

**ICANN Transcription
GNSO Next-Gen RDS PDP Working Group
Tuesday, 30 January 2018 at 17:00 UTC**

Note: The following is the output of transcribing from an audio recording of GNSO Next-Gen RDS PDP Working Group call on the Tuesday, 30 January 2018 at 17:00 UTC. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record.

Attendance may be found at: <https://community.icann.org/x/8ge8B> Recordings may be found at:
<https://audio.icann.org/gnso/gnso-nextgen-rds-pdp-30jan18-en.mp3>

Coordinator: The recording has started.

Julie Bisland: Okay. Thank you very much. Well good morning, good afternoon and good evening everyone. Welcome to the Next Generation RDS PDP Working Group call on Tuesday the 30th of January, 2018.

In the interest of time, there will be no roll call. Attendance will be taken via the Adobe Connect room. If you're only on the audio bridge would you please let yourself be known now? Okay, hearing no names, I would like to remind all to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

With this I'll turn it back over to our chair, Chuck Gomes. Thank you.

Chuck Gomes: Thank you very much, Julie, and welcome everyone, to today's call. The – it's good to see a large number of people entering the call on time, that's much appreciated, thank you for that. And while I'm at it let me say that we had one

of our stronger responses to the poll last week and that was appreciated too, so thanks to all of you who participated.

We're going to go first to SOI updates, and let me start that. I did a minor update this morning to my statement of interest, really didn't add any new information there, but I moved something from one place to another in the statement of interest. And basically that just involves the fact that VeriSign funded me for part of my time to chair this working group the second half of last year and looks like they'll do it for this quarter as well.

The – let me be clear, there are absolutely no obligations to represent VeriSign; they are doing this just to – as an encouragement to me to continue to spend the time it takes, or at least part of the time it takes or at least part of the time it takes to chair the working group so that – and that was in there in my statement of interest, I just moved it to another place so that it doesn't look like I'm representing VeriSign's interests or the Registries in any sense, which I am not, and hopefully that's been clear by what I did, but the – I just wanted to let you know that has been updated.

Let me call on Mason.

Mason Cole: Thank you, Chuck. Mason Cole here. I have recently updated by statement of interest to reflect that I have left the employ of Donuts, the TLD registry, and I'm now affiliated with the law firm of Perkins Coie.

Chuck Gomes: Thank you very much, Mason, I appreciate that. Anyone else? Then we're going to add a new agenda item before Number 2, which is the main part – starts the main part of our agenda. If most if not all of you have seen, Susan Kawaguchi resigned from the leadership team, my understanding is she's going to continue to be part of the working group, and the Commercial Stakeholder Group has nominated Alex Deacon to take her place on the leadership team.

So we need to confirm – the working group needs to confirm the change in the leadership team. And to keep it really simple, let me just ask for those of you on the call if there's anyone objects to this change in the leadership team? And we'll do the same thing and so this'll be our first action item from this meeting, we'll do the same thing on the email list. Assuming no objections we will confirm Alex as a new member of the leadership team replacing Susan.

Okay, not seeing any objections we'll assume none for those on the call. And we'll do the same action on the mailing list as our first action item from this call.

Okay, note that you have scrolling capability. And so you may want to scroll to Slide 3 in Adobe Connect. We're still continuing how to decide whether the proposed purposes that we've been focusing on are legitimate for processing registration data. Let me again, refer people to the second bullet on Slide 3, for the sake of what we're doing here, we can change it later if we want to or if we even need to, but we're using the GDPR definition of processing which in front of you there.

Notice it includes lots of things. And whenever we're talking about a purpose being legitimate for processing we don't mean all of these things, it could be just one of them. Okay? So and certainly as we noted in the last few months is that, you know, a lot of the purposes may not be legitimate for collection, which is just one element of processing, and we understand that. We'll zero down on what – which purposes are legitimate for collection specifically but we're not focusing on that right now.

The poll results have been posted as you can see in the third bullet. And so the results definitely showed us that we need to flesh out possible working group agreements a little bit different than what we polled on, and we'll look at the results shortly.

Now you'll notice at the bottom of Slide 3 that we've made a modification to the proposed working group agreement that was Question 2 in the poll, and that was based on feedback from several members of the – I think it was at least five people suggested that we should note that the list of criteria is non exhaustive, in other words, we could add other ones and some people have suggested that already.

So we're not debating whether this proposed agreement in red at the bottom of Slide 3 is okay with those on the call yet, but we hopefully will get there on this call as we look through the results and discuss a lot of the comments.

So Slide 4, we're going to take a look at the results for – let's see I'm looking here – oh I'm sorry, Slide 4 is agenda Item 3, and we're going to be focusing on slide – Question 2 first of all, okay. Which means we'll skip Slide 4 for now. Well, let's see, I guess these slides, oh okay so let's bring up the presentation for this meeting and that'll help us first of all discuss the results of Question 2 in the poll from last week.

The – and Question 2 basically asks, which, you know, are all of these criteria that we listed and are shown again on Page 1 of the presentation here, legitimate for – legitimate reasons for doing some sort of processing of RDS data elements, not yet specifying the elements.

So as you can see in the first main row of the table on Page 1, 54% supported the full list, for some sort of processing by a criterion for some sort of processing, not yet identifying what form of processing. We'll get to that later. In other words, basically what that means was they selected A or B in the poll and so they did that. Now some of them, if they selected B they wanted to add to that list of criteria.

So now, what I did and shared with the leadership team yesterday was I went through the comments in detail all of them, took me quite a while because there was a lot of good comments, because people – many of the comments

actually specified certain criteria as being supported and others being opposed. So what I did I took the data from – the results from the poll for Question 2 and where we had 54% supported all of them, then I added based on people's comments specific items of support or opposition to come up with – for each of the elements. Okay?

Now, we won't spend time going through it but if you look at Page 2 you'll see the assumptions I made when I added numbers to either support or opposition. And if you're one of those people you'll see your name there and if I made a – if I made an incorrect assumption you can keep me honest here. In some cases it was pretty direct, in a few cases it was less obvious but I at least wanted to you what assumptions I made.

Now that said, we're not going not use these numbers to make any final decisions, but just to get a general idea of where the working group is in the poll. So if you look at Item A in the table on Page 1, you'll see that when I added information provided in the comments about 74% supported the criterion in support of ICANN's mission and one person specifically opposed it, okay?

So now what Lisa has done in the second column of the table is to put key comments in there and note in the last column which commenters actually made that comment, okay. So let's start off talking about some general comments, okay, so the first main row of the table.

And you can see that the first one is one I've already mentioned and that's the list must be non-exhaustive since it is incomplete. And at least four people, I think I said five but I was wrong on that, so at least four people made that suggestion. Does anyone on the call today disagree with that? And if so, raise your hand, please explain why.

Okay, then we – and this will come out hopefully in a poll this week, but we'll assume that there's support for that and then any proposed modification to a

working group agreement will include that non exhaustive wording like I showed – or like we showed previously.

Another comment made by one person is that a purpose is legitimate only if it is in compliance with the GDPR Article 6. Again, qualifying all this, we're focusing a lot on the GDPR because it's alive, it's time sensitive and it's important. I hope everybody understands that we're not just responsible for a policy that complies with the GDPR; we're responsible for a policy that is global and may vary by jurisdiction. So but it is helpful to us, I think for the sake of registrants that come under the GDPR we want to propose a policy that can comply with that particular regulation.

And so I think the comment here that the purpose to be legitimate must be in compliance with GDPR, I think it's fair to say that that's our goal at least within that jurisdiction. So we want to come up with ways to be compliant there, so I personally don't have any problem with that comment there, I don't think it changes our direction any but somebody thinks otherwise please speak up. And we have a couple people that have raised their hands so let's start with Alan. We're not hearing anything, Alan, you may be on mute. Still not hearing anything.

Mason Cole: He had typed it, his line has dropped.

Chuck Gomes: Okay. Let's go to Kathy and we'll come back to Alan.

Kathy Kleiman: Hi, Chuck. Can you hear me? This is Kathy Kleiman.

Chuck Gomes: Sorry, couldn't understand you, Kathy. Repeat that please?

Kathy Kleiman: Can you hear me?

Chuck Gomes: Yes.

Kathy Kleiman: Okay. Terrific. I'm going to raise my hand and say that I'm not sure the list should be non-exhaustive because what ICANN – and I think we should talk to people who interpret the GDPR on a regular basis, and there are those experts as we've been seeing. The list must be non-exhaustive since it is incomplete. So let me throw out a different interpretation.

So exhaustive means, you know, complete, non-exhaustive seems to imply that ICANN's mission and role is changing, otherwise why, you know, why would the criteria be changing? But it's not. ICANN's mission and role is fixed. What we do is pretty fixed. And so why shouldn't the criteria be exhaustive? Why should it be open to continuing interpretation? I believe when companies now are working with the privacy shield, they're coming up with the criteria and purposes that are defined based on their concrete mission and operations. So I think it should be exhaustive. Thank you.

Chuck Gomes: Okay, and thanks for that Kathy. And this is Chuck. And I'll disagree with you for a very simple reason, we're not perfect, we have limited knowledge, we're learning and so as we do learn it's not unreasonable to expect that we may discover something that needs to be added to the list.

Now we may not, and we'll have to justify it if we add anything and get working group agreement, but that's why I would disagree with you there.
Alan, are you back in?

Alan Greenberg: I am back. Sorry about that.

Chuck Gomes: Go ahead and speak. Welcome.

Alan Greenberg: All right. I put my hand up to talk about the issue of compliance with GDPR but I will also respond to what Kathy said. And I agree with you, Chuck. I agree that in jurisdictions where it applies or in cases where it applies, we must comply with GDPR, that's a no brainer. But I also make the claim that it doesn't matter. And I'll give a specific class of example. If we decide, and this

is an if, that a certain piece of data might be valuable but is only available under subpoena or legal instrument from law authority to provide it, that we means we still have to collect it.

So GDPR allows that kind of information to be made available if we can demonstrate that is in fact valuable and useful to law enforcement to pursue their legal ends. That means we have to collect it if that piece of data falls under that criteria. And similarly as the Internet evolves, as, you know, criminal actions evolve, we may find that two years from now there are some other piece of information about registrants that we need to have.

Perhaps only available you know, under cases of a legal instrument being presented, but the world does change and we may have to respond to it. So I don't think we can be static, and although we must comply with GDPR, GDPR allows information that is very private – considered personal information to be collected and distributed under certain cases. So I don't believe that puts a lot of constraints on us in terms of what we are allowed to process, which includes, among other things, collecting. Thank you.

Chuck Gomes: Thanks, Alan. And let me give credit to Kathy and her comments because I think she said something that's at least indirectly related to what you're saying, Alan, and that is that the GDPR has some flexibility built into it for exceptions and so forth. And I think that's similar to what you're saying. Let's go to Denny.

Denny Watson: Yes, Denny Watson. Spamhaus Project. I'm going to have to agree with both you and Alan with that. And add additionally that the GDPR may change over time. And we don't want to have to go back and rewrite the document.

Chuck Gomes: Thanks, Denny. Chuck again. Let's go on to the third comment in red, the general comment that criteria could be interpreted differently in the GDPR. We're – I think we're discovering that as we see different legal analyses and so forth, so if somebody wants to comment further on that we can, but I don't

think that it would hurt to add a footnote. In fact, my suspicion, and I may be wrong, but my suspicion is with a lot of the opposition to some of these things, that we might be able to clear it up if we put appropriate footnotes.

Now in that regard, let me point out something that in the polls one of the instructions is, if you didn't attend the relevant call, that you listen to the recording or read the transcript or both. Now, I fully respect how busy everyone is, okay, so I don't want to minimize that or – in any way. But I'm pretty sure, and this is just me speaking, I'm pretty sure that a lot of you completed the poll and you didn't listen to the recording or read the transcript.

Now, I'm not going to say that I don't want you to respond to the poll if you can't find time to do that; your responses were still useful. But I do want to point out that it does cost us time because I think in some cases the comments would have been different if people had – that didn't attend the call had listened to our discussions on the call.

So my point here is please try to do that if you at all can. Now if you can't find the time to do that and I'm not saying don't respond to the poll, but try to minimize the times when that happens and it'll make our work more efficient and we won't have to go back and duplicate and re-explain things and so forth. So just a request from me as chair that you try to do that as much as possible.

The other general comments here we're not going to spend time unless somebody specifically wants to talking about the ones in black. We'll probably are to get the – whether or not we want to recommend any form of consent later – and the other comments as well. And I think some of the comments related to whether it's a legal basis or a purpose statement we'll have to zero down and make sure, and I think a legal basis could be a purpose too, not necessarily. But let's not get bogged down on that, I don't think it helps us move forward today unless somebody strongly objects to doing that.

Okay, I've been doing so much talking I'm not watching the – I need to look at the chat a little bit. Okay, some of the chat's getting a little bit ahead of us. We haven't got to the – we're going to get to each of the criteria here and whether or not ICANN's a law enforcement agency, we're going to get to that when we talk about the comments.

Okay so let's go on to Item A, Criterion A, which is in support of ICANN's mission. Overall when we add in the comment data, about 74% supported that as criterion for doing some sort of processing, whatever that is. And one person opposed it, as I pointed out earlier. Four people, whose comments were pretty much identical, which is fine, said only A and D are valid, in other words only in support of ICANN's mission and inherent to functionality of the DNS are valid. And that both of those should be combined, in other words, it has to be any criterion would have to be in support of ICANN's mission and inherent to the functionality of the DNS.

So let me pause there and let people on the call respond to that comment of A and D are the only valid ones and it should be an "and" – and I welcome those who made the comment, the four of you, or people who have concerns about that comment to raise your hand and discuss. Nobody, I mean, maybe I need to poll all of you. How many of you, and again I'm looking for hands, okay, here we got a hand up. Jim, go ahead.

Jim Galvin: So thanks, Chuck. James Galvin for the record. You know, I guess you're looking for people to comment on whether they agree with the statement only A and D are valid, and I guess you know, I don't agree with that statement. I think that it's more a case of A and D required and obvious to me, so there's not as much discussion to be had about them. But I wouldn't want to close the door on other legitimate interests and criterion. So I guess I don't agree with the comment. But I do agree with what happens as a result of the comment if that makes sense. Thanks.

Chuck Gomes: Thanks, Jim. Denny, go ahead.

Denny Watson: Denny Watson, Spamhaus Project. I'm going to have to fully agree with James' interpretation there.

Chuck Gomes: Okay, thanks. And by the way, you know, and I know it's – you know I'm not very good at watching chat because I'm trying to listen and manage the flow of the meeting, and chat is so busy that let me encourage you to raise your hand and speak audibly. You can enter it in the chat too, but as long as everybody's as brief as you can be and to the point, I think we'd be a little bit more effective if people would speak audibly if possible. So – and again, I ask those on the leadership team help me keep up with the chat because I really try to concentrate when people are talking and I'm not very good at reading chat and listening so if you would raise your hand to make your case that would be much appreciated, at least by me.

Let me do – just to facilitate where people are at. How many of you – and I'll do this after we listen to Vicky, okay, but what I'm going to ask you to do in – after we cover the hands that are raised if there are more, is to indicate with a green checkmark if you agree with that comment, only A and D are valid, and it should be “and.” And then I'll let the rest – if you don't agree with that I'll have you put a red X so be thinking about that. In the meantime let's listen to the people that have raised their hands. Vicky, go ahead.

Vicky Sheckler: Thank you very much. I don't think A and D are the only criteria that we should use in thinking about what is a legitimate purpose for processing data. I think that is much too narrow. In fact I think I was one of the people that suggested in the poll that the list should be non-exclusive. I understand that there was a letter that was sent from the EC to ICANN yesterday and I skimmed it quickly and I think that letter talks about, you know, at least indirectly what are other areas where there could be legitimate processing. So, you know, trying to limit it narrowly to just a couple of criteria I think doesn't make sense for that reason and also for the reasons that Alan articulated previously. Thank you.

Chuck Gomes: Thanks, Vicky. And hopefully most of you have had a chance to see the document that Vicky is referring to which was a letter from I think the European Commission, wasn't it, to ICANN. And I added to that a footnote there. Now so I wanted to call your attention to because it relates very closely to what we're talking about right now. So thanks, Vicky. Chuck still speaking. Let's go to Kathy.

Kathy Kleiman: Hi. This is Kathy coming off mute. I think it would be a little premature to do a poll Chuck, because if we go through each of the criteria then we can talk about why it is that some of us were – did not think that necessary for the fulfillment of the contract (unintelligible) all the provisions that it stands alone as an isolated criteria for the processing of the data and why I don't think that's appropriate or allowed under the GDPR, why it would allow things that go, you know, like could take us far afield of our mission in support of ICANN's mission or the functionality of the DNS.

So before we poll everybody, it would be good if we could go through the criteria and just take them one by one and that would give us the opportunity to discuss you know...

Chuck Gomes: We are doing that, Kathy, we're going through them one by one. And...

Kathy Kleiman: Okay.

Chuck Gomes: ...the reason I decided to do a poll is because very few people were raising their hands. And I know you haven't been on very many calls in a while but we've used that pretty effectively and we don't use it to make any final decisions but rather to just get a sense of the room. So just to let you...

Kathy Kleiman: I'd like to object because I don't think that's what we do through all the criteria but thanks.

Chuck Gomes: Okay, your objection is noted. And now I'm going to do the poll. Okay? The – go ahead, some of you have already started. If you disagree with that statement put a red X. If you agree that only A and D are valid and it should be “and” but a green checkmark. Helpful if as many as possible, okay. All right, you can remove your marks so that we don't confuse them as we move on. Certainly for those who responded, which is not even a majority of the people on the call, there are many more who disagree with that.

So it's incumbent upon those who support that to convince the rest of the working group that that's the case. Again, please remove your red Xs and green checkmarks if you haven't – or most of you have done that, thanks for doing that.

Let's go onto the next comment, only A is valid and defined in the bylaws. One person said that. So if somebody wants to defend that comment that's fine or it's – we won't spend a lot of time on that because it was just one person and that one person can make his or her case for that.

So okay so it seems to me that there's reasonably strong support for A as one possible criterion for determining whether an item is – a data element should be – could be processed in some way. Now that may be just giving restricted access to it, and maybe very restricted, but there seems to be reasonably good support on this call for that one, not by any means unanimous.

And so let's go onto B, a legitimate interest pursued – and let me make this comment, Lisa did it to me privately in the chat, I think she did it in the overall chat too. What we're talking about here is possible criterion, not purposes here. Okay?

Is criteria that we can use to make decisions, okay, so don't think that we're talking about purposes, we're going to get to purposes a little bit more when

we get to Question Number 3. So try not to mix up those two. And, Lisa, I don't know if I said that very well, if you want to comment, feel free to do so.

Lisa Phifer: Thanks, Chuck. This is Lisa Phifer for the record. For those that weren't on last week's call, we actually did go through this list of criteria one by one in last week's call with the eye towards trying to resolve an underlying problem that we've been having about agreeing on purposes, and that is coming at that question with a different set of criteria in mind.

So what we're trying to do with this question in the poll and I last week's call and now in this week's call is to just get some agreement on what are the criteria that we'll consider when we look at each purpose and decide whether that purpose may be legitimate for processing registration data in some way. So we're still on the criteria, not on the purposes themselves yet. Thanks.

Chuck Gomes: Thanks, Lisa. You said it a lot better than I did. So and what we're saying in A is that, you know, if there's a purpose that we support in the working group for some sort of processing of RDS data, that it needs to be consistent with ICANN's mission. Now, we have in the poll one person who disagrees with that. Is there anybody on this call who thinks we don't have to be consistent with ICANN's mission in whatever purpose we define?

Okay, Vicky, go ahead.

Vicky Sheckler: I don't think we should be inconsistent with ICANN's mission or in direct contravention with ICANN's mission. And, you know, quite frankly I think that a lot of the uses that we've discussed fall within ICANN's mission. But that being said, I think one of the concerns for the issues I've seen in this group is that we interpret ICANN's mission differently and you know, we interpret and value who and how the Whois is used differently which can be problematic. So, you know, should in support of ICANN's mission be a criteria? In my opinion, absolutely. It is consistent with ICANN's mission, I think that should also be a good criteria to think about.

Chuck Gomes: Thank you, Vicky. This is Chuck. And I like the way you worded that. We certainly don't – I like it better than the way I said it. We don't want to be inconsistent with ICANN's mission. And I'll add to that that we could come up with some recommendations in this working group that could point out some areas where ICANN's mission may need to be clarified and maybe even changed. That of course is a Board decision with community input. But thanks for the comment, Vicky, I appreciate that.

Okay, let's go to B, a legitimate interest pursued by the data controllers, okay, there's pretty good evidence in my opinion that –and I don't know that all of the possible controllers have admitted to this yet, but that probably ICANN registries and registrars are all joint controllers, but we don't need to argue that point right now. Let's go on and look at the results.

So 60% supported this one as a possible criterion, that's after adding in information from the comments. And 7 specifically opposed it, okay. So before we look at the comments in red, let's let Bradley jump in.

Bradley Silver: Thanks, Chuck. This is Bradley Silver for the record. Just a clarification, the legitimate interest pursued by the data controllers seems fine to me, I certainly support that. You know, you mentioned that there is discussion and in some cases disagreement about who amongst the parties doing the processing may be regarded as a joint controller. So I think we need to be very careful obviously about, you know, limiting it purely to the data controllers themselves because it's not quite clear at this point precisely who all the data controllers are.

And of course the GDPR itself in Article 6.1.F points to legitimate purposes pursued by both controllers and third parties. And I think in emails that came around before the call you had pointed out – well someone had pointed out the letter from the Commission there was also specific reference to public

interest objectives pursued by third parties and not only the controllers. So I just wanted to make that point, thanks.

Chuck Gomes: Great point, Bradley. Thanks for that. And I want to call your attention, or call everybody's attention down to the last column of the table because in one case, at least four different people commented that we should add legitimate interests of third parties as a criterion and we'll come to that later. And one person suggested that we should add legitimate interests of data processors. Now we'll talk about those two specifically as we go through this list one by one, so bear with us on that. But I think that relates to the point you're making is why I wanted to call attention to that now.

Kathy, your turn.

Kathy Kleiman: Great. Thanks, Chuck. This is Kathy. So my comment was that a legitimate interest pursued by a data controller is interesting and valuable but it's a legal basis for data processing, not a purpose or criteria for it. So we establish the purpose and criteria under the GDPR, so in support of ICANN's mission, necessary to the functionality of the DNS, but of course it has to be in the legitimate interest of the data controller, that's got to be a legal basis. But it's not what drives the purpose or criteria, it's a kind of what gives it a basis.

These are all terms of art so we don't really get to come up with our own definitions. You know, we could try but it's just waving the flag that this is not a purpose or criteria; it is a legal basis for data processing. It's necessary but not sufficient. Thanks.

Chuck Gomes: Thanks, Kathy. And I encourage people to respond to Kathy's comments if you agree or disagree or need clarification. So let's go onto Andrew.

Andrew Sullivan: Hi, this is Andrew Sullivan. Thank you. So again as I noted on the mailing list, I didn't manage to listen to the entire conversation from last week so it could be that I'm missing something and if so please tell me to shut up. But I'm – I

think one of the things that I've been struggling with a little bit in listening to this, and I found a little troubling in listening to the conversation from last week is that several of these things just seem to flow from that Criterion A in the first place. That is there's literally nothing that ought to be something we're talking about especially in an ICANN working group that is not somehow in, you know, in making a policy for ICANN, is not somehow in support of ICANN's mission. If it's not, then we just shouldn't do it.

And so then there isn't anything under class B here, under Criterion B, that isn't already included in Criterion A. And so what I don't understand is whether B is now a filter for things that were already in A. So you've got something that was in support of ICANN's mission now it's also got to be a legitimate interest pursued by the data controller to be a possible criterion or not. I don't think so; it wasn't the way I interpreted the questions. But it seems to me that if you're satisfying, you know, anything that is in support of ICANN's mission then presumably, you know, that's going to be okay module the legal criteria that I think Kathy was just talking about, but apart from that I guess I don't understand why we've got all these other criteria and maybe somebody can say something about that so that I'm less confused in case lowering my level of confusion is at all interesting to anyone. Thanks.

Chuck Gomes: Thanks, Andrew. So and this is Chuck. If I'm understanding correctly, you don't think we need anything but A? Is that right?

Andrew Sullivan: Well, I guess I don't know is the problem. I just – and that's part of the reason why I said earlier that I didn't support that propose because I just don't - I don't fully understand this. Indeed I kind of think that D is what we need, and everything else is just kind of decoration. But, you know, that's sort of – that's sort of betraying my bias in all of this discussion. So maybe I just don't understand the goal of having these other criteria and that's – it's more of a question than a position. Thanks.

Chuck Gomes: So, Andrew, sorry to continue. This is Chuck again. But so you might – you're probably in agreement with – and I'm testing this so tell me if I'm right or wrong, you're probably in agreement that A and D are valid and then they should be "and" like Kathy commented and like three other people supported. Is that correct or am I reading too much into that?

Andrew Sullivan: It's Andrew again. So I did not support that proposal just because I didn't understand – and I put this in the chat but again, it was because I was sort of trying to get somebody to respond to this. But I guess I don't understand like what the differences are among these different things. That is, suppose you had D that was inherent to the functionality of the DNS, you wouldn't need anything more in support of, you know, you wouldn't need Criterion A then because it's all consumed already under D or maybe you think it's the other way around.

But to me, and this was ultimately why I concluded that I didn't really care which of these was the basis for them, because the later thing was at least one and I was always able to come up with at least one.

But to me I think that we're – I think we may be bogging down in this when it turns out it doesn't matter because if any one of these is good enough for anybody on the call then I feel like the rest of it automatically follows. In particular I'm having an impassable time imagining anything that we could come up with that we could say this is a legitimate use but it's not in support of ICANN's mission. Why is ICANN involved in that case?

Chuck Gomes: Okay. Thanks, that's – I think that's constructive comments. Appreciate that. Greg, go ahead.

Greg Shatan: Thanks. It's Greg Shatan for the record. A couple of things. First, I would disagree with Kathy when she describes the legitimate interest of data processors as necessary but not sufficient. Once again, we're ignoring the rest of the clause which is a legitimate interest of data processors or third

parties. So clearly that's an "or" which means that legitimate interests of third parties is by itself sufficient perhaps also necessary, but at least sufficient to satisfy that prong or aspect of what we're talking about.

And I think that fits quite well with Whois which was always created for the use of third parties. Registrars and registrants can do quite well between themselves in a business transaction without any Whois whatsoever, it's really for the – in many cases the third parties that this exists at all and is integral to the operation of the DNS and the Internet.

I think that as any of these – considering whether these are Russian nesting dolls and somehow they all fall under ICANN's mission, I think Vicky made a very important distinction between not being inconsistent with ICANN's mission and being in support of ICANN's mission. Perhaps if we changed A, but then again it's kind of a question of how we balance all of this. I do feel like all this is somewhat a proxy discussion for general feelings that data should be less available or more available especially to certain parties.

And so it's – has an element of kind of chess and maybe it's just checkers here but I feel like, you know, it's pretty clear and maybe even for myself where people – some people tend to fall on the spectrum, others may not be viewing it this way but I think for many it is a proxy discussion for generally how they view availability of data and trying to see if they can maneuver the language here so that the result is what they would like it to be. Thanks.

Chuck Gomes: Thanks, Greg. Chuck again. So it looks like Greg and I get a mute when we both are unmuted. So all right, let me go to Lisa and Lisa, in addition to what you raised your hand for, I'd like you to also comment on why we went down this path of trying to look at criteria because I think – and maybe it was – maybe it wasn't a useful direction. We thought it might help us move because we seemed to be stuck. But if you could in addition to what you raised your hand for, comment on that I'd appreciate it. Go ahead, Lisa.

Lisa Phifer: Thanks, Chuck. Lisa Phifer for the transcript. So for those who maybe weren't quite as active in this working group since last October, we embarked upon a process last October where we spun off drafting teams to flesh out the definitions of about a dozen possible purposes. And the drafting teams were fairly successful, I think in examining each of those possible purposes and what they might mean, what the data elements might be that are relevant to the purpose and who the users of those data might be.

The idea was to give us a foundation to more effectively deliberate on purpose, that is central to our charter. And as we started deliberating on each purpose individually, we had fairly good support for the first two purposes that we discussed but as soon as we got to the third purpose, I should say the first two purposes were technical issue resolution for DNS resolution problems and domain name management. As soon as we got to domain name certification, our progress really got blocked by essentially people arguing simply yes or no, that is a legitimate purpose or not is it not a legitimate purpose.

And so in looking at what happened with that purpose and also the next one we began to deliberate, we realized that people had sort of inherent criteria that they were using to decide whether their answer was yes or no. The reason that we stepped back and tried to list criteria and discuss them more explicitly was in hopes of exposing what those underlying assumptions might be and maybe coming to some agreement on some of the criteria that would help us then move forward when we returned to deliberating on the individual purposes.

So that's how we got to where we are currently. The reason I put my hand up is I wanted to make an observation which is in coming up with this list of criteria we basically have a list of legal bases for processing of data from the GDPR plus two, the two being in support of ICANN's mission and D, inherent to the functionality of the DNS.

So possibly one way to collapse this list would be to consider as possible criteria A and D and that the purpose being deliberated on must satisfy at least one of the legal bases for processing as defined by the GDPR. If we collapsed the list in that way we wouldn't have to argue what's in the GDPR but rather accept that we're looking for at least one legal basis for processing. So I just put on the table as a possible suggestion.

Chuck Gomes: Thanks, Lisa, very much appreciated. This is Chuck again. Let's go to Kathy. Kathy, are you on mute?

Kathy Kleiman: Hi.

((Crosstalk))

Chuck Gomes: There you go.

Kathy Kleiman: I'm on location so it's hard to find. Can you (unintelligible) about collapsing or what you said about (unintelligible) but I'd like to hear it again (unintelligible). Thanks.

Chuck Gomes: Okay, I had a little bit – I don't know if it was just me but I didn't get all of that. It's not coming through real clear. Could you try again, Kathy?

Kathy Kleiman: I had a comment that Lisa – can you hear me, Chuck?

Chuck Gomes: Yes, I can hear you and it's clearer now too.

Kathy Kleiman: Great. I have a comment but Lisa just said something (unintelligible) discussions of merging A and D, and so could she say that again because it may affect my comment. I want to work off of what she said but she said it quickly. Please say it again. Thanks.

Chuck Gomes: Okay, thanks. And let me say that I was going to come back to you, Kathy, and ask you what you thought of Lisa's suggestion. So I'm glad you would like to hear it again. So, Lisa, could you repeat that or rephrase it or maybe both.

Lisa Phifer: Sure. Lisa Phifer again. So I have put it in chat but my point was that the question may be whether satisfying at least one legal basis for processing should be a criteria that we take into consideration when we deliberate on possible purposes. In other words, take this list, keep A, keep D and then have one new criteria which encompasses all the rest that the purpose must satisfy at least one legal basis for processing as defined by the GDPR.

Chuck Gomes: So...

Lisa Phifer: Andrew does make a point that A and D are related. And while I agree, my point was really about collapsing the other elements that were not in addition to what's in the GDPR.

Chuck Gomes: And if I can add one qualifier to your suggestion, Lisa, I would say as defined by GDPR or other regulations. Certainly the GDPR is in front of us and that's helpful to us and so forth but we want to keep in mind that if there was a regulation that provided a legal basis somewhere else in the world besides Europe that would be just as important as what's going on in Europe, I think. So but we can deal with that.

Now, Kathy, did that provide the clarity that you needed? Do you – feel free to ask Lisa any questions you have.

Kathy Kleiman: Okay. Thanks. This is Kathy. Can you hear me? And I'm sorry...

((Crosstalk))

Chuck Gomes: Yes.

Kathy Kleiman: Okay. So it makes sense. Of course there has to be the legal basis for processing under the GDPR so that absolutely makes sense. You can't, you know, even with our mission, you know, the purpose has to – one assumes has to be legal. So yes. But one of the things that concerned me was the “or” that was separated. And I agree with of course the A and the D. But the “or” the idea that you could have – set aside outside of in support of ICANN's mission, inherent to the functionality of the DNS or a legitimate interest pursued by the data controllers.

So it doesn't – as Andrew said, there's an umbrella here and it all has to fit under that umbrella, not be separate. So let's think about that “or” it's really – and at the end to create our purposes, so we can't create – under C we can't create a contractual obligation that doesn't fit under the mission and the functionality of the DNS but is for something else.

So for any other company let's say it's not ICANN, you can't create, you know, you can have all sorts of interests but they're not necessary to the purpose of the organization or inherent to its operation and functionality. So again let's think about ands and ors. Thanks.

Chuck Gomes: Thanks, Kathy. Go ahead, Andrew.

Andrew Sullivan: Hi, it's Andrew Sullivan here. So in keeping with what you suggested earlier, Chuck, I'm going to state something that I've already said in the chat. But, look, it seems to me that if we were to accept D then D implies A because of ICANN's mission.

And if D implies A, then anything that is being collected for this is a legitimate interest pursued by the data controller necessarily because all of this flows from the support of ICANN's mission and I guess I'm assuming implicitly that ICANN's mission is legitimate for the purposes to which it's being put. So if that's the case, then once you've got – once you've accepted D you accept A,

and once you accept A you accept B and now we are all the way necessary to meet Lisa's proposal.

Chuck Gomes: Thanks. I think we're moving in a helpful direction here. Let me ask everyone is there anyone on the call who thinks that A doesn't necessarily – all of A doesn't necessarily flow from D? And if so, can you give an example? And if not, then maybe we've got a potential working group agreement here.

Now by the way, just a comment to – who was it, I think it was Bradley but maybe not, I'm looking, not it was Denny, you said we shouldn't use the GDPR. Are you okay, Denny, with the – using the way Lisa did it using the GDPR and other data protection laws, is that ok? Does that...

Denny Watson: Yes, I'm fine with that, it's just that we should not limit...

Chuck Gomes: Okay. Yes.

Denny Watson: ...ourselves to GDPR.

Chuck Gomes: Yes, you were thinking the same way I was, yes. Thanks. Good. Now let's go to Alan.

Alan Greenberg: Thank you. I'll go back to a suggestion that was made before of saying we shouldn't do things outside of the mission. One of the parts of the mission is ICANN shall not act outside of its mission. And I'll give an example, certainly in the US companies have been ordered to retain data for certain amounts of time. I suspect they may also be required to collect certain data and not discard it, communication companies have on a regular basis. If we were to receive such a court order our mission doesn't say we must obey the law, but that's implicit and part of being a California corporation in the United States.

So collecting certain data if we've been ordered to or retaining it, and retention is also part of GDPR, is something we would have to do at that point

but it's not in our mission. And that's why I like the term "not outside of the mission" better than "in the mission." Thank you.

Chuck Gomes: Okay. That's a – I think a useful suggestion, Alan. Lisa, you've had your hand up for a while, let me call on you.

Lisa Phifer: Sorry, Chuck. Old hand.

Chuck Gomes: Okay. Greg, go ahead.

Greg Shatan: Thanks. Greg Shatan for the record. I just want to make sure I'm understanding this – the relationship between A and D. I think that ICANN's mission, while it's expressed fairly simply in the begging of – in Section 1.1 of the bylaws if not, you know, all that short and certainly can't be boiled down to inherent to functionality of the DNS, unless you interpret the words "inherent, functionality" and "DNS" quite broadly. Now it's obviously it's all related to the DNS in some fashion but "inherent" and "functionality" kind of imply a very technical set of issues in my mind. And I don't think that you can boil down ICANN's mission to D. So there's definitely more to ICANN's mission than D.

And I think that whatever ICANN's mission is, you know, first I agree with Alan's construction, which harks back to Vicky's earlier construction, but in any case, just because it may take some time to express ICANN's mission appropriately is not reason to restricting even more narrowly than ICANN's mission would ask that we do. And again, it's really a question of not being inconsistent with or acting outside of ICANN's mission, that's really more the issue here. Thanks.

Chuck Gomes: Thank you, Greg. And that's what I – you're getting at what I was asking when I said does – and maybe another way to phrase it is, is A a subset, sorry for the mathematical term, but is A a subset of D? Which I think is what Andrew was saying. Correct me if I'm wrong on that, Andrew. And I think

you're saying, Greg, that it isn't. In other words, if we were to use a Venn diagram, they certainly overlap, but they're – one is not completely contained in the other. First of all, did I say that right, Greg, from what you're thinking?

Greg Shatan: I think that's right but more particularly that – and as Andrew said in his comments, and that he, you know, as I said, maybe I need more clarification, he was not saying that D defines all of A but rather that A is a superset of D. But again, if this is disjunctive rather than conjunctive, you know, that's also a big issue or maybe it's not an issue because I think we have decided this is – these are disjunctive. Yes, it's an "or" rather than an "and."

But certainly to me inherent to the functionality of the DNS if that is a non-exhaustive singular criterion, and disjunctive, then certainly seems, you know, valid on its own but just, you know, the bigger point was trying to get at the issue of making sure that we're not kind of trying to limit ICANN's mission or our understanding of it.

Chuck Gomes: Okay.

Greg Shatan: I think we're getting there.

Chuck Gomes: Thanks, Greg. Bradley, go ahead.

Bradley Silver: Thanks, Chuck. This is Bradley. So just to Lisa's suggestion, the suggestion that's on the table about having it be A and D or some collapsed combination of A and D plus an additional legal ground, I think this kind of brings us back to one of the questions that you asked earlier in the call, the one that you took a poll on, and I think it was clear that it was probably a little premature to be getting into knocking off a number of possibilities for criteria this early in the discussion because I think that's essentially what would be happening if before we've gone through all the possible criteria we're making certain of them sort of supreme above others such as A and D.

I was I think, to some of the points that have been made including that by Greg just now, there is, you know, some question and disagreement around exactly what the contours of ICANN's mission is. And if we make that specifically a gating criteria I think we're going to be mired in disagreement around what that is instead of looking more granular – in a more granular way at each of these specific possible purposes which some may regard as being integrally bound with ICANN's mission.

But perhaps not necessarily and for which there has been significant support indicated in the poll, for example, domain name management, which some may think well of course that's part of ICANN's mission but as those who were engaged – and I think this is probably most of the people on this call, in the discussions around how to express ICANN's mission in writing, it's not that simple. ICANN's mission is very specifically prescribed in the bylaws and was the product of negotiation and very close word smithing.

And I don't think that we should necessarily you know, be bound by that process in this process when we're thinking about in more practical terms what we might be prepared to live with as a – as the contours of the next generation RDS.

Chuck Gomes: Thanks, Bradley. This is Chuck. A question for you. Do the suggestions which I think are similar from I think Vicky it was and Alan, solve the problem or at least one of the problems that you just address and that is instead of saying in support of ICANN's mission, not opposed to ICANN's mission. Does that help us avoid the issue of going down the path of you know, interpretation of the mission and so forth. Does that help?

Bradley Silver: Yes, no I think that does help. That does help. But I still think that at this point before we've gone through the list we shouldn't be making determinations on the inherent value or priority of the other points further down the list that we haven't discussed yet. So I think yes, possibly that would solve it but I honestly think that we should, you know, wait until we're at the end of the

discussion about all the points in this list before we have a discussion about A plus B or A and/or B or those sorts of conclusions.

Chuck Gomes: Okay, and so one more follow up question, would you – you think then we should go through the rest of the items on the list and talk about those before we reach any conclusion? And the reason I'm asking that because I was kind of thinking well maybe we don't need to go through those other items if in fact where we're heading now kind of includes all of those indirectly through laws. Am I correct? You think we still need to go through each item?

Bradley Silver: Well, if we can agree on a solution that doesn't foreclose and perhaps not being inconsistent is one of those solutions then yes. I don't know if we necessarily need to go through all of the items, yes.

Chuck Gomes: Okay, thanks. Thanks, that's helpful. Andrew, go ahead.

Andrew Sullivan: Sorry, that was old.

Chuck Gomes: Okay, thanks. All right and I'm – okay so now take – everybody take a look at what Lisa put in the chat. She probably had it in the chat earlier but look at – she's – so she's noted a problem in there. But take a look at the proposed working group agreement and we'll talk about that. Now, while you're looking at that, and Lisa, if you want to fix it that's fine. It looks like you are. I want to point out kind of a high level observation of process in what's happened in this call today.

I am actually really really pleased with what's gone on in this meeting and what happened in response to the poll. And I'm not talking about the people who supported things or the people who opposed because I think they have both proven to be very helpful. And that we've grappled with them and talked about them on this call in a way that in my opinion is exactly what we want to happen in this working group. And it's that kind of process that I think will lead us to success in this working group.

So with that said, let me – it looks like Lisa has put that – why don't you talk to it, Lisa, and maybe read through it just to facilitate discussion please?

Lisa Phifer: Sure, Chuck. This is Lisa Phifer again. So I've put this in chat and hopefully I've debugged the language a little bit based on comments. But the proposed working group agreement would be that the following non exhaustive list of criterion would be used by the working group to determine if any proposed purpose for processing registration data may be legitimate. The purpose should be, A, not inconsistent with ICANN's mission; D, inherent to the functionality of the DNS; and, a new one, satisfy at least one legal basis for processing as defined by data protection laws. And note that I included "and" but there's still conversation about whether that is "and" or "or" and I also included A and D on the basis of comments that we shouldn't preclude anything at this stage.

Chuck Gomes: Thanks, Lisa. I'm a little bit confused on where you have the "and" there because to satisfy ICANN's mission, and inherent functionality of the DNS, doesn't seem to me would necessarily match to some legal basis. It wouldn't be illegal, but the "and" bothers me there. But maybe I'm missing something in that.

And I'm going to look at Bradley's comment because he had thought D shouldn't be included. Yes, I'm kind of with Denny, it seems like "or" is better in that case. But I'm not sure. Kathy and the people that had responded with comments saying it should be "and" they were saying A and D, they weren't necessarily "and" this new one of a legal basis. So, Lisa, maybe you can comment on the – what I'm reading with the way you have the "and" is that there would have to be a legal basis in data protection law for everything in ICANN's mission. And I don't know that that's true. Am I misunderstanding something?

Yes, moving around the phrasing might solve it so we can work on that. In the meantime we've got a couple hands up. Andrew, go ahead.

Andrew Sullivan: Oh hi, it's Andrew Sullivan here. So I actually think that Lisa's quite right about this. The idea here is that you have to have something to do with the DNS in the thing, which we can agree or not agree about whether that entails ICANN's mission, there's got to be something like that; and there's got to be legal basis. If you don't have those two criteria then it is not a possible reason for inclusion in our list.

And...

((Crosstalk))

Chuck Gomes: Be specific, Andrew.

Andrew Sullivan: And it doesn't mean...

Chuck Gomes: ...about Lisa's proposal. How would you change that?

Andrew Sullivan: I don't think it needs to change, I think she's got it right.

Chuck Gomes: Including the "and"?

Andrew Sullivan: Yes, because you need both. Look, if – it wouldn't be enough to say A, while it could be – it's got to be legal under the – under some data protection law, there's lots of stuff that's legal under some data protection law that has nothing to do with ICANN's mission and it wouldn't be okay to do it. You could put the weather into the, you know, into the DNS and there's no data protection think that makes, you know, reporting the weather wrong but it shouldn't be in here because it's got nothing to do with the DNS. So it falls on the nothing to do with the DNS criteria, it doesn't fit under ICANN's mission. So requiring that people put the weather in the DNS would not be legitimate.

On the other hand, you know, putting people's birthdates for instance, imagining that your birth date was somehow related to the DNS, which it isn't, would not be okay. So I think it is an – I think it's an "and."

Chuck Gomes: Okay. And I think I agree with you if we take out at least one. I agree that – I think I'm okay with there being a legal basis when we say at least one legal basis it sounds like we're saying there needs to be some law somewhere that supports elements of ICANN's mission. I don't know if that makes sense or not. Let's – do you want to respond to that, Andrew?

Andrew Sullivan: No, I think you're right. I'm not sure I fully understood so maybe somebody else can say.

Chuck Gomes: Okay, all right. Kathy, go ahead.

Kathy Kleiman: Hi, Chuck. It's Kathy. I can (unintelligible) your phrasing or Lisa's phrasing. I think we're getting close. So "and" you know, legal basis for processing as defined by data protection laws makes sense. What I'm not sure of, and I'd like to think about it, is whether the term "in support of ICANN's mission" and the term "not inconsistent with ICANN's mission" means the same thing. And if they don't what are the differences? And I'd certainly like to think about that for like a week...

((Crosstalk))

Chuck Gomes: Sure.

Kathy Kleiman: Thanks.

Chuck Gomes: Yes, and of course we always want everybody thinking about these things. We'll probably try to do a survey to motivate the thought, okay, and we're probably not going to have time to get the proposed agreement perfect this

time, and of course you always have a chance in the comments to make suggestions but I think by being able to poll the group we may not be able to finalize the wording via the poll but probably we can get people to think like Kathy's suggesting and do – and the hopefully wrap it up our next working group meeting. Mike, go ahead.

Mike Palage: Hi, Chuck. Can you hear me?

Chuck Gomes: Yes.

Mike Palage: Perfect. I just wanted to comment about adding additional elements to the RDS. And specifically I think I had raised this point before. Ali Baba in connection with the dotShin TLD actually incorporated a person's credit score into the authoritative RDS, so that's something they decided – they as a registry operator wanted to do. There have been other registry operators particularly some of the Geo TLDs that have added additional requirements such as nexus points of contact.

So the reason I'm just raising this point here is I do not want the – this group to prohibit innovation. I respect that we want to be looking at what are the minimum data sets, I respect that. But I would not want to have this group actually bar registries from innovating by adding things that they thought would be constructive to appear in any RDS. Thanks.

Chuck Gomes: Thanks, Mike. And again, we're going to get more into data elements themselves later. And I think all the way along we have recognized that registrars or even registries could do things on their own as long as they were consistent with their contracts and so forth. So that may come up again later.

So all right, we're just about out of time. I'm going to propose, if there are no big objections, that the leadership team take a crack at wording a proposed agreement. And we probably won't get it right, okay, but we'll try to get it as close as possible.

If for no other reason than to get people think like Kathy was suggesting, and all of us to kind of look at it and see how we can improve it. So anybody object to that action item for those – leadership team to create a poll question, to send it out and then to use those results including the comments, again, after you've all given it more thought, to try and come to terms with this. I think we've made good – very good progress in this call, maybe not in quantity but I think in terms of thought and coming to some common agreement regarding criteria. So anybody object to that?

Okay. So our working group meeting next week is at the same time so that'll be on the 6th of February, Tuesday, at our regular time. The action items – keep in mind that we're going to – we're going to send out a – staff's going to send out a – see if there's any objections on the list to adding Alex Deacon to the leadership list and we'll put a timeline- a fairly short time limit, maybe a couple days on that so that we can actually get Alex involved in this weeks' work.

Another action item is to look for the poll – for the leadership team to come up with the final wording or – I won't say “final” – the wording for the poll of the proposed working group agreement that you got – you'll be able to critique and pick apart in the poll with your comments. And then of course for all of you to hopefully respond to the poll as well as those who are not on the call. Did I miss anything? Are there any other action items? Lisa, any questions in terms of where we go next?

Lisa Phifer: Thanks, Chuck. This is Lisa Phifer for the transcript. I do have one question which is, I think that on last week's poll Question 3 we got a fair number of comments indicating support for or opposition against individual purposes based on the criteria. I'm wondering if we should repeat that question as well with more granularity so that we have the foundation for discussing that further once we have agreement on the criteria discussed today?

Chuck Gomes: I think that might be helpful. Anybody disagree? Okay, let's do it. And, Mike, I'm assuming that's an old hand. If not, speak up. Mike Palage. Okay thanks. All right, anything else? Lisa?

Lisa Phifer: No, Chuck. That's it. Oh, I should point out our next call is February 6 at 1700 and the calls scheduled then for February would be February 6, 13 and 27, I believe at 1700 with the week of the 20th being the off cycle call at...

Chuck Gomes: Right.

Lisa Phifer: ...600.

Chuck Gomes: Okay good. Thanks for pointing that out. Okay, our time has run out. Sincere thanks from me for a very useful meeting. And useful responses to the poll from last week that helped make this meeting successful so thank you very much. Everybody have a good rest of the week. Watch for the poll either later today or first thing tomorrow and you'll have until Saturday night your time to respond. With that I'll adjourn the meeting and the recording can stop.

Julie Bisland: Great. Thank you, Chuck. Operator you can go ahead and stop the recording. And everyone have a good rest of your day.

END