

The RySG EPDP and IRT Team members respectfully submit the following information to the GNSO Council as it continues to work on a response to the EPDP Phase 1 IRT regarding the implementation of Recommendation 7 from the Phase 1 Final Report.

We understand that the Small Team has been grappling with the question of whether the existing Thick WHOIS Policy (TWP) serves as a legal basis to mandate the transfer of all registration data from the registrar to the registry in all cases, whereas the text of Recommendation 7 indicates that the transfer of certain data elements is optional. The EPDP Phase 1 Team never discussed the idea that the TWP would provide such a legal basis in all cases, despite the fact that Charter Question c4 explicitly referenced the need to consider the TWP when determining whether transfer should be required.

We also believe that the RySG's comments on the Phase 1 Initial Report regarding the existence of a legal basis have been misinterpreted. That misinterpretation appears to be based on a misunderstanding of what the Phase 1 team defined, and the RySG correctly considered, as the "aggregate minimum data set."

- For each ICANN Purpose outlined in Recommendation #1, the Phase 1 team identified: (1) the related processing activities (including, where applicable, the processing activity of the transfer of registration data from registrars to registries); (2) the corresponding legal basis for each processing activity (e.g., 6(1)(b) or 6(1)(f) of the GDPR); and (3) which specific registration data fields ("Data Elements") were "necessary" (as that term is interpreted under the GDPR) to be processed in order to achieve each identified ICANN Purpose.
- Those Data Elements that the Phase 1 team determined were "necessary" to achieve the ICANN Purposes are laid out in the Data Elements Workbooks in Annex D of the Final Report with an "R" or "Required" designation, and it is these "Required" data elements that are defined as the "aggregate minimum data set"
- This is clearly laid out on p. 43 of the Final Report in the text accompanying Recommendation #7: "As part of this analysis, the EPDP Team has identified a set of data elements that are required to be transferred from the registrar to the registry in order to fulfill the Purposes for Processing Registration Data. This set of data elements constitutes an 'aggregate minimum data set.' This is an aggregate minimum data set of all identified Purposes that registrars will be required to transfer to registries."
- So for example, for Purpose 1a (activate a registered name and allocate it to the Registered Name Holder), and Purpose 1b (establish the Registered Name Holder & ensure the Registered Name Holder may exercise its rights), the Domain Name, Registrar name, and Registrar IANA ID are the only Data Elements designated as "Required" to be transferred and thus are the only fields that constitute the "aggregate minimum data set" for those identified ICANN Purposes.
- The RySG's comment that "the inclusion of the language 'Provided an appropriate legal basis exists' in this recommendation is inconsistent with Purpose 1a and 1b, which in fact provide the legal basis for processing the aggregate minimum data set" is a point of clarification that an "appropriate legal basis" was identified for the "aggregate minimum

data set” of the Domain Name, Registrar Name and Registrar IANA ID under Purpose 1a and 1b.

- In other words, the RySG cautioned that the “provided an appropriate legal basis exist” language in Recommendation #7 should not be interpreted to require each Contracted Party to “develop a new/separate legal basis apart from what is provided by Purpose 1a and 1b” for the “aggregate minimum data set” of Domain Name, Registrar Name, and Registrar IANA ID.
- That the RySG considered the “Minimum Data Set” to be limited to only those data fields identified as necessary for the registration of a domain name is clearly articulated on p. 175 of the Final Report: “This Minimum Data Set is comprised of those data elements that are considered to be necessary for the registration of a Domain”.

Additionally, we believe the ICANN Board made an incorrect assumption that the EPDP Phase 1 team intended “registry terms, conditions and policies” to include prior ICANN Consensus Policies. This is incorrect for the reasons mentioned above, and it is also an incorrect interpretation of the RySG’s suggested clarification.

- In fact, the chart listed immediately below the RySG’s suggestion makes the distinction between “REQUIRED” data elements where transfer was necessary to support an identified ICANN Purpose (such as the Domain Name) and registrant contact data, which the RySG listed as “REQUIRED to be transferred from Registrar to Registry IF Registry terms/conditions/policies require this data element” (emphasis in original).
- There is no support in either the Final Report, the Phase 1 team’s lengthy deliberations, or any of the Board Materials that “registry terms/conditions/policies” was intended by the Phase 1 team to refer to ICANN Consensus Policies in general, or the TWP in particular.
- Rather, “registry terms/conditions/policies” was meant to refer to individual registries’ own legitimate purposes and legal basis that would support the lawful transfer of registrant contact data from the registrars.
- Recommendation #7 was specifically drafted to account for these differences by not requiring the transfer in all cases, but allowing registries that have a purpose and legal basis for the registrant contact data to continue to require the transfer on an “Optional” basis “where such a Registry Operator, due to varying business model and legal interpretations of obligations, require an alternate data set to fulfill, in their *subjective* evaluation, their *specific* policies, terms and conditions (for example, for the purpose of administering the application of a Registry Acceptable Use Policy (AUP)) in cases where such policies exist” (see p. 101 of the Final Report).
 - This makes it clear that the “policies, terms and conditions” referenced in the Final Report (and as properly understood by the RySG) are NOT mandatory ICANN policies (such as Consensus Policies) that all registry operators are required to implement, but rather “specific” policies that the registry operator’s in their “subjective” evaluation require the transfer of registrant contact data.

Finally, the position that the Phase 1 team's conclusion that transfer of registrant contact information be designated as "Optional" in the Final Report should in fact be "Required" based on "the purpose and legal reason" of "all of the reasons the thick WHOIS policy was developed" has no support in the Final Report or any of the Phase 1 deliberations.

- The 11 March letter¹ and 22 April call² were the first time this position was presented by anyone in the community or the ICANN Board. This position was never discussed during the Phase 1 work.
- The Phase 1 team spent a great deal of time and resources carefully considering the legitimate purposes and lawful basis under the GDPR for processing registration data in response to charter question (a), a process that ultimately resulted in Recommendation #1.
- A position that the "the reasons the thick WHOIS policy was developed" was somehow identified by the Phase 1 team as constituting both a legitimate purpose and lawful basis for the transfer of registrant contact information from registrars to registries simply has no support in the record.
- Such a position also appears to undermine the work that the Phase 1 team did to methodically identify and document the ICANN Purposes set forth in Recommendation #1, and the clearly articulated conclusion by the ICANN community in the Final Report and in Recommendation #7 that the transfer of registrant contact data to registry operators was not "Required" to achieve any of those identified ICANN Purposes.

We hope this additional information helps the Small Team in concluding its work. Please let us know if the team members have any additional questions.

¹ <https://www.icann.org/en/system/files/correspondence/botterman-to-drazek-2-11mar20-en.pdf>

² https://community.icann.org/display/RDPIRT/2020-04-22+Registration+Data+Policy+Implementation+IRT+Meeting?preview=/126427830/132941702/GMT20200422-170032_Dennis-Cha.pdf