ICANN Transcription

GNSO Temp Spec gTLD RD EPDP – Phase 2

Tuesday, 19 May 2020 at 1400 UTC

TERRI AGNEW: Good morning, good afternoon, good evening, and welcome to the GNSO EPDP phase two team call taking place on the 19th of May 2020 at 14:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please identify yourselves now?

Hearing no one, we have listed apologies from Matthew Crossman of the RySG, Julf Helsingius and Amr Elsadr, NCSG. They have formally assigned Beth Bacon and David Cake as their alternates for this meeting and any remaining days of absence. All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select all panelists and attendees in order for everyone to see the chat. Attendees will not have chat access, only view access to the chat.

Alternates not replacing a member are required to rename their lines by adding three Zs to the beginning of their name, and at the end in parentheses, their affiliation, dash, “alternate,” which means they are automatically pushed to the end of the queue.

To rename in Zoom, hover over your name and click “rename.” Alternates are not allowed to engage in the chat apart from private chats or use any other Zoom room functionality such as raising hand, agreeing or disagreeing.

As a reminder, the alternate assignment form must be formalized by way of the Google link. The link is available in all meeting invites.

Statements of interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now.

Seeing or hearing no one, if you do need assistance with your statements of interest, please e-mail the GNSO secretariat. All documentation and information can be found on the EPDP Wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public Wiki space shortly after the end of the call. As a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

Thank you, and with this, I'll turn it back over to our chair, Janis Karklins. Please begin.

JANIS KARKLINS: Thank you, Terri. Welcome, everyone, to the 58th call of the team. On the screen, we have proposed agenda. the question is, can we agree to work accordingly? I see no requests for the floor. I take that proposed agenda is accepted.

So, I don't have any specific housekeeping issues except SSAD note that we have not sufficient activity in doing homework. That puts us a little bit in catch 22 situation when due to fatigue, homeworks are not done, and we have to examine all the issues during the call and no preliminary work could be done by secretariat, and we cannot proceed swiftly because homework is not done. And thinking whether there is a fix at this stage when we're negotiating possible changes and recommendations or edits, maybe it is not so important that groups internally try to agree on every bit of input that you provide in the process, but maybe you could consider rather assigning specific tasks to individual members of your respective groups and ask those individual members to provide input to the comments before the call with a good knowledge of the sensitivities within the group. And that maybe will help us progress swifter than we are doing now.

So with this, I would like to move to the next item, and that is recommendation 7 and recommendation 16 on automation. We started the examination of this recommendation during the previous call. We have progressed significantly, but we didn't finish it. We have still some minor issues to clarify, but before getting to that point, I will ask Caitlin to provide information what has happened with the recommendation itself after our discussions, and then also brief us on those clarification issues

that we need to address. Thank you, and Caitlin, you have the floor.

CAITLIN TUBERGEN: Thank you, Janis. The Google doc that you currently see on the screen was circulated with the agenda, and support staff tried to make clear in the note that this version of the recommendation, we accepted changes and removed highlighting so that it would be clear to see exactly what redlines we applied. However, with the disclaimer that that doesn't mean that these were agreed or that the previous highlightings were agreed to. There is a link to the previous version at the bottom of the recommendation for those who wanted to compare and contrast.

But for sake of the discussion, we thought it would be better to clearly show the redlines that we applied. You'll note that at the end of the recommendation, similar to some of the previous recommendations we showed, there's a table that tracks all of the changes so that you can see where we made changes as a result of the last call, but I'll quickly highlight a few of those if you don't mind scrolling back up, Berry.

So at the top of the recommendation, you'll notice a couple of redlines once we get there. It might just be that my computer's a bit slow. Apologies. So here you'll note that we added that the central gateway manager must automate the receipt and transmission of SSAD requests to the relevant contracted party. That was to provide a little bit more color on what needs to be fully automated because there was some confusion there.

The next big change is under recommendation 7, authorization for automated disclosure requests. This was the issue that we discussed at length last week about “must“ versus “should.” So what we've done here is there's been a footnote added to the “must” to show that there is an escape [valve] for contracted parties who believe that automated disclosure would not be technical commercially feasible or legally permissible, that they could request some sort of exemption.

I did want to note that our internal ICANN colleagues haven't had a chance to review this text in detail, but we wanted to provide an example of a potential compromise here. And then as we scroll down, on implementation guidance, I'll note that we had a discussion about how requests from law enforcement that are subject to a 6.1(e) lawful basis have been added here pursuant to the GAC input. Also, you'll note the new bullet, no personal data on registration record previously disclosed was also incldued and that was because that was included in the legal guidance we received from Bird & Bird.

So that’s a high-level of the changes that we applied. As always, there is going to be another chance for groups to review and include their “cannot live with” and minor edits in the tables at the endo the recommendation.

Janis, would you like me to go into the minor edits requested now?

JANIS KARKLINS: Yes, I think that would be useful. Thank you.

CAITLIN TUBERGEN: Okay. So starting with minor issue for clarification, small letter A, the first question is one that has appeared in a couple of recommendations, actually, so the support team is looking for some clarification here in terms of how the EPDP team envisions that disclosure will work when responses are automated.

In the previous iteration of the recommendation, we noted that the central gateway manager would direct the contracted party to automatically disclose to the requestor and it could be done with some sort of command via RDAP. However, that doesn't seem to be the understanding of some EPDP team members, and accordingly, we need some guidance there.

For small item B, I believe this was an ALAC question, so ALAC members, feel free to provide further clarification in the chat if this is incorrect, but there was some sort of suggestion that there may be cases where there would be a human associated with the central gateway manager, but that's not currently foreseen in the recommendation. So if that is something that the EPDP team would like to see, we're asking if that should be included here.

Also, as a clarification, in a previous iteration of the recommendation and as discussed during the LA face-to-face, the group had talked about that some contracted parties may want to request to automatically disclose in all cases, and so the contracted party would have the option to do that. We added some language about the trusted notifier scheme, and that was following the conversation about recommendation 1 and the

trusted notifier scheme that was recommended in public comments.

And last, in D, there was a request to change “meaningful human review” to “review” as not all cases that are automated may require meaningful review. I'll turn it back over to you, Janis.

JANIS KARKLINS: Yeah, thank you. My suggestion would be let’s first talk about how the data should flow addressing small A. And after that, once we finish conversation about this, then we can address other topics as they're suggested.

So let me start with the small A, and the question is what is suggested in the report, the central gateway manager would direct the contracted party to automatically disclose the requested data to requestor, and this could be done in form of command via RDAP or some other way that would be determined during the implementation. Would that be accepted? Since [this could have been challenged] during the contracted parties. Alan G, please go ahead.

ALAN GREENBERG: Thank you very much. Although I'm not sure that we need the word “automatically,” I guess I’d like to hear from people who think it should be done some other way, because my understanding was we said the data would only be held by the contracted party, would not be shipped to the SSAD for distribution, and therefore I'm not sure what other alternatives there are within the bounds of

what we had discussed. So I'm not one of the ones who's confused. I'd like to hear what the other options are. Thank you.

JANIS KARKLINS: Okay. Thank you, Alan. James, please.

JAMES BLADEL: Hi Janis. I guess I'm one of the ones that's confused. I feel like you're asking us if we like the flowers and the music and the menu, and we're not really sure if we want to get married. So let's just back up a second here. Maybe I missed a few steps, but when we talk about automating or the central gateway manager directing the contracted party to disclose the data, or I think earlier, approving a request from a contracted party or an exemption request that the data automation would not be legal or technical or commercially feasible, does that mean that the central gateway is now making the decision and therefore assuming the responsibility and liability for the disclosure of that data? Because it seems like we've really shifted the paradigm here to the central gateway managers calling the balls and strikes. So if I missed that and that decision was made on the last call that I didn't attend, I apologize for revisiting it.

JANIS KARKLINS: No, James, it's not—at least at the beginning of operation of SSAD, there will be absolute majority of cases where central gateway only will channel requests to contracted party for disclosure, and then contracted party will make decision and will

provide the data to requestor in case of positive disclosure decision.

At the same time, there might be, at the beginning, limited, and hopefully in the future, more cases where disclosure decisions will be made in automated way at the central gateway, and then the question is, in that case, how the information should flow. So if the automated decision is made at the central gateway level, then the central gateway manager requests or directs the contracted party to disclose certain type of data and send it directly to requestor using secure protocol.

So that is the question, whether that is the correct understanding. So for the moment, we're talking about limited number of cases if automation will be made at the central gateway. Do you want to comment further, James, after this clarification?

JAMES BLADEL: Thank you for the clarification. I guess I missed the "if" part. I wasn't seeing this as conditional. But that makes a little bit more sense, so I will lower my hand.

JANIS KARKLINS: Much more sense, James. But do you think that this data flow is acceptable to you?

JAMES BLADEL: I probably need to study it a little bit further since I was confused at the outset. I need to go back and review it, so I will defer to my colleagues on the EPDP and the contracted party to ...

JANIS KARKLINS: Okay. So I have next Hadia followed by Marc Anderson. Hadia, please go ahead.

HADIA ELMINIAWI: Thank you, Janis. I would have lowered my hand because you said everything, actually, I wanted to say. But just quickly to James' point, according to recommendation number seven as it stands now, the cases that we're talking about are four possible cases, and those are investigation of data protection infringement allegedly affecting a registrant by a data protection authority, a request for city field only to evaluate whether to pursue a claim or for statistical purposes, and law enforcement in local or otherwise applicable jurisdiction in an otherwise applicable jurisdiction with a confirmed 6.1(e) lawful basis and not personal data on registration record previously disclosed.

So that's basically right now what we're talking about. And since the central gateway is not going to hold any kind of data, there is no other solution but for the data to flow from the contracted party to the requestor directly. So I'll stop there. Thank you.

JANIS KARKLINS: Thank you. I see that Berry has corrected me in the chat. So nevertheless, if this automation conditions are met, so ultimately, that is the automated decision making. Marc Anderson, please.

MARC ANDERSON: Thank you, Janis. I guess I have to say I share James' confusion at the start, and the point Berry put in chat, decision made by central gateway manager but the criteria is met for automation, I guess that point was lost on me as well. So I feel like James, I have to go back and relook at this, because here I did not understand the language correctly. So I will do that.

I did want to raise my hand and make a comment not related to that but more specifically to the minor issue for clarification with A, and that's the point about this could be done in the form of a command via RDAP or some other way. I have to say it would have to be some other way. This could not be done via RDAP, at least not as it's described here.

If I could use an example, this would be like me trying to open a webpage in a browser and James getting the response. RDAP, just like a browser, is a—RDAP is like a restful interface like a browser, and it's designed so that the person submitting the request also gets the response. So the central gateway manager couldn't send a request and have somebody else get a response. It doesn't work that way. So I think that's why some people, myself included, have some confusion with how this could be done via RDAP. It couldn't be the way it's described here. we'd have to have some other mechanism in mind.

JANIS KARKLINS: Do you have any idea what that mechanism could look like, Marc?

MARC ANDERSON: I don't think it would be great use of our time right now for me to pontificate about the different ways this could be accomplished, but it could not be done via RDAP the way it's described here.

JANIS KARKLINS: Okay. Thank you. So I have further hands up. Alan G, Chris, Margie.

ALAN GREENBERG: Thank you very much. It's actually on the same point as Marc was just talking about. We really do have a problem here, and while we don't necessarily want to design protocols in this group, we have to make sure that we have a viable way to go forward. My recollection is GDPR says you can't just send the result in open e-mail, so you need some sort of secure transmission mechanism. That brings up a whole bunch of problems on how do we get all the contracted parties to implement this and all of the recipients to implement this.

The only simple solution is to somehow have the originator be told to make the request again, but then it has to pass through the SSAD. And if that's problematic—we really need to have some technical people to make sure there is a viable way of doing this

that is implementable at a commercially reasonable cost, because otherwise, this whole thing just falls apart. Thank you.

JANIS KARKLINS: Thank you, Alan. Can we suggest that these technicalities could be worked out during the implementation phase? Chris, what do you think?

CHRIS LEWIS-EVANS: Yes, and that's exactly where I was going on that point. I think this is very much in implementation phase, and I think as Alan said, it pivots around what the return mechanism is, whether it goes through the central gateway or goes direct from the contracted party back to the requestor.

I've just seen James saying remove reference to RDAP. I think that's probably wise. I think "via secure mechanism" would be a better replacement there.

And then the reason I raised my point I think was just hopefully to provide some clarity. Agree very much with what Berry said and what you said, Janis. Realistically, it has to be covered under the joint controller agreement and not from phase one. It would have to be a new joint controller agreement is my understanding, although I don't know if Stephanie is on the call. She'd be better placed than me to say whether there would need to be a new one to cover this sort of relationship. My thoughts are that it would.

So if there is, for one of the agreed categories, automated processing, then it would be meeting the sort of conditions set

under that, and then it would be pushed through an automated channel and that would be obviously covered by a joint controller agreement, and depending on the processing type, maybe even a DPIA. So that's my thoughts on how this happens on a policy-wise. And I think technically, that's down to implementation. Thank you.

JANIS KARKLINS: Thank you, Chris. Margie, please.

MARGIE MILAM: Hi. I haven't had a chance to really think about this, so I might be wrong, but I do think I agree with James and Marc about the decision on the automated cases. What I thought was once we got to a place where something was agreed upon that could be automated, then the central gateway manager is making the decision and should have the responsibility for that disclosure. I think we were initially trying to shift liability from contracted parties to the gateway when it was appropriate.

So I'm a little puzzled by the thought that now in automated cases it's not the central gateway manager that's making the decision. And I do agree with what Chris was saying, that this would be covered in a joint controller agreement, that certain decisions would be made by the gateway and certain decisions would be passed down to the contracted parties. At least that's how I envisioned the system to work, so now I'm a bit confused as to why there's this shift.

And in our comments, and I think other comments, we've been pushing for a centralized solution for a while, so that in my view was the hybrid model, that some things were centralized and I mean centralized by centralized decision making, and some things simply couldn't be because they were more complex. And that would go down to the contracted parties which was why it was a hybrid.

I just want to echo that I think the questions that James and Marc raised were actually fairly important, and I think we need to probably understand it a little more.

JANIS KARKLINS: Thank you, Margie. You can argue that since there's no distance in cyberspace, then if you have one system, then the same function could be done in one place or another place, and customer wouldn't know where this is done. Of course, that is technically. But legally speaking, of course, there's a fundamental difference in this one, and again, I think that simple logic suggests that if the disclosure decision is made at the central gateway, then the liability lies with the central gateway. And for the moment in central gateway, we do not anticipate anything but automated decisions. Again, that is my understanding, but most likely, all of us, we need to review clearly what is written in the recommendation itself, and I only can encourage all of us to look in the Google doc that is published and refresh our understanding. Volker.

VOLKER GREIMANN: Margie is not incorrect. We are proposing a hybrid model that does centralize essential functions and will hopefully become more and more centralized as time goes on. However, that does not necessarily mean that this is mandatory centralization.

If we look at the system, we already centralized the intake, we centralized the ability to have one place to go and find out what the requirements are to get a likelihood of a positive response. You have a centralized format for your requests. So a lot of the piecemeal work that is currently existing is already being eliminated by that.

Further, we are creating a system where contracted parties should have the ability to automate certain requests and responses. So depending on the comfort levels.

If I as contracted party feel that a certain type of request or requestor is trustworthy enough to merit automated responses, then I should be able to set that, and that is also, I think, a benefit that we are looking at in the hybrid model.

And I think the comfort level that we will have will just increase over time. While the system is set up, we gain experience with it. So I think what you will see is that for the requestor side, there will be a significant improvement once the system is live, and going after—improvement after that as well, so I see the hybrid model as something that comes very close to fulfilling your requirements. Thank you.

JANIS KARKLINS: Thank you. Chris.

CHRIS LEWIS-EVANS: Thanks, Janis. Yeah, just a quick one on Margie's point. In my understanding, the centralized gateway manager is not making a disclosure decision on automated requests. It's making a decision of whether the request meets the bar to be an automated decision.

So the decision-making to disclose under those circumstances is made jointly by the joint controllers. Obviously, with the contracted parties having the final yes or no whether they are automating. And then the decision whether it is an automated request is the centralized gateway manager's.

So where the liability lies more in the centralized gateway manger side is where it makes that determination that it is an automatic— and if it hasn't followed all the steps detailed in joint controller agreement, and any other agreements that there are, then that's when it would be liable and that's when it fails. And then obviously, there is always a risk that automation is not liable and then they would both be held accountable.

So I think that's my understanding of where that sort of delineation is between those decision-making processes. I hope that helps. Thanks.

JANIS KARKLINS: Thank you, Chris, and I just got note from staff that you're 100% correct, this is exactly what is written in current version of recommendation. Beth, please.

BETH BACON: Chris really did the work there. So I want to agree, plus 200, with Chris. I think that was exactly right, and I appreciate staff confirming that that's how it's captured in the recommendation. And just to add one more kind of supporting point for Margie's point.

Even if the gateway were making the decision, they're not really. They're doing what we have decided and told them, so they're not making any decisions. And so I don't think that that is actually a viable train of thought with respect to removing or shifting liability. So I do appreciate the desire to shift liability, because that would be great, but I don't think that this is particularly a point where that's going to be possible. So once again, just plus one to Chris. Thanks. And all the others.

JANIS KARKLINS: Thank you. Marc Anderson, last word.

MARC ANDERSON: Thanks, Janis. I'll just add a plus two there. I want to add my read of the new revised language before this call. Based on my read, I did not have the same takeaway that Chris just had. And I appreciate the way Chris described it, and it's reassuring to hear staff say that's what they intended. I just want to point out that that's not how I read what was there though.

And then one other point on this, I see there's new blue text in rec—or minor issue A for clarification, removed "via RDAP" and

added something else there. Others have suggested this is an implementation issue. If it's an implementation issue, let's just say this'll be worked out in implementation. Let's not try and armchair quarterback implementation. Either it's an implementation issue or it's not.

JANIS KARKLINS: Thank you. I understand that this conversation provided enough clarity for the staff and staff will make sure that the language of the recommendation is crystal clear, and then of course, we will once again revisit this during the final reading of the text of the final report.

So let me now move to subpoint B which basically asks question, can we imagine that there is human intervention at the central gateway for the disclosure decision-making. And I think that that is a question that Alan G is or has been raising on a number of occasions. Alan, you have the floor.

ALAN GREENBERG: Thank you very much. My concern is that this is something that was being discussed periodically. At one point Stephanie was talking about a centralized authority, but not necessarily unmanned, that could make decisions. And particularly, since we now have a legal opinion that full automation may not be something that is advisable in specific cases, including ones like trademark issues.

And if we take that seriously, that might mean that even requests from UDRP providers cannot be automated. Then adding a level

of human scrutiny—which doesn't necessarily have to take a lot of time—can remove the fact that it's no longer fully automated. And I don't believe—although it's not clear that we want to spend a huge amount of money with people handling requests at the SSAD level, I don't believe we should rule it out altogether. And by not mentioning it at all in the report, we are effectively ruling it out as a possibility.

So I think we need to consider that some decisions might be made centrally but not necessarily fully automated. I don't think we need to identify those decisions today, but I think we need the provision for it. Thank you.

JANIS KARKLINS: Thank you, Alan. Are we in agreement with Alan's request? I see Beth's hand up. Beth, please.

BETH BACON: Thank you. I have some real concern about the vagueness of this language. First of all, I don't actually fully understand what a person associated with the SSAD really means. We don't know who is going to run the SSAD, we don't know what their credentials will be, we don't know perhaps where they will be based, we don't know their expertise level at this point. So there's a lot of I don't knows associated with just saying a person who's related to the SSAD would do this.

Secondly, I don't know that the contracted parties—and I'm not speaking for them at this moment, but I'm just saying as a general—this is my thought—as a general comment, if we aren't

able to say and agree that that category or item is meant to be automated, then it has to go to the contracted party to make that evaluation and decision. Otherwise, it's just a contracted party who is the controller of the information allowing a third party to make a decision on our data disclosure, which is not viable, I don't think, at this point, simply because there are so many I don't knows about the SSAD and who that person associated with the SSAD would be and what their guidelines would be, what their criteria are, when they could make a decision. There's just a lot. So I'm not comfortable leaving this particular language this vague or this open. Thanks.

JANIS KARKLINS: Thank you, Beth. Brian.

BRIAN KING: Thanks, Janis. We also agree that we should not roll this out. In fact, it would be our preference for decisions that cannot be automated that the disclosure decision is still made centrally. We may not have all the legal guidance today that we need to have to support that, which is fine, but we certainly would not preclude this scenario, because this is our preference, to have the decision be made centrally. And I think we can confuse ourselves and we overload words like automation and controller, and what we are looking for here, we've asked Bird & Bird questions about automation and tried to tease out this scenario as well in that piece of legal advice, and I don't think there are just two options. I don't think that we should only consider a world where the disclosure evaluation is automated entirely and no human every

looks at it, versus disclosure decisions that get sent to the contracted party for review.

There are other options, and one that we would strongly consider and prefer is the one that happens centrally. Also, to Beth's point, I think that we agree that contracted parties are controllers and will be controllers for RDS data, no doubt. I think when we look at the disclosure decisions specifically, you can have different controllers and processors for different data processing activities. And this is the level of nuance that I think is helpful to look at, that for the disclosure decision, the contracted parties may not be the controller if the central gateway manager or the human that works there is making that decision.

So I think there's more nuance there that we should explore and we don't want to rule this out. Thanks.

JANIS KARKLINS: Thank you. Seems to me, Brian, that you're opening completely new discussion basically revisiting the fundamentals of SSAD that we agreed. So the conversation whether that should be centralized or decentralized system is what we did eight months ago, so when we chose path of this hybrid model where majority of the disclosure decisions would be made at the central contracted party level and hopefully when time goes by, more and more decisions could be elevated in automated way to the central gateway.

So if we start reverting back to centralized system, so then we're basically putting in jeopardy the whole final report. Alan G, please.

ALAN GREENBERG: Thank you, Janis. I don't think that's the case. Beth said the contracted parties are controllers. But ICANN is also a controller and we have determined that ICANN will be overseeing and running the SSAD. So the SSAD is going to be run by a controller. Presumably we will have a joint controller agreement in place sometime, and we've heard that joint controller agreements may well be able to assign liability.

All of that notwithstanding, all that I'm suggesting—and I think we are suggesting—is that there be a possibility that this be done. Whether it's ever used is going to depend on the evolution mechanism, and there's going to have to be agreement that any particular case can be centralized but may not be fully automated.

So we're adding another card in our deck, in our repertoire of options. We're not saying it will be used. It's going to be up to the evolution mechanism to actually determine that it is usable in any given time and situation. So we're not adding anything. All we're doing is going back to the original decision of saying in the hybrid model, some decisions may be centralized.

Somehow in the drafting of the report, automation and centralization became synonymous. That was not always what we discussed much earlier on, and I'm simply suggesting that we put back in the option of centralization that is not fully automated, because we have heard legal advice that full automation may be problematic in some specific cases.

So we're giving ourselves another option moving forward. It will still have to be approved by the evolution mechanism and go through all those checks and balances, but we're not adding any liability on a particular case here. We know it's ICANN who is a controller, and our report said there will be a joint controller agreement. So that's all this is suggesting. It's something which somehow dropped off the table when we went to a hybrid model, and I'm saying we should bring back the option that it might not be fully automated if it is centralized. That's all. Thank you.

JANIS KARKLINS: Thank you. Hadia, followed by Beth.

HADIA ELMINIAWI: Okay, so it could actually be beneficial to automate the decision for some defined cases. It could be of benefit to automate the decision and then have a human look at the decision in case it's a yes.

So excluding the human intervention at the central gateway has actually no advantages but it could have very good advantages looking forward. Right now, we don't have the time to look into which cases could be automated and then have a human look at the decision after it's made, but again, as Alan said, having this option is beneficial, and again, it could never be used, but going forward, if we have this option, it could prove to be of benefit, especially in cases where we can automate the whole decision and then have a human look at the decision after it's made.

In that case, the human would not look at the decision if it's a no. If it's a no, it's a no. If it's a yes, then the human will look at the decision in order to make sure that it does meet the criteria for disclosure. Thank you.

JANIS KARKLINS: Thank you, Hadia. Beth, please.

BETH BACON: Thanks. Several questions. With regards to what Alan G was saying, certainly, we have said that we believe ICANN is a controller. However, ICANN has also said they agreed that they will oversee the gateway. That doesn't necessarily mean that they'll operate it.

In addition, I'm not certain how they become a controller of the registry or the registrar's individual data for disclosure. If they're coming to us and saying this is your data, we have to make the decision as a CP. They're simply kind of administering a vendor, if I'm understanding what ICANN will likely do, which is not operate and build and create everything but they'll have someone do it. Those people don't work for ICANN. if they do work for ICANN, we still need to understand the criteria. ICANN still doesn't necessarily have access to all our data, so we're going to have to work out the liability there. and I understand that this is supposed to be a joint controller agreement. We don't have the joint controller agreement yet. We haven't actually heard from ICANN as to whether they will go into a joint controller agreement as a

controller even though we have stated in our recommendations that that is the case.

So I think there's so many unknowns with respect to this thing that there's just so many questions. I'm not sure how we tackle them in order just to keep an option open.

Further to that, I understand keeping a door open for an evolution. However, that evolution mechanism has also not been defined or discussed, so there's just so many questions.

Meanwhile, any evolution mechanism would have to likely be scoped based upon new information that would allow us to make a change, in which case we don't need to keep the option open here if it becomes through our experience or through guidance from a DPA or through some sort of legal proceeding, a court case, something that gives us definitive guidance that something could be changed, then that could easily be included in the scope of the next go around, whatever the continuing mechanism is. But it would have to be scooped based on something new, not just checking off a list of things that we thought would be great before. We already know that these are of interest to folks. It would be so much easier if we could automate all of this, but it's not legally substantiated at this point, can't do it.

So I have concerns keeping an option open for something that has a multitude of variables, including the way that we're going to revisit it. So I think there's just so many questions on something just to keep an option open. That's my thought. Thanks.

JANIS KARKLINS: Thank you, Beth. The mechanism is described in draft recommendation 19 which has been coined by the small group. I encourage you to look, it's on the Google doc where the scope of this mechanism is clearly defined and would not require new policy development process. And that is the trick. So we need to develop this mechanism in a way that is very precise and clearly defined scope of operations and adjustments, as said, otherwise the alternative is new PDP, which takes a year, two, or three. Milton, please.

MILTON MUELLER: I just wanted to reinforce the notion that I think Janis you tried to make to us, which is that we did have an agreement about a hybrid model. In my understanding, the hybrid model was always that it involved centralization of the request and dissemination of requests and disclosure decisions made at the contracted party level. And I think we agreed that we would be starting from the hybrid model and then it was this notion of evolution. And I think the problem we're running into here is in fact the open endedness and vagueness and problematic nature of this so-called evolution. I think it was Beth that was saying there's too many variables there, too many open ended questions that people can continue to wrangle about.

So I think we need to define a basic principle which is guiding this evolution, and as a matter of policy, we need to say what evolution does not entail. And for us, that means evolution does not mean a steady progression towards full automation. It may mean something acceptable might be that it means identifying and implementing automated responses when this is proven to be

consistent with law and efficient practice. But we really need to stop sort of using this concept of evolution to relitigate the battle over a hybrid versus a centralized model. That's all I have to say.

JANIS KARKLINS: Yeah. Thank you, Milton. Though the reality is that the decentralized model with 100% decisions made at the contracted party level was not accepted by a number of groups in the team, hence we went for this evolutionary model in Los Angeles. I think that we kind of designed the contours of that model, leaving modalities for elaboration at a later stage. So now the recommendation 19 on this mechanism is an attempt to provide more details on what that evolution would entail, very limited in scope, but that include also automation if and when decision is made by consensus on the basis of additional information received, for instance from DPAs and so on.

But we will talk about recommendation 19 in one of the next meetings, so please, look at it and then try to make a homework providing an input. Brian, please.

BRIAN KING: Thanks, Janis. And thanks in particular to Beth for sharing those concerns. It's really helpful to understand where those concerns are and it helps us to address those. And I do think we all probably have some heartburn about uncertainty on the mechanism for evolution right now.

The good news for you and for everybody is I think that we're open minded about how we can put up the right guard rails on

how this thing can evolve without crossing the picket fence in a way that does what we need it to do, and I think we all realize the challenge now is there's so much unknown about the law and how it applies in this context that we're trying to solve a policy with legal uncertainty all around it. So thank you for that in particular, directly to Beth.

As a general comment, I had a question for ICANN Org along the lines of the point that was made about ICANN's willingness to do this. If ICANN's not willing to do this, that's something we need to know quick, fast and in a hurry. As we mentioned before, this has always been our preference. We have, I believe, GAC advice and letters from DPAs and others that have expressed a strong preference for a centralized decision making as unified access and as standardized access.

I think many of us think that 2000 different contracted parties making decisions the way that they feel is not standardized and is not unified, and so we're hoping that with legal clarity, the decisions can be made centrally whether they're automated or not. And so my question to Org is that if you're not willing to do that, please let us know now. I know there's going to be some financial questions about that, but that's something that we would need to know. And I guess to conclude that point, the way that we know that is to adopt the policy and work with our Org and board liaisons here to tell us if this is something that the board would vote yes on if we did adopt it. So if that's a concern, let's address it. Thanks.

JANIS KARKLINS: Thank you, Brian. Alan G and Hadia, and then probably, we need to draw the line.

ALAN GREENBERG: Thank you very much. I'm really concerned when someone says that we can do this alter. If we don't allow the option now— allow it, not require it be used but allow it—it will require another PDP. For decisions made at the contracted parties, we are silent as to whether they will be automated or manual or semi-automated or whatever. All I'm suggesting is that we be similarly silent for decisions made centrally. It's not adding anything in, not adding any vulnerability. And yes, we haven't decided on the evolution mechanism. And let's be honest, if we can't decide on an evaluation mechanism, this whole thing's going to fall apart, because a decision that as we are right now without evolution is not acceptable to some of us. So we're going to have to come to agreement on that if we're going to move forward at all, and all we're saying is leave an option open so we don't need a PDP to implement it later. Thank you.

JANIS KARKLINS: Thank you, Alan. Hadia.

HADIA ELMINIAWI: Okay. So in order to address some of the concerns raised with regards to the legal uncertainties, what about including the possibility of automating some of the cases with some kind of human intervention without mentioning where that human intervention is? That means that that human intervention could lie

within the central gateway, or it could lie with the contracted parties. So like that, we have the option of having some kind of human intervention with regards to some automated cases, but we leave it open to where that human intervention is.

JANIS KARKLINS: Okay. Thank you, Hadia. I think we have put ourselves a little bit in the corner with this particular question, because if there is no automated disclosure decision making at the central gateway that was confirmed during the previous conversation just half an hour ago, then there is no point to having human intervention at the central gateway because there's no decision making at central gateway at any time, only confirmation that the case should be automatically answered at the contracted party level. So there's this contradiction and this placeholder would not be overly helpful. So we can think of, during this evolutionary mechanism, whether there is a way how the decisions could be moved to the central gateway in consensual way. But let me suggest that we revisit this conversation when we discuss the evolutionary mechanism recommendation 19 which is posted for review of the groups and so far no one has commented on that recommendation.

So I ask staff maybe to think whether there is any way we could take onboard concerns of ALAC and then BC, IPC in this respect and certainly keep in mind that this should be noted in the conversation on evolutionary mechanism.

So I would suggest that we move to point C. And so, anyone would like to clarify for staff on subpoint C? Milton, please.

MILTON MUELLER: What wash the disposition of B? I got the impression that this was very unresolved, and ...

JANIS KARKLINS: It stays unresolved until we discuss the evolutionary mechanism.

MILTON MUELLER: Okay.

JANIS KARKLINS: So, any guidance on subpoint C? Caitlin, maybe once again, if you could in one sentence formulate the question we need to answer.

CAITLIN TUBERGEN: Thank you, Janis. I'll note that this was a Registries Stakeholder Group concern, and it wants the language to be removed regarding the possibility for the contracted party to automate all disclosure requests. I'm sorry, it’s an NCSG concern.

JANIS KARKLINS: Okay. Thank you. Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. I've lost the thread a little bit. What language does this refer to? Can maybe staff pull this up so we can get a refresher on what it is we're talking about with this issue?

JANIS KARKLINS: Yeah, in the automation recommendation, there is a language suggesting that contracted parties may consider automating disclosure decisions at their won risk. NCSG is asking that this should not be possible as a policy issue because that is contradicting the requirements of GDPR if I understand correctly objection. But in defense of contracted parties, in order to scale up the system, probably automation is needed. And Berry, you're looking for the text, right? While I'm talking.

They certainly may decide to do their internal automation, and I would compare this with the speed of the driving. We know that it is not allowed to drive more than 120 or 130 depending on countries on the highway, but we do, and we take this calculated risk. And most likely, this would be done by contracted parties. So they would take a risk to automate simply because that is what they will decide to do. And they will bear consequences if sued.

So now, Marc, text is on the screen. Any guidance? Beth, please.

BETH BACON: Just to fill the void of silence, for this one, I believe the question here—because I'm a little bit lost as to where we are, and I apologize—if a disclosure request is sent to a contracted party for review, then it's going to be human review and it's going to be meaningful because the review should be meaningful. So I think

"meaningful human review" is—I think that's why a question there, why do we need to be that granular? It's going to be reviewed by the contracted party according to their processes and then we're going to release or not release.

I'm sure it was meant to say that to distinguish between an automated request, but I think it's pretty clear that this is not automated. If it's sent to the contracted party, then it's up to the contracted party's decision, I believe.

JANIS KARKLINS: You're talking about D. We're still on C.

BETH BACON: Yeah. So, [inaudible] the part that's highlighted on the right, or is the editor just the same [inaudible]?

JANIS KARKLINS: No, that's the same thing.

BETH BACON: All right. Well, I apologize. Please just file those away for D.

JANIS KARKLINS: So, any guidance for the staff? Brian.

BRIAN KING: Thanks Janis. I think we're okay with the language on the screen as it reads now. Thanks.

JANIS KARKLINS: Okay. Is everyone else okay? Milton, please.

MILTON MUELLER: I think it's a bit ambiguous now, so [inaudible] being able to automate all requests should not be allowed. We do think that it's a legal question, so what you're saying with your speeding example is that some contracted parties will break the law and automate requests simply to reduce their workload and this will be not compliant with GDPR and other privacy laws. Your response is sue them. Is that what you're saying here?

JANIS KARKLINS: No, I'm saying—I just used this as an example. So if contracted party decides that they want to automate even though that is not legally allowed, but internally, they make the decision, they do it at their own risk, because if they will be challenged—so they will be also fined, provided that they would do it in the wrong way. And it's the same thing, we have speed limits on the highway. How many of us follow those speed limits 100%?

MILTON MUELLER: Me.

JANIS KARKLINS: You?

MILTON MUELLER: Always do, yes. So what you're saying is the real accountability check here is litigation against the contracted party. And I'm also not clear about the meaning of this last sentence where they say the Registries Stakeholder Group is of the view that this language should be removed as it is up to the CP to decide their own criteria on opting into central gateway automation. And again, is that the contracted parties saying we can automate for whatever reason we like, we don't care about the legality?

JANIS KARKLINS: No, were now talking on the right side of the screen we have a text of the draft recommendation. And my question was whether the draft recommendation as now highlighted is acceptable. And Brian said that for BC, it is acceptable. Sorry, IPC. My apologies, Brian. Milton, while you're thinking, I'll take Chris and we'll come back to you.

CHRIS LEWIS-EVANS: Thanks, Janis. As I seem to remember, when we first discussed this, I think it was probably before we agreed on the hybrid model, but I think the discussion was around the likes of .pharmacy or .bank where all of the registrations would be legal people, an obviously, understanding there may be personal data there. But I think that's where this language emanated from. So I'm happy with the language where it is, but I think that might just give us a bit more context and enable us to [be happy.]

I think it's for those contracted parties where all the registrants tend to be legal or there's contracts in place that means that all the contacts have to be displayed, such as .bank I think has those. Thank you.

JANIS KARKLINS: Thank you for refreshing our memories. Milton, are you ready to—

MILTON MUELLER: Yeah, I'm really not comfortable with the sort of blank cheque being given here. It's one thing to say they weighed the risks and assessed the legal permissibility. I'm not sure what "as applicable" adds to that. But why don't we just say, "If it is legally permissible?"

in other words, we seem to be sort of winking here and saying if you don't think you'll get caught, you can do something that's not legally permissible. So I'm not comfortable with that.

JANIS KARKLINS: Okay. Thank you. Stephanie.

STEPHANIE PERRIN: Thank you very much. I'm not comfortable with it either, and I would note that one of the reasons that's subject matter expert of us have been pounding away on where are the joint controller agreements is that one of the elegant beauties of the GDPR is that in the old days, you were obliged to ensure compliance with

the data protection law in your contracts, with your processors and your business partners.

Now, thanks to the new language in the GDPR, you have to have joint controller agreements and processor agreements where you don't lose the liability that actually spell out your accountability.

So not only is it totally unwise to do the wink and a nudge that Milton described and in fact your example is an example of clear violation of law, how can we possibly set a policy that permits clear violation of law? It's just not on. So I'm afraid that this just doesn't work. Thank you.

JANIS KARKLINS: Thank you. So let me take Brian next, and then see whether we can conclude this conversation.

BRIAN KING: Thanks Janis. It's not ICANN's job to enforce the law. And certainly, it's not ICANN's job to enforce one jurisdiction's laws in other jurisdictions. So I'm thinking of contracted parties that are outside of the EU or jurisdictions that have data protection laws and only deal with registrants in similar jurisdictions. There's no reason why those contracted parties shouldn't have the freedom and flexibility to automate disclosure decisions or contracted parties that only do business with legal registrants. Why couldn't they automate the responses?

So it does not seem appropriate to remove that flexibility in this case. I'll leave it at that. Thanks.

JANIS KARKLINS: Okay. Thank you. Again, I also would like to point that this is not "must" requirement but "may," and that provides flexibility and it will put each contracted party in front of decision how they want to run the disclosure mechanisms outside the general guidance that is provided by the policy.

We need to move on. Otherwise, we will spend all day discussing this issue without any closure. And so for the moment, I hear that one group is in favor, one group opposing, others are silent. It's not overly helpful for the [inaudible] and in general. Hadia, please.

HADIA ELMINIAWI: I would just point out that the point about human intervention that we were talking about previously actually does fit here because there are some concerns that some of the contracted parties would automate cases, would allow the central gateway to automate cases that actually are not legally permissible to be automated, and then there's this argument that some contracted parties could do that because of the resources. And again, if we do have this kind of human intervention at the central gateway or some other place, then that legal concern won't be there because it won't be totally automated. Thank you.

JANIS KARKLINS: Okay. Thank you. So on D, I think we heard opposition to the deletion of "meaningful human," what Beth said. Is there anyone who would oppose Beth's suggestion? Beth.

BETH BACON: Sorry, Janis, no, I supported the deletion. It was a [registry—]

JANIS KARKLINS: Oh, you support the deletion?

BETH BACON: Yeah, it was a registry suggestion, I believe.

JANIS KARKLINS: Oh, sorry. My apologies. So, anyone opposing deletion of "meaningful human" and leaving only "review?" So it seems that that is accepted. So now on B and C, maybe we need to postpone a little bit the final determination. On B, as I suggested, we would revisit and see whether evolutionary mechanism could take care of this notion of centralization versus automation, gradual sort of move as we acquire experience.

On C, for the moment, I see no way to reconcile opposing views, and so maybe staff is wiser than me and can find a magic bullet of reconciliation of different positions. But for the moment, it stays as is and we'll see in the final reading whether this will not become a small piece of bigger "cannot live with" principle of automation by some groups.

I would suggest now to go further and talk about issues that have not been mentioned in the initial report and is outlined by public comments. And I would like to ask Caitlin to introduce the conversation.

CAITLIN TUBERGEN: Thank you, Janis. In terms of the general assumptions and takeaways for the recommendation [inaudible] considered, I just wanted to note that unless the topics received unanimous support from the responding groups, we did not include them here. similarly, if the topics regarding recommendations not considered involved topics that were considered in the addendum, we didn't include them here either.

I think in terms of the questions for the group, there's really only one that applies, and that's the second question. The first question, we discussed—I'm sorry, the second question we've already discussed. The first question was about cross-border transfers and how this wasn't considered in the initial report text, and how is this expected to be addressed in the final report.

And we were noting that perhaps it would be advisable to include some sort of note that contracted parties would need to pay attention to any relevant requirements that apply to cross-border transfers and the request for and disclosure of data. But we wanted to get some feedback from the team on if there were any other ideas in terms of cross-border transfers on what the requirements should be, if any.

JANIS KARKLINS: Okay. Thank you, Caitlin. So, question, as Caitlin indicated, whether we should put them in the final report, notion that the contracted parties sending the disclosure or disclosed data would need to pay attention to the cross-border data flow requirements.

Any comments? Or we just leave it open and do not mention it at all. Volker.

VOLKER GREIMANN: Yeah, I think it's an important part, and therefore, I would perhaps just mention that it's important that the requestor be very clear about their statement of where the data will be processed by them and how so that the disclosing party can make an informed decision without having to go back to the request and make that request or having to deny because they're not certain about that. But that's probably for implementation.

JANIS KARKLINS: Okay, but you're in favor of mentioning that type of note in the recommendation?

VOLKER GREIMANN: I think [inaudible] it's probably in the interest of all.

JANIS KARKLINS: Yeah. Thank you. Georgios, please.

GEORGIOS TSELENTIS. I think I also support that we mention this. I think it's of the benefit of well functioning of the model to have the clear legal basis, because I expect that there would be many cases where we will have requests from jurisdiction A to B and therefore, this needs to be clear, and when we assess in the SSAD model what is the

legal basis, where are the parties, what are the conditions, which parts of GDPR are applicable and what are possible other obligations that have the contracted parties that need to comply with in order to do the disclosure. I think it's for our benefit to highlight this in our report. Thanks.

JANIS KARKLINS: Okay. Thank you, Georgios. Hadia.

HADIA ELMINIAWI: Okay, so I do agree with what Georgios definitely said, but I personally think it's already covered. So Article 48 of the GDPR addresses transfers of personal data to foreign authorities. So GDPR requires without prejudice to other grounds for cross-border transfers that any transfer or disclosure to non-European Economic Area Country must be based on international agreements.

So we have two things here. We have cross-border transfers and international agreements. And during the course of our work, we have never referred to legitimate bases for cross-border transfer, and we have also never referred to international agreements, though they both need to be taken into account for disclosure to [third] countries to happen.

So if you want to mention it clearly, we can. However, it is covered by GDPR in my opinion. And also, in that regard, we would need also to refer to other things like international agreements as well. Thank you.

JANIS KARKLINS: Okay. Thank you. So potentially, there might be other limitations on data transfer, not only private data transfer, that may kick in at one point. Marc Anderson, please.

MARC ANDERSON: Thanks Janis. I'm not sure I quite followed where Hadia was going with that one. Sorry, [inaudible] for that. I do think that Georgios and Volker made some great points. Thank you for that. I was looking at recommendation 3 while they spoke, which is criteria and content of requests, and there isn't anything about the requestor having to identify where the request is coming from, what their jurisdiction is or where their location is.

So in light of what Volker and Georgios said, maybe adding something there would help address those points.

JANIS KARKLINS: I think that during the accreditation, the location of requestor will be identified and so the stamp will be put on the forehead. But I think that we have consensus on the topic that this particular issue should be highlighted in the recommendation and I think that staff will find the appropriate language based on suggestions in the chat and appropriate place where that could be reflected. Georgios, are you in agreement with that conclusion?

GEORGIOS TSELENTIS: Yeah, I'm in agreement. I would just like to add that there are several other issues that need to be highlighted. For example, when there is made a request and it is an international—as I said, jurisdiction from outside where the data resides. It could be very helpful also as we say to get not only about the legal basis but also prove that the requestor is vested with the powers to make this request. In other words, it's very difficult when I get a request as a contracted party to know that actually the requestor is having this potential legal power to make the request, and it could be helpful also when they make the demand to say under which grounds they made the demand. Particularly in the GAC, we said that there are several types of requestors, not necessarily as clear cut as we might have in the most cases. There are local governments that can make request, there are all sorts of requestors, that it would be very good that we know under which legal basis they operate from. Thanks.

JANIS KARKLINS: Thank you, Georgios. Isn't that covered already in other recommendations? So if maybe staff can give me some advice. So yeah, this will be added then to the recommendation number three, staff suggests, unless there's a violent opposition. Okay, thank you.

So then we will add a notion on the trans-border data transfer that they should be taken into account when data is transferred. Let us move to the next topic, and that is third-party justification. It is now on the screen, and Caitlin, please introduce the topic.

CAITLIN TUBERGEN: Thank you, Janis. So for recommendation 4 on third-party purposes and justifications, the assumption and takeaway that folks seem to agree with was to change third-party to requestor, and then the additional questions where there wasn't agreement on, first being, should purposes be removed from the title and the first sentence to avoid confusion with purposes as defined in phase one, or could we include a footnote for example to make sure there's no confusion about the term "purposes?"

Secondly, there was a request by a commenter that instead of a non-exhaustive list, should this be an exhaustive list of justifications that can be used by requestors? And lastly, on question three, small bullet point four, or point four in the first bullet, there seemed to be some confusion about that point, how it's envisioned to work, what that's supposed to mean, and how that could work. If the requestor data subject went to the SSAD, the SSAD wouldn't necessarily know or the contracted party wouldn't necessarily know how many requests dealt with that requestor's—data subject's data, as the request would go through the accredited entity, not the data subject. And that's how they reorganized. So we're a bit confused as to how it would actually work, so we need EPDP team members to shed light on that. Thank you.

JANIS KARKLINS: Okay. Thank you. Let's take one by one. Are we in agreement of changing the title in order to avoid confusion with the purposes defined in the phase one? Any objection to that? Brian.

BRIAN KING: Thanks Janis. The third-party makes it clear, so it can just stay how it is. Thanks.

JANIS KARKLINS: So we will change third-party to requestor as suggested.

BRIAN KING: if I could respond, I think that's fine too in the bullet. I thought the first comment was the title, which would not need a change, but in the bullet, the third-party is there, it's fine to be requestor.

JANIS KARKLINS: Okay. Milton, please.

MILTON MUELLER: Yeah, I think we should just have justifications. I think that's actually what we're talking about here. When you're submitting a data disclosure request, you are not really telling us your purpose so much as you're telling us your legal justification. And again, I do think there is a—we got very wrapped around the axle on debates about purposes, ICANN purposes versus third-party purposes and so on. So I just think there's no need to put purposes there other than possibly to [foment] confusion about that issue, which we don't want to do. So I would very much prefer to just eliminate that word.

and I indeed thought that we were proposing also to change third-party to requestor in the title as well. So maybe we need to clear up that.

JANIS KARKLINS: Okay. Thank you. So the proposal is to delete purposes from the title of the recommendation, and so then the question is whether to change third-party to requestor also in title or only in the first bullet of the recommendation itself. Margie, please.

MARGIE MILAM: I disagree with the change of removing the word “purposes.” Just to remind everyone, this came up when we rewrote purpose two. This was part of the rewriting of the purpose two from phase one. And the reason we split it up was because we received advice from the European Commission that we needed to not conflate the third-party purposes with ICANN purposes. So in order to be consistent with that letter, we need to keep the word “purposes” as that’s also a word that’s referenced in GDPR, and that was the whole reason we reached agreement in the first place. So I do not support the word change. Thank you.

JANIS KARKLINS: Okay. Thank you. So, what about adding the footnote and explaining the difference in the third-party purpose from the purposes identified in phase one? Would that work? Milton?

MILTON MUELLER: Yeah, I guess I'm not understanding this. So the whole point of me and others supporting the deletion of “purposes” here is precisely

to avoid that confusion that Margie was talking about. And by keeping it in there, we are contributing to that conflation. So I don't see how we move away from conflating third-party purposes with ICANN purposes by putting them under the same label, and I don't see what Margie loses. I'm not sure why she wants that word in there. What do you get? Except possibly, again, confusing [those two] by leaving that word in there.

If you want to make clear the justifications that third parties are using to request data or to disclose data, just call it justifications, don't call it purposes.

JANIS KARKLINS: Thank you, Milton. Margie, would you like to respond to clarify your position?

MARGIE MILAM: Sure. So purpose two became the ICANN purpose. There's no debate about that. That didn't mean we dropped off on the notion that there should be separate third-party purposes. They were just different from the ICANN purposes.

So I again reiterate that GDPR talks about purposes, and part of what we were doing was making sure that it would be part of the purpose statement that goes to the registrant so that the registrant is aware of what the possible outcomes of disclosing the data would be. So this is very much consistent with that, and changing it to "justification" takes that out of the GDPR context. So the language in GDPR doesn't use the word "justification," it uses the

word “purpose,” and I think we need to stick with that. That was the original agreement.

JANIS KARKLINS: Okay. Thank you for clarifying your position. Brian, please.

BRIAN KING: Thanks, Janis. Agree with Margie, and also find it a bit frustrating that we spent phase one banging our heads against the wall collectively, I’d say, talking about purposes for the collection of the data and agreed that we would talk about third-party purposes and we would document those in phase two. We had agreement on that, and so that’s what we’re trying to do here. It says third-party purposes. That’s very clear. We agreed on it. That went out in the initial report.

I don't know why we would change that now. I'm not understanding, I don't know what it does for us, and it’s important for us, as Margie said, that this thing tracks the GDPR. So we were promised that we would document and discuss third-party purposes, and that’s what we need to do here. Thanks.

JANIS KARKLINS: Okay. Thank you. But you would—

MILTON MUELLER: I'll go ahead with it and you can leave it in. I withdraw my objection. But I'm still not clear why we have “justifications” in

there if you really want to make this about third-party purposes. It's just clumsy, but whatever.

JANIS KARKLINS: Okay, so then if we take—we leave the title as is, or we can delete justifications, speaking specifically about third-party purposes in the context of GDPR. So, anyone [inaudible] object deletion of "justification" from title?

Okay, now, the second question is, should it be exhaustive or non-exhaustive list? I would argue to leave it as a non-exhaustive because it would be painful to work out exhaustive list. But of course, it's up to the team to decide. Are you in agreement of leaving non-exhaustive list as it is also phrased here, "such as but not limited to?" Any objections?

No objections, then we can move to the third one. Now staff is asking to clarify the meaning of this bullet point, which is now highlighted. Who would like to attempt to make this clarification? Most likely candidate is the one who put it in. Who claims the authorship? No one? Then we'll delete it.

MARGIE MILAM: No.

JANIS KARKLINS: No, Margie.

MARGIE MILAM: Sorry, I don't know why we would delete it. What is the question that you need clarification? I don't understand what clarification you need.

JANIS KARKLINS: So the clarification is needed to answer question, is it envisaged that the registered name holder will provide consent via SSAD? And if so, how that would work?

MARGIE MILAM: I think that's probably something that could be sorted out in implementation. But certainly, if someone is making the assertion that there's consent here, they conceivably could attach some sort of documentation to prove that there is some sort of consent. So I don't think we need to flesh that out here, but it's certainly possible that that could be provided.

JANIS KARKLINS: Okay. Thank you. Let me take further hands. Mark SV.

MARK SVANCAREK: I'm not the author of this, but I'll try to defend some of it. I think you really need to break this into two things. I don't think we have an agreement that the registered name holders' requests need to go through and the right of access need to go through the SSAD. I thought that there was continued objection to that.

There are some cases where like if my personal information is used fraudulently, I think that's an edge case, but the other ones

where there's consent or contract—there are examples I can think of, namely if you're using one service and you're submitting a domain name, that service may need to confirm that it is in fact your domain name, and that would be a legitimate use of this bullet four.

So I would separate the part, exercising the right of access, and just consider that separately but keep the first part as is. Thanks.

JANIS KARKLINS: Okay. Thank you. Brian.

BRIAN KING: Thanks, Janis. There are a few examples of cases where this would be really useful for the registered name holder, and having privacy by default, but the ability to consent to a specific third party for a specific purpose to validate that they own the domain name. See Margie put in the chat SSL certificates. It used to be done this way when WHOIS was public. Some other examples include validating that somebody owns a domain name for collateral for a transaction or for escrow or to have this option available for future transfer policy if a registered name holder could consent to their new registrar accessing the data in SSAD to send an FOA or validate that the domain owner is who they say they are to purchase a domain name and to release funds to escrow based on the fact that the new owner of the domain actually has control and that's reflected in the RDS data.

Just shooting from the hip, I think that's four or f I've reasons where registered name holders might want the data not to be

visible to the whole wide world, but based on their consent and their direction, to be disclosed one-off for a reason that's beneficial to the registrant. So I think we'd be silly to prevent the SSAD from allowing that. I don't think we're requiring that that happens here.

I note that we have "may" language, so I think we have the right balance here. Thanks.

JANIS KARKLINS: Thank you, Brian. James, please.

JAMES BLADEL: Hi Janis. I guess that was focused on the sentence that you had highlighted earlier. Is it envisioned that registered name holders would provide consent via SSAD? And if so, how would that work? I did not believe that that's how consent would be managed via SSAD, primarily because transmitting and potentially revoking consent would be a challenge, I think, to implement. But instead, I think we could get the same thing if each contracted party manages the consent and the revocation of consent on their own, and then if there's just a consent flag or something that indicates that this record has been made public at the request of the registered name holder—and I think as Brian mentioned, we had a number of use cases where registered name holders have indicated that they would like to publish their information, mostly because they're interested in potentially selling the domain name.

So I think, yes, consent, not via SSAD but just some indication in SSAD that the contracted party has obtained and is maintaining consent with the registered name holder/data subject.

As far as the rest of the stuff, I haven't read further down, but that's my response to the question that you highlighted a minute ago. Thanks.

JANIS KARKLINS: Okay. Thank you. That was Berry, not me, but anyway, thank you. Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. In the context of this overall recommendation, this is a recommendation for third-party purposes. And under our recommendation for third-party purposes, the items listed in subsection four there don't seem to make sense to me.

Brian had some interesting use cases and examples there, but none of those seemed to fit in a discussion about third-party purposes for requesting data. And James made some really good points highlighting the questions in section three there. There are some ramifications on the implementation of SSAD that I think were just not intended by putting this subsection in there. Are we envisioning that data subjects could log into SSAD and request very specifically, "I want to consent to have my data disclosed to this person and not another person?" That's a level of complexity that I don't think is justified or what is intended there.

I think I want to remind everybody that this is not an exhaustive list of purposes for third-party requests, and so dropping four seems to me the simplest and easiest way to go forward. This is disclosure requests for specific purposes such as but not limited

to—four seems to open up a can of worms that I don't think is justified. Can we just drop that section and move on?

JANIS KARKLINS: Thank you. Would that be way forward? Stephanie?

STEPHANIE PERRIN: I certainly agree with what Marc just said, and I also agree with what James was saying. I think this is a bit confusing. The vast majority of RNH requests for their data should go to the contracted parties, because they have deeper data and odds are good that the average data request is not going to be for data that is held by the SSAD, it's going to be for data such as financial and correspondence, and, "You messed up my domain, show me the documents about it." Those sorts of requests have no place in the SSAD.

And the threshold for identifying who exactly the RNH is is a high one before you disclose the data. I believe Mark SV said it was an edge case when someone pretends to be the individual and requests their data. We had a lot of those so-called edge cases where former spouses and former intimate partners, shall we say, requested data from all manner of organizations. I don't see that this would be any different.

So I think that those cases are hard to verify, and why would you want to burden the SSAD with that when in fact the data should go directly to the contracted party? So you're avoiding a can of worms—large one—if you keep the SSAD out of direct requests from RNH.

Now, the issue of consenting to disclosure in certain cases such as domainers wanting to sell, that's kind of a totally separate matter than first-person requests as to the disposition of their data. There's a whole tree of data disclosure types that you can get under that. Again, I think it should be managed by the contracted parties. Thank you.

JANIS KARKLINS: Thank you, Stephanie. Volker.

VOLKER GREIMANN: Yeah, I think unified method of displaying consent of the registrant to disclosure is something that we have been looking for for a long time. No one has really implemented that so far, there's no unified standard for that. So even if the registrant consented to disclosure with the registrar, there's no way for the registry to rely on that and the registrar to forward that consent to the registry. So ultimately, the registry and registrar [inaudible] would still be different, and every registry would have a separate system. So having a unified system to show that such consent is present is probably something that would be helpful as well. Thank you.

JANIS KARKLINS: Okay. Thank you, Volker. Margie.

MARGIE MILAM: Yeah, I agree with what Volker said. I think that the notion of keeping it means that at least through implementation, we would

have some sort of standardization about how this might work and flesh out some of the use cases, like the ones when someone is trying to purchase a domain name or the scenario that Mark SV noted where someone's information is fraudulently put into the WHOIS record.

In that scenario, they actually don't have a relationship with the contracted party and their natural inclination would be to go to the SSAD for it because that's where you go for information related to registration data. So I wouldn't want to preclude that opportunity, and I think it would be best suited in the implementation process to really flesh out what it might look like.

JANIS KARKLINS: Marc, would you withdraw your proposal to delete this point as a result of this conversation?

MARC ANDERSON: I [don't] think I would. I think that I'll still say this is "Third-party purposes such as but not limited to ..." I don't think removing this language prevents this from occurring, and I think having this language is very problematic for the reasons I stated and others have stated. I don't know. I don't think I would [follow] that suggestion.

JANIS KARKLINS: Okay. And then the question is to BC or IPC who spoke in favor of it: would that be a deal breaker if this bullet point four would disappear, taking into account that this is non-exhaustive list and

nothing prevents third parties to claim or to submit requests with that purpose in mind? Mark SV:

MARK SVANCAREK: Thanks. It's not really a deal breaker, and I agree conceptually that since this is a non-exhaustive list, that perhaps this one is not needed. But I really do think that that first part, consent contract, really ought to be in there, because I do think it's going to be a point of confusion in the IRT. I think it would be helpful to have that first part. So I wouldn't die for it, but I really wish we could have the first part of it remain in the text. Thanks.

JANIS KARKLINS: So you would say—where this first part ends?

MARK SVANCAREK: Registered name holder consent or contract.

JANIS KARKLINS: Okay. So if we would leave only registered name holder consent or contract and the rest of it would go, would that be something we could live with?

MARK SVANCAREK: I would be happy with that. Thank you.

JANIS KARKLINS: Marc Anderson, please.

MARC ANDERSON: Thanks Janis. I don't see how that makes sense though. So [right in the hole,] third parties may submit data disclosure requests for specific purposes such as, but not limited to, registered name holder consent. I don't understand what that means in the context of third-party purposes here. That's not a third-party purpose. At least not as I understand it.

JANIS KARKLINS: Mark SV:

MARK SVANCAREK: Yeah, let's try to clarify so that it makes sense to Marc. And maybe it's the word "consent" there that's confusing. But I could just think of an example, which is if I have a contract with an Azure customer or an Office 365 customer and they want to bring their own domain name, we need to somehow confirm that they actually own it. And in some cases, there are technical ways of doing that such as Domain Connect, and in other cases, there are not. And it would be great to be able to indicate "I am processing this data in performance of a contract that I have with the registered name holder." So that would be one example of that. So they're giving consent or they're signing a contract, something like that.

well, Milton, what I'm thinking is that it's a contract with the registered name holder with the third party. So it's the third party who is requesting the data from the contracted party. So it's a purpose of the third party to perform the contract that they have

with the registered name holder. And that was the reason I wanted to keep this text, just because that may be a non-obvious use case to some people and I wanted to make sure that it was made clear here. Thanks.

JANIS KARKLINS: Okay. Thank you. Brian, you're the last one on the call.

BRIAN KING: Thanks, Janis. I agree with Marc Anderson that the language as drafted does not make sense literally. But as a suggestion, when we get into four, that's perhaps not a third-party purpose, that's probably a basis for processing the data.

So maybe staff can help us with some language there for specific purposes such as one, two, three, or on the basis of four, registered name holder consent or contract. That might help to at least let it make sense. And I'm not sure that that will stop us from fighting over whether four should exist, but at least it will make sense semantically if we did something like that. And we could probably move along then.

JANIS KARKLINS: Okay. Thank you. So I think that we haven o choice but to ask staff to think about the possible way forward in relation to four, because some asked to be deleted because it does not make sense. Some say it's full of sense and I'm not well placed to judge who is right and who is not. So staff probably can do a little bit go between, and try to formulate this fourth, IV, in a way that that

makes sense and is acceptable to the contracted parties and to others who argue in favor.

So we are on top of the hour, if not over the hour, so I think we need to bring this conversation to close today. Thank you for active participation. We covered some ground. Far from all that we planned. And we will continue on Thursday. With this, I would like to draw end to this meeting and wish all good rest of the day, wherever you are. This meeting is adjourned. Bye all.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and have a wonderful rest of your day.

[END OF TRANSCRIPTION]