done in Phase 1.

So, the language that staff had suggested originally after various conversations on this topic was to note that, through the experience in the asset and over time, it might be possible to identify specific sets of justifications or standardized justifications that you would see coming back over and over again, and at that point, it might help in prepopulating some of the fields to facilitate input, while of course always recognizing that a requestor should be free to provide his or her justification.

I don't think it's necessarily un-compatible with what the BC is suggesting. I think they provide some specific language here on recognizing that there are specific purposes that can already be seen or are known to the group and there's been some language added because we actually had a bit of conversation around this yesterday during dinner that there was some concern expressed that by including those purposes, the impression would be created by just stating that you had that purposes ... Your request should automatically be approved and the data should be turned over.

So, I think that additional language here is intended to make clear that just having a specific purpose or justification does not guarantee you access. It still depends on the evaluation of the merits of the request and compliance would [inaudible] policy requirements.

Margie, I hope I've done that explanation justice. So, I think the question for the group is here, whether you can live with the proposed language that has been put forward by the BC. I think they feel pretty strongly about having this in the report and there is now as well a clarification that just having that purpose or that justification doesn't give you any automatic access to data. It's still all in line with the policy requirements that are outlined in the doc.

So, I think the question is what are the group's views on this? Is it something you can live with for including in initial report and obtained for the comment on or does that give anyone a [inaudible] to see that language in there?

JANIS KARKLINS:

So, with this, I have Dan's hand up. I know that this will not be the only one. Dan, please go ahead.

DANIEL HALLORAN:

Thank you. A couple questions. One, is this in addition to what's already in the current language or is it a replacement? Two, is it a list of ... So, it lists five things. Is this it may be one of these but could be other things or is it these five and only these five purposes?

JANIS KARKLINS: So, this we will answer you after conversation. There may be some additional elements added or something along the lines, not exhausted list or something like that. But let me see.

My question to the group is can we support or live with the language proposed by BC as it's now displayed on the screen?

UNIDENTIFIED FEMALE: We may need a minute to review.

JANIS KARKLINS: Yeah. I am not rushing. Hadia, please.

HADIA ELMINIAWI: So, thank you, BC, for submitting this. My only comment here is that I think that the wording shouldn't say "request for following specific purposes". It's good to list all the purposes, but we should be clear that there might be other purposes that are not included here. So, if we can put some wording that says "not limited to" something.

JANIS KARKLINS: Stephanie, please.

STEPHANIE PERRIN: I hate to say it but my reaction to this language is that's quite a laundry list of purposes, and if I were looking at it as a DPA investigating release to these third parties for these purposes, I would wonder if they were

using indirect access client data provided through the SSAD to set up a databank. I mean, how ...

In a specific request, you can make an argument that you need to find out who's behind a domain name for consumer protection. But if you are gathering data systemically for consumer protection, then you're setting up a databank.

So, maybe I'm overreacting or grumpy today. I don't know. But that's my honest reaction to that language. Thanks.

JANIS KARKLINS:

I think that the second phrase in this proposal addresses your concern, that EPDP [inaudible] selection of one [inaudible] specific [inaudible] does not guarantee access to all cases. So, that is clearly a clear statement. Franck?

FRANCK JOURNOUD:

Just [inaudible] record the fact that IPC supports that, the BC's proposal.

JANIS KARKLINS:

Thank you. Margie?

MARGIE MILAM:

To address Stephanie's concern, that's why the added language, the last sentence, was added. You still have to satisfy the legal requirements. So, the balancing test would be applied. If the balancing test doesn't weigh in the favor of disclosure because it's too broad, there hasn't been

sufficient information provided to support it, then it gets rejected. That's the concept of the last language is to recognize that it's not ... You can't just check the box and say we're asking for it and not providing a real basis for it. And we also still have all the other safeguards we've been talking about that still apply and that's why we pulled in the thing about compliance will all applicable policy requirements.

JANIS KARKLINS:

So, with these explanations and adding the phrase as suggested by Hadia, recognizing that third parties may submit data disclosure requests for specific purposes such as but not limited to. And then the list of five. Then with a clear understanding that that does not guarantee the automatic access or automatic disclosure. Alan, you're in agreement, right?

ALAN WOODS:

Thank you. I am in agreement with the original language to an extent, I'm afraid. The only reason why I say that is when you're looking at privacy by design, which is something that we need to look at at this particular point, what we're specifically stating here is that, given time, there are going to be buckets which requests will fall into and we're building into a system there almost an institutional laxness that's saying if they fall into that specific bucket, then more than likely, it will be just a rubber stamp.

I know that's not what is being suggested here, but again, we need to look at this from the point of view of the registrant and how the DPA will take it from the registrant's point of view. And the way they're

going to look at this is they're saying, "Well, you've got these almost rubber stamp categories. You're expecting disclosure in these instances and that takes away from the individual ability of the controller to make an individual decision based on the individual case. I'm not saying that's ... I understand that there is that caveat on that second paragraph, but again, transparency and the understanding from the point of view the registrant should be key here and I think that we're slipping into a very unfortunate area with enumerating specific ones like this, and therefore it's best to leave it as open as possible for the case to case. And I agree with Stephanie on that one.

JANIS KARKLINS:

If we're looking from the implementation perspective ... So, specifically, if you think about the interface which will be on the screen probably with drop-downs, so where you click, more precision we have at this stage, it would be easier to design and the new trend will appear. So then there may be additional line in that drop-out. And here we are saying [inaudible].

If I look to these lists, to the proposed lists, many of those are actually sort of hard to contest, [inaudible] law enforcement. So, it is recognized group that most likely will be using the services of SSAD. So, network security ...

Again, I simply do not see the reason why we should not try to establish something with the safeguard that's not limited to these categories and then putting very clear explanation of understanding that does not grant any privilege. Again, I am in your hands, but this seems to be one

of those where we will be stuck again for hours. So, Mark SV ... Wait, no. It's Stephanie, Mark SV, Franck, and Margie in that order.

STEPHANIE PERRIN:

Thanks very much and I'm sorry to keep us on this point. But the set-up of this drop-down list looks like a template for a contract of adhesion and we're all familiar with these contracts of adhesion online.

I think that Alan's point about at least having the appearance of attempting to do privacy by design and make individual determinations rather than these ... We all know buckets will emerge. But there still has to be a decision-making process on these. You can't just sweep it into the buckets and set up an automated decision-making process that is going to inevitably have some people falling through the cracks because the operators are just going to click every box. Or if you only make them do one at a time, then they're going to come back and click another one. It's going to be a nightmare. You have to at least address the concept that you're evaluating these requests.

JANIS KARKLINS:

But the second part, isn't that addressing the concept, the second sentence which says [also note] that selection of [inaudible] specific purposes does not guarantee access to all cases but will depend on evaluation of the merits of specific request, compliance with applicable policy requirements, and the legal basis for requests. So ...

STEPHANIE PERRIN: Well, I would be happy if you'd take that paragraph and tack it on to the existing language. Then that further reinforces. I like that. But, unfortunately, I think the opening paragraph, as I say, sets up a narrative where "here are some boxes that will make life easy. Just tick these boxes and we have a contract."

JANIS KARKLINS: So, I have Mark SV, Franck, Margie, Brian, and Alan G.

MARK SVANCAREK: I think to address Alan and Stephanie's concern, which is a concern that they have both themselves and also they're concerned about how this will be viewed externally later, perhaps we should move the second paragraph first, so that it's really, really explicit.

I think there are lots of these safeguards already in the policy, and so to some of us, this already seems pretty clear. But I guess it's not clear. So, perhaps if we move the second paragraph first, that would be more helpful.

I do think that it is good to have such a list because I think it is inevitable that with lots of contracted parties with lots of levels of experience, that there will be concerns.

I don't know if consumer protection is allowed. I just don't know. And if it's a built-in category, then they will say, "Oh, okay, it is safe for me to perform a balancing test as opposed to simply rejecting it out of hand." So, I do think this is a valuable concept and I would like to keep it.

There was a comment from Matt regarding number three. Number three is a little trick. I will grant you that. Right now, we have a system of unmonitored email, so we don't actually know if the email was received or read, obviously. So, perhaps more specificity would be valuable here to indicate. The necessity of this would occur when we had attempted to contract a registrant, for example, to let them know that their domain is compromised. So this a common thing that we do. And we've attempted to contact them through the Web form or anonymized email address, and if it's not forthcoming, but they're still at risk, we would like some sort of an alternate way to do it.

I mean, if we can't accommodate that, I guess we can get rid of number three but it is a real use case and I would like to see if we can find a way to be more specific about it, so that it would be acceptable to the group. Thank you.

JANIS KARKLINS:

Franck, please.

FRANCK JOURNOUD:

Thank you, Janis. So, here's why we think that it's important to have this list. And Hadia's point I'll take it that it may not be a good idea to make this list [limited]. It's because routinely right now ... I [work] for an organization that does intellectual property enforcement. We routinely get, "Oh, I'm sorry, we don't do IP." We make requests to registrars. To certain registrars. I'm not saying all registrars but a lot of them say, "Oh, I'm sorry, I don't do IP. I don't do IP enforcement. Go fish." So, no, we need it to be clear in this policy that that's not an appropriate response.

So, the fact that we would [assert] and that it would be recognized that it is in scope to make an intellectual property enforcement request still requires you to go through all of the merits of the request, the balancing test, etc. You can't just say, "I'm sorry. You're out," [inaudible] or any of these other four or five grounds [inaudible]. That's [inaudible] today and if we [lead] to a policy that is vague on this point, then that's not going to be something we're going to be able to support at all.

JANIS KARKLINS:

Thank you, Franck. Margie, followed by Brian, and then Alan G.

MARGIE MILAM:

I agree with, obviously, what Franck had just said. But I also want to remind the group that the BC and the IPC dissented from Phase 1 because of the lack of specificity here. This is one of the issues that really is a very, very important to our constituencies and will affect our ability to join consensus.

So, we want to be able to accommodate the concerns. In thinking about Matt's question about number three, contacting registrants, let me ask my colleague, Mark, is that also already implicit if it relates to abuse prevention in the scenario you're talking about? Because I can see how that might be a broad statement. But if we're really thinking about when we would contact registrants, it's probably for one of the other elements that are already listed there. So, just a question for you.

MARK SVANCAREK: The [abuse] case I was mainly interested in is the one where a domain name is compromised, we have reason to believe that the person has been owned, that they're not a malicious actor and we need to contact them either to just let them know or to work with them to resolve the problem.

MARGIE MILAM: Right. And my suggestion is that we could still ... In that scenario, you could still ask for that information under 5 where it says "abuse prevention".

MARK SVANCAREK: Yeah. I think we can. It's nice to be clear about it, but it can be accommodated by another one.

MARGIN MILAM: Okay. Thank you.

JANIS KARKLINS: Thank you. Brian, please.

BRIAN KING: Thanks, Janis. I apologize [inaudible] caucus. I missed the first part of this conversation. I think a lot of this has already been said. I'll just reiterate the need for this from our group that Margie mentioned.

The other point I'll mention. Alan Woods made a good point in the chat that the best use case for a [consenter] contract that is in my mind is something that used to work well for SSL certificate validation. If you wanted an SSL certificate, you had to prove that you own the domain name. The certificate authority would look at the WHOIS to verify that it was that you are who you say you are and that you actually own the domain name.

I think a good use for the SSAD would be to enable that so the registrant could still have their privacy and that the public world couldn't see that they own the domain name. But if they did have a—could give their consent to the certificate authority to take a peek behind the SSAD and see that it was them or some other third party that needed to verify the domain name for a purchase or for some other reason that the registrar consented to or had a contract, that that could be enabled by SSAD. So that's the best scenario that is in my mind to keep that as a list. I don't think we should prohibit the registrants from doing what they want to consent to do. Thanks.

JANIS KARKLINS:

Thank you. If you want [inaudible].

ALAN WOODS:

So, I don't want to get into the nitty-gritty on this one, but that's not consent that we can rely on. That's consent you rely on. So, we would still be processing a 6.1(f) on that one. It's not consent given to us. It's consent given to you.

But, that's, again, look, am I actually in queue at this point or is there somebody before me I can hold off.

JANIS KARKLINS: No, there is somebody before you.

ALAN WOODS: Okay. I will hold off.

JANIS KARKLINS: Now you have two times the microphone. Alan G is next.

ALAN GREENBERG: Thank you very much. I wanted to address Stephanie's concern. The two paragraphs in the section, one starts off with the EPDP team recognizes that ... And the second one says the EPDP team also notes. If we want to link them together, put one "EPDP team recognizes" and have two bullet points. Make it two parts to the same thing and therefore they're clearly linked together.

We can also flip the order, as Mark suggested, but this may be clearer, to say they're two parts of the same thing. Thank you.

JANIS KARKLINS: Would that [inaudible]? Alan?

ALAN WOODS:

I actually just want to go back to what Margie said there because, I'm sorry, Margie, but I find that exceptionally unhelpful. You were saying that you would withhold consensus [probably] on this because you're not representing what the BC and the IPC would want on this one because you would rather have a drop-down box rather than a box where you would fill in your actual purpose. I mean, that's all we're talking about here. We're saying we shouldn't have pre-populated boxes. But there's still going to be a box there that you just say, "This is my purpose." That's literally all we're asking for here is not to tie it down. We understand that IP is a purpose that you can have, but on an individual request.

So, all we're talking about here is, is there a freeform box or a dropdown box? And we're saying that it would be a better reason and a better thing for the SSAD to have a freeform box to create your purpose on an individualized basis. It's not a huge thing in my mind, but at the same time, it is an optic issue from an enforcement point of view. I'm at just a bit of a loss here.

JANIS KARKLINS:

Look, Alan, you're slightly contradicting yourself. So, you said that you would live with the first option. You would live with the first option and the first option suggests, in the second part, that EPDP team expects that over time the entity responsible receiving a request will be able to identify certain patterns that could result in the development of [preset] list of rationales and justifications that requestor can select from.

So, you are ready to accept that this reselected list could be developed. And then here you have initial five options in that preselected list already at the beginning. So, you are ready to live with that in one year but why you are not ready to have it already from day one?

ALAN WOODS:

And I can answer that quite easily. Because, number one, I can live with the first one, and that is our basis here. Can we live with the first one? Yes. And in a year, if we can establish that it is just based on experience, that it is not an assertion that this is going to be accepted, we could develop that and leave that up to the SSAD and how it could be implemented better based on experience. But coming straight off the bat saying these are ones that we should expect, yeah, I can't live with the second one but I can live with the first one because it at least has some sort of time, some element of decision-making over time and experience, not just coming straight off the bat.

JANIS KARKLINS:

Mark SV?

MARK SVANCAREK:

Hi, Alan. Yeah, I'm not sure where the confusion is because I also don't understand your argument. I feel like we have lots and lots of clarity that every request is evaluated on its own merits. The problem that we're trying to solve here ... And this really is not a thing about dropdown boxes. That would be a possible implementation. This is about sending clarity to a contracted party that certain categories are

not disallowed because that is the thing that is being experienced right now, people saying, “This is a category of things that I think is disallowed and therefore I should just say no. I should just say no to these sort of things.”

And if there is another way to send that clarity, then we are open to it. So, let’s not get hung up on we might implement it as a dropdown box. But somehow that message needs to be sent. And again, there must be some way we can write the policy so that it doesn’t have bad optics to a DPA, because throughout the document, I feel like we have many, many places where we clarify every request is on its on merits. And for me, I don’t see how this language contradicts that in any way. So, I’m really stuck on why this concept is unacceptable. So, maybe if Alan could jump the queue and clarify for me. Thanks.

JANIS KARKLINS:

So, I have Alan G, Stephanie, Franck, Brian. Stephanie, please. Sorry, Alan.

ALAN GREENBERG:

Thank you very much. I was just going to point out that I think Chris or someone said it in the chat and Mark said it. This is not just about boxes. It’s about clarity of what is allowed. Thank you.

JANIS KARKLINS:

Stephanie, please.

STEPHANIE PERRIN:

My understanding is that these purposes have already been recognized as being dealt with in part one of our work, and when I see language like selection of one of these specified purposes.

Now, that tells me that somebody is going to pick a purpose and that a request is going to be evaluated based on their selection, with the caveat that is granted in that language.

However, the impetus here is not towards clarity because we don't need these purposes to be explained here. What we need in a request is how your particular request for data fits into a law enforcement request.

In other words, you don't accept a subpoena that says "for an investigation". You need what kind of investigation? You need how your officer is authorized to do that kind of investigation. So that's the kind of specificity you're looking for when you evaluate whether the request is valid.

So, yes, we will have buckets, but the buckets are not ... They're going to be domain name abuse, domain takeover, hostile takeover, whatever the hell you guys—pardon my language—call these things. But it's got to be specific. Malware attack. It's not consumer protection. That is ...

So, the listing of these categories which we've already agreed in phase one were valid purposes kind of decoys us off into the dream land where this is the kind of rough category that, if you have—you're accredited and you put in a pile of requests for consumer protection, then every one you're going to be trusted is okay. And that's something

we will resist. And my colleague, Milton, is not here today but he would be pounding the table over this. Thanks.

JANIS KARKLINS:

Okay. I will take a few more. So, we have Franck, Brian, Hadia, Margie, Mark SV, and then we'll see if we can do something with the text. Franck, please.

FRANCK JOURNOUD:

Thank you, Janis. To respond to Stephanie, we may be talking past each other and maybe a misunderstanding, but my very clear understanding is that, in fact, phase one did not agree on all or at least some of these purposes, at least as far as the IPC is concerned. We did not support outcome of phase one precisely because IP wasn't there. So, hopefully, that addresses one of Stephanie's concerns.

And I think the other concern, one other concern that Stephanie has raised, and I just don't know how to say this better, is there will be a case-by-case review of each request. It says that specifically in that paragraph, but as Mark SV has said, it's said ad nauseum throughout the entire SSAD policy that we're developing.

So, the fact that we are asserting, selecting, stating that, "Hey, I'm here for IP infringement," I still have to say, "Yeah, but look, I also have as [NPA], delegation from let's say [inaudible] media to enforce their copyright on websites that are illegally streaming, etc. I'm providing evidence that this Harry Potter movie is on this website and they do not

have a license, etc.” So those are all things that the authorization provider will have to review.

Finally, and I guess this is a question I would direct, if I may, Janis, to someone from the CPH. Our experience right now is we get a lot of denials just because, “Sorry, you’re here for IP. I don’t do that.” That’s the reality of our experience today. And we need this policy to sort of say, “No, that can’t happen.” Not that you then get an automatic disclosure because you are [inaudible] IP. Yes, you need to go through the case-by-case review, etc. But IP is not out of scope. We need that certainty. We need that clarity. And if we don’t have it, then we’re not going to be able to SSAD.

I just want to be honest. I’m not trying to be a bully. But it’s like this is one of our redlines, and believe me, there’s a lot of things that we want in this SSAD policy and it doesn’t look like we’re going to get them. But this is definitely something ... This is the hill we’ll die on.

If your position is, yes, I think a contracted party or the [authorization] provider or ICANN, whoever, whatever model we settle on, should be able to deny [out of hand] an IP request because it’s IP, then let’s be clear on that.

JANIS KARKLINS:

Okay. Thank you. That was very clear. Hadia, please.

HADIA ELMINIAWI: I initially raised my hand in order to address Stephanie's point about this language being addressed during Phase 1, and actually it hasn't. And this was one of the problematic issues during Phase 1.

The other thing that's also been mentioned, this is not about drop boxes or forms. And if Alan feels like that he would like to have those drop boxes or forms after one year, I think this is fine. You don't have to develop the forms right now. This is about the IPC and other stakeholder groups being certain that they will be allowed to submit their requests. Thank you.

JANIS KARKLINS: I think that the issue here is not about being allowed to submit requests. The issue is here that requests would be examined in the same foot as any other requests. That's the issue here as far as I understand.

HADIA ELMINIAWI: Yes.

JANIS KARKLINS: So, Margie, Mark SV, Alan G, and Alan Woods. Then we're closing the discussion.

MARGIE MILAM: Sure. The other thing that I wanted to remind the group is that we've received letters from the European Commission and even the Data

Protection Board about things like intellectual property and cybersecurity. I believe the GAC also had asked for this in the past. So this is something that we've been asking for from the very beginning. Honestly, I don't know why we waited until the last minute to bring this up and have this discussion because we've been talking about this since phase one.

But we made it as clear as we can that because of the current situation, our current experience, and the simple lack of responses that we get today, the policy is just not going to be sufficient for our stakeholder groups if we don't have this kind of clarity. And the clarity is also I think important for the registrant itself. I think part of the notice that goes to the registrant after this policy is adopted is to let them know and inform them, with transparency, that the data can be used for these purposes and I think that that's also an important component of complying with the data protection laws.

JANIS KARKLINS:

Thank you, Margie. Alan G?

ALAN GREENBERG:

Thank you very much. I'd like to read from the ALAC statement from the Phase 1 report. It's one paragraph.

"The term consumer protection occurs five times in the temporary spec. it is not used in the present report. DNS abuse and cybercrime are also mentioned in temporary spec. Cybercrime is not mentioned in the report and there is one reference to addressing DNS abuse in Phase 2.

But there is also statement that it would be difficult to argue that processing to prevent DNS abuse is necessary for the performance of a contract to which the data subject is a party. This lack of concern for public interest issues makes it very difficult to have confidence that these and other issues will be properly dealt with in Phase 2.”

I’m afraid we’re seeing it played out.

JANIS KARKLINS:

Not yet. We have not made a decision. So, Alan Woods.

ALAN WOODS:

Thank you. To be clear, based on the levels that we’re saying, I can live with the first language, not because I agree with it—

UNIDENTIFIED MALE:

[inaudible] current language?

ALAN WOODS:

The current language, yes. But because I can live with it. Okay? So, let’s not assume that I agree fully of that—but I can live with it. So, that’s the first thing.

And the second thing. I just want to be clear that, at the end of the day, I have made my objection. I have made my voice clear and I don’t feel like I’m going to pull consensus because I didn’t get my way. Thank you.

JANIS KARKLINS:

Okay. I think that here is the moment of truth. We heard two groups saying that this is absolute redline for them. My question to CPH is taking into account that you can live with lists being developed during the process in the not-so-distant future, would you for the sake of keeping two other groups outside the redlines be able to swallow and accommodate their concern with the text as suggested now on the screen proposal of BC?

So, as a matter of gesture, keeping them in. Ultimately, in one year, we will come back to the list of five or maybe six, seven, but we will be losing ... There will be walk out or not support. And we had that in the first phase, I understand, that there was some measured disagreement.

So, my question is—and I'm not asking answer now. Just maybe reflect over coffee whether you could make that type of concession on this particular issue with the understanding that BC/IPC folks would stay on and support SSAD?

So, I think that this is this moment where we need to give up something. From my perspective, especially if you can live with the list in the near future, maybe that is that concession that you could make.

What I would like to suggest now. We have a coffee break, but also, we have now prepared to look at the redrafted Section 4 of initial report. We will distribute now the printout and we will ... I invite you to read this redrafted text and follow instructions that Marika outlined at the beginning and identify things that you cannot live with and discuss that among groups. We will have about an hour to do this exercise and we would then resume at 11:30. And if, let's say, at 11:20 or 11:25 you

could start indicating which are the numbers of lines you cannot live with to Marika, that would be helpful. And we would resume meeting at 11:30. Marika, please.

MARIKA KONINGS: Yeah. Thanks, Janis. If I could just remind everyone to also assign one person in your group to open that sheet up on their laptop and fill it in electronically, that would greatly help us in consolidating all the input instead of handwriting. I can post it here in the Zoom room, so everyone has it. So, please use that. That will help us a lot in putting everything together for this afternoon.

UNIDENTIFIED MALE: Just a reminder. You need your badge to walk around. If I'm correct, you're not allowed in the cafeteria, so really no further than the ... Unless you're with us. Room 312. We're outside, if you want.

JANIS KARKLINS: Yes, Brian, please.

BRIAN KING: Thanks, Janis. I have a brief word before we depart here. In order to address some of the concerns, [inaudible] Marika, I'll put on the screen what I propose. That assertion might make folks more comfortable than selection or something that implies that it needs to be a drop-down box. I'd like to offer that as a constructive olive branch, if you will. Then I think Mark and James and I have language for the side project that we

were working on, too, that I think should clear that up. But a [inaudible] before we go into the break, I think we can keep going.

JANIS KARKLINS: So, you're suggesting that you would like to look at now ... Simply, we're a little bit tired. I think we can address it after the break.

MARIKA KONINGS: If you want to send it by email, so people can look at it.

JANIS KARKLINS: We will take outstanding issues—and actually we have two of them. One was with Brian and Mark worked on and another one was Thomas and Lauren. If you could also use this hour to see whether some kind of language you could agree on for the benefit of the team as a whole.

So, one hour. Homework. Alan, please.

ALAN GREENBERG: Sorry. Just a quick question. It's a 33-page document. Are there parts where the model is focused on? Just to help us look at the right parts and not run out of time.

MARIKA KONINGS: Of course, in the introduction, there is a description that outlines. And just take into account as well, there's my ugly graphic that is there that is really a placeholder. Berry is actually working on a much more

detailed [inaudible] model which I think he hopes to discuss with those interested sometime tomorrow to make sure that it also is graphically represented.

Then I think it's really a question of maybe looking at the redline briefly so you can see where the sections are with the biggest changes. We've separated out some of the recommendations, so there's one recommendation that deals with SLAs that was basically already included in the chameleon proposal and we've created it here as a separate recommendation. We've added in that section this notion of a central gateway providing a recommendation to the contracted party on whether to disclose or not and the recommendation for contracted parties to provide input to the central gateway if they deviate from that decision. We've rewritten the paragraph on the advisory panel which we hope is in line with what the group discussed. The GAC proposal has been incorporated into the document and I think Chris was going to have a look to make sure that it aligns and [he gives] a thumbs up. So that is new in there.

And I think, additionally, there are a number of changes to indeed specify the roles, being very clear on "must" and "may" and as well the updates we discussed yesterday. So I think that's, in a nutshell, what is in the document.

Oh. And just a note as well. There are some additional things I think some have pointed out that, for example, automatic disclosure. If a contracted party decides that all requests that are directed to that party they want to have automatically disclosed, they can opt to do so. But at

any point they can opt out of that again. I think those were the main things that are in there. Did I miss anything? So, happy reading.

JANIS KARKLINS:

So, we will reconvene now at 11:30, and at 11:30 we will take up those two outstanding issues Brian and Thomas, and also if you could tell whether you could do the concession or not on purposes. Then we will go for lunch break. We will have an additional hour and during the lunch break we will have [Karen] coming in telling about a study, legal versus natural. And then we will look at the update draft initial report at 1:00 after lunch which gives additional hour to reflect and have a look at the text.

So, you can now stop recording. And we're resuming at 11:30.

[END OF TRANSCRIPTION]