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ICANN Transcription
GNSO Temp Spec gTLD RD EPDP – Phase 2
Thursday, 23 April 2020 at 14:00 UTC

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TERRI AGNEW: Good morning, good afternoon, good evening, and welcome to the GNSO EPDP phase two team call taking place on the 23rd of April 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 Thomas Rickert for ISPCP. He's listed no one formally as his alternate. 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 only to chat.

Alternates not replacing a member are required to rename their line 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 doc. The link is available in all meeting invites towards the bottom.

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 updating 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.

With this, I'll turn it back over to our chair, Janis Karklins. Please begin.

JANIS KARKLINS: Thank you, Terri. Hello, everyone. Welcome to the 54th meeting of the team. the first question is traditional. Can we follow the suggested agenda? I see no objection, so it is so decided. To start, we will go to the housekeeping issues, and I would like maybe to provide additional clarification in relation to change in agenda for today's meeting. We were thinking that the ICANN Org would have calculation and assessment of financials ready for this time. We were told that not yet, and I decided that it would be better to wait until we have additional information and we will address financial sustainability recommendation as soon as we have financial assessment from ICANN Org.

So the draft recommendation process update, is this Berry who will take the lead?

BERRY COBB: Caitlin.

JANIS KARKLINS: Caitlin, please go ahead.

CAITLIN TUBERGEN: Thank you, Janis. As everyone can see on the right side of the screen, the support staff has created a new page on the Wiki. What we're doing is following the discussions of recommendations. We are taking the agreed upon edits that came through in the comments and also trying to propose some

compromises based on the discussions. And as they come in, we will post them on this page.

I wanted to note that we're still going through the public comments as everyone is aware, and that homework is the priority, but folks are welcome to visit this page and see the edits that we're applying, particularly for the recommendations that they are interested in.

Berry, if you don't mind clicking on the last recommendation, the recommendation new reporting requirements so everyone can see it as an example.

So here you'll see that the updated recommendation text is posted here, and if you scroll down similar to how we've operated in the past, there's still an opportunity for everyone to clarify text that they cannot live with and propose updated text, and also a place below where you can characterize minor edits to the text as well.

So there will be a time where we'll be reviewing all of the updated recommendations, and as we develop that schedule, we will post the dates on that page. But for those that follow more closely or keep up with the work, you're welcome to go here because this is where they will all be cataloged. But again, we wanted to remind everyone that homework on the discussion tables and the public comments is first priority right now. We just wanted to inform everyone that that's where those will be posted.

JANIS KARKLINS: Okay. Thank you, Caitlin. Any questions in respect of the new Wiki page? Seeing none, once we will get through all recommendations, we would publish or prepare the consolidated draft final report, and then we will use the tables that you saw, cannot live with, and minor changes, and we'll review all recommendations of the draft final report.

Good. So in absence of requests for the floor, I will maybe go to the next one additional housekeeping item. As you saw, we have received two legal memos from Bird & Bird, one on accuracy and other on automation. And I wonder whether it would be useful for the legal subcommittee to meet maybe next week and review those memos and maybe give a synthesis in a human language, not legal language, that everyone can really understand.

And of course, I don't know whether that is feasible or not, but maybe Becky as a facilitator for the work of the legal committee can say something when the legal committee meeting would be possible.

BECKY BURR: We are looking at times right now, Janis. We're thinking about Tuesday at 14:00 UTC and a notice will be circulated.

JANIS KARKLINS: Okay. So thank you. Then hopefully legal committee will be meeting next Tuesday at 2:00 UTC and we will get some guidance

from legal committee for our consideration soon after. So thank you.

Let us now move to recommendation 8 on response requirements. And as we started practice, I will invite Caitlin to kickstart each of the topics that we need to review or discuss, and please note that everything in italic in the text you see is the verbatim text from initial report. It is to facilitate our conversation and putting in context.

So with this, let me start with recommendation 8, and Caitlin, if you could walk us through to the first question.

CAITLIN TUBERGEN: Thank you, Janis. The first section deals with the response requirements noted in bullet points A and B. Underneath, you'll see the takeaways that staff will factor into the updated recommendation. And generally speaking, those represent edits or principles that everyone agreed on in their responses to the comment. So in this case, those factors are that where there's duplication in recommendation five, which is the acknowledgement of receipt recommendation, that text won't be duplicated again here, so we'll combine those. And staff is actually working on trying to simplify recommendations 3, 5 and 8 since there's a lot of duplication between those three recommendations. So when that's ready, we'll circulate that combined recommendation.

Also, there was a commenter that asked about a ticket number in response to a request. That again is dealt with in recommendation five, but we noted it here. That will include that when we review those recommendations together.

So the first additional question for the EPDP team is similar to a question we previously discussed but didn't really come to a resolution on if I recall correctly, and that is which contracted party the request should be forwarded to. In this particular instance, the commenter suggested that the request should always first go to the relevant registrar but that there may be some limited instances in which the request could go to the registry, and they specifically noted that if the registrar isn't meeting the SLA or there might be a situation where a registrar is terminated or in transition and in that limited instance, the request could go to the registry. But also that in any event, it should be made clear that if a request is denied, the same request shouldn't be forwarded to the registry just because the registrar denies the request.

And then the second question that deals with A and B I believe was a question submitted by ICANN Org, and that was some confusion with the language with regards to automated requests versus nonautomated requests and what information is expected to be relayed in the event of a nonautomated request. Is it the same for an automated request, or for an automated request, would that just involve a subset of the information that's generally sent from a nonautomated request? But all of the text is in those two questions for the group to review and respond to.

JANIS KARKLINS: Thank you, Caitlin. Let me take one by one. On the first question, are we in agreement with the suggestion of the staff that as a default, request goes to registrar and only in limited cases that are defined here they may go to registry? And understanding that if registrar denies the request, then requestor cannot forward request to registry. Are we in agreement with that? Alan Greenberg, followed by [Brian King.]

ALAN GREENBERG: Thank you very much. Two comments. Number one is what this is saying is that if a registrar does not respond—that is, doesn't meet the SLA—it could go to a registry, but if a registrar for example routinely says no to everything, then the requestor has no recourse. And that I find somewhat problematic.

I thought we were aiming towards but didn't decide that there could be a flag, and if the flag says I want to go to the registry, which is what happens right now with the manual requests, you can choose whether it goes to a registry or a registrar, and I thought that's where we were heading. thank you. But it's certainly problematic that a registrar who refuses everything does not give the requestor any recourse. Thank you.

JANIS KARKLINS: We have also recourses and ICANN Compliance is one of them as suggested here in the [inaudible].

ALAN GREENBERG: if you're willing to wait long amounts of time. Thank you.

JANIS KARKLINS: Thank you, Alan. Brian, followed by Margie.

BRIAN KING: Thanks, Janis. I would clarify that we did agree that by default, if there was no explicit option selected, that requests would go to the registrar, and I think that's fine. We would not agree that for similar reasons that Alan stated, that if the request was denied by the registrar, that the requestor would be precluded from going to the registry with that same request. And as an example, there could be jurisdictional issues related to why a registrar in one jurisdiction would choose to deny a request and a registry might approve the request or vice versa. So we wouldn't support a bar on going to the registry in these cases. Thanks.

JANIS KARKLINS: Question of clarification, Brian. Going to registry with the same request after denial within SSAD or outside SSAD?

BRIAN KING: Good question, Janis. I think we wouldn't agree that the SSAD should preclude the requestor from using SSAD to ask the registry for that same data. Thanks.

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JANIS KARKLINS: But if the default in every request is that it will be sent to registrar, then after negative reply and filing the same question again, it automatically will go to the same place. If the default position is registrar.

BRIAN KING: That's right, Janis. I think what we're envisioning is that's the default if the requestor doesn't make an explicit request that it go to the registry, but we were contemplating that SSAD would allow the requestor to explicitly request the data from the registry. And we would not want to preclude that option.

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

MARGIE MILAM: Hi. Yes, we agree with what Brian was saying. Currently, it's a huge problem where there are registrars that simply say no to everything, and we have already received input from ICANN Compliance that they will not question the decisions of the contracted parties. That's in some of the input that we received from ICANN Compliance.

So I think that it's actually a very important element of this, that either the registrar or the registry could be a point of inquiry. Certainly, it makes sense that you could funnel it first through the

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registrar, but I don't see anything wrong with making it a policy decision that the registry is also an eligible place in the event that there's a problem. Even with ICANN Compliance, it's a very long process. they'll investigate, they'll give opportunities for the registrar to respond, and then it takes months before anything actually leads to termination of a registrar. So just relying on ICANN Compliance alone is simply not going to work for us.

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

CHRIS LEWIS EVANS: Yeah. Thanks, Janis. Slightly different take, but sort of agree with Brian. By default, going to registrar, I totally agree with, but must always disagree with—there may be some instances where the registry is in the same jurisdiction as law enforcement or another governmental entity and it's a different legal basis that they can request under and better sound decision making process around going to the registry rather than the registrar that might be in a different jurisdiction.

So as long as that's a proper reason and due process is followed, I don't see why they shouldn't be able to go to the registry if it's more applicable or if there's a valid reason for that. So, happy with default, but not "must always." Thank you.

JANIS KARKLINS: Thank you. Can we think then in terms that as a default, it goes to registrar, but requestor sending the first request could also choose to ask this question or ask that the request be sent to registry? But if either registrar or registry denies the request, then it cannot go to another one. Volker.

CHRIS LEWIS EVANS: Yeah, I'd be happy with that. You don't get two bites of the cherry.

VOLKER GREIMANN: Thank you. I'm a bit concerned by some of the things that I've been hearing. A registrar answering no to most requests may not be something that is in violation of their requirements. If they have legal requirements that are so strict that it prevents these types of disclosure that is being asked, then it might be well within its rights and obligations under national law to refuse those applications.

And if we now open a secondary route to the registry, that creates a legal issue in my view because then it may require that registrar to also cease providing that data to the registry and only send dummy data to the registry, because if we know that a registry will disclose two entities that we are not able to disclose to, then we cannot disclose to the registry because at that point, the safety of that data under all local law would be not guaranteed and therefore we have no protection on our end from being held accountable for that disclosure to the registry that led to that disclosure to that party that we were not able to disclose to.

So I think having that secondary route available while beneficial for many requestors and also shortcuts around certain policies and requirements that registrars would have to oblige with regards to compliance, creates other issues that might lead to a breakdown of certain disclosures to registries that under the SSAD would function perfectly fine, but if we now have a secondary disclosure route, might not work anymore and legal risks might require that redaction at that point. And I would like to avoid that. Thank you.

JANIS KARKLINS: Thank you, Volker. Amr.

AMR ELSADR: Thanks, Janis. Yeah, I think Volker said most of what I wanted to say, thinking if registrars are denying disclosure requests, then they probably have a reason, and once that reason has been determined, seeking disclosure from another party that may hold the same information doesn't sound legally sound to me. The registrar will obviously deny this request either because it conflicts with the consensus policy that it's obliged to comply with or because it conflicts with the privacy and data protection law which it also has to comply with, both of which I presume are there for the benefit of the data subject's protection and protection of data subjects' rights.

But I also wanted to mention that folks are expressing difficulties they're facing with registrars not disclosing or denying too many

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requests for disclosure at this point. Right now, if I'm not mistaken, contracted parties are functioning with a temporary specification. Once we're done with our work, there's going to be a new consensus policy in place with new requirements and obligations that we're all working to develop together, and at that point, the second recourse I would imagine would be that the requestor can go to ICANN Compliance. And sure, ICANN Compliance's role now, again in the context of the temporary specification, might be very different than what it would be following a new consensus policy. I think both ICANN and contracted parties will be on relatively firmer ground in terms of what they are permitted to do in terms of processing of personal information and there should also be more clarity to requestors who will understand what kind of consensus policy and contractual obligations the contracted parties need to comply with when responding to these disclosure requests.

So I'm just thinking the status quo now is not necessarily the standard we need to be measuring the policy against. It's what we're currently working on, what we're developing, that's what we need to measure against. Thank you.

JANIS KARKLINS: Thank you, Amr. You're an optimist. Laureen, please.

LAUREEN KAPIN: Thanks. So some of the discomfort that I hear falls into two categories in the discomfort with the proposal. One, separate and

aside from all the good intentioned and upstanding registrars we have on this phone call, there is a recognition that not all registrars are going to behave in a way that's consistent with the requirements. And in the event of a pattern of unreasonable rejections, there needs to be some sort of recourse. That's one.

And then two, I'm also hearing that there are some jurisdictional hurdles created by the GDPR where there may not be clear paths, for example for law enforcement to be able to obtain information from registrars from a different jurisdiction from itself.

So I think there does need to be some mechanism to allow for getting information under those circumstances. And I just wanted to highlight that those situations aren't resolved by the proposal. And I would hope, as Amr hopes, that once we have a different policy, things would improve. I'm perhaps not quite as optimistic as Amr, however.

JANIS KARKLINS: Thank you, Laureen. James.

JAMES BLADEL: Hi Janis. Thanks. And I think Volker and Amr and Laureen touched on some of the things I wanted to comment on. I agree that registrars should be the first point of response for these types of requests. I agree that the requestor should be able to go to the registry in the event that a registrar is nonresponsive or is habitually responding outside of the SLA window. But I do not agree that they should have this option in the event of any kind of

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a denial, otherwise the decision of a registrar doesn't stick, it is just simply a speedbump on the way to asking other parties for the same request.

And I just note that Volker is absolutely right. If there is a codified process that says essentially that we have to give our customer's, our data subject's, data to a party that may disclose over our objections, then that questions whether or not we should be sharing the data with the registries in the first place. And I think that's a concern.

So to me, there are safety mechanisms that we nee to build into this here, but I think what I'm hearing or what I heard earlier in this conversation was just I want to keep asking because no denial of my request could possibly be legitimate, so I need to keep asking until I get the answer I want. And I think we need to guard against that. Thanks.

JANIS KARKLINS: Thank you, James. Alan.

ALAN GREENBERG: Thank you very much. I don't think anyone is saying that no denial is legitimate. There are going to be plenty of denials that are legitimate. and perhaps for jurisdiction reasons, perhaps for other reasons. The wording that I thought we were using earlier—although I don't think it's in the document—is if a registrar says no, they have to have a reason and they have to have a

viable reason and "The law prevents me from doing it and I can show you the law" is certainly a viable reason.

But the cases that we're trying to address here are where the registrar does not have a viable reason that would stick up in court and I thought would not stick up in Compliance. We're now being told that Compliance will not question it no matter what the reason is or lack of reason is. Then we have a real problem here. That is, there's no way to enforce that the policy we're going to put in place is being followed. And that's a real problem.

Now, I'd like to think our new policy will be so much clearer than the policy we did in phase one—which by the way we've now already passed the deadline for everyone implementing the policy. We seem to have forgotten that. But nevertheless. So the new policy we've put in place in phase one should be in place, and we're not changing the level of decision making. Rather, what the decision is based on from what we did in phase one. That's still the same.

So expecting different outcomes from what is effectively the same policy I think is the definition of insanity. So we do have to accept that there are bad actors and if we can't get around them or fix them with Compliance, then why are we wasting all of our time? Thank you.

JANIS KARKLINS: Thank you. I just want to remind that we have spent already 30 minutes in the call and we haven't got past the first question. Stephanie, please.

STEPHANIE PERRIN: Thank you very much. I have typed this in chat, but I do believe that these are all issues that ought to be sorted out in co-controller agreements, and we have not really determined those co-controller arrangements.

In my opinion, I don't see how ICANN Compliance can fail to intervene when someone is not complying with data protection law, because they also have an accountability. Even if the accountability only reaches as far as setting the policy.

So if they're going to police the policy in any way, they must also police the policy with respect to complying with data protection law. So we have only been talking here about a registrar that is not complying with a disclosure order. And that's not really a hanging offence under data protection law, but what about the registrar that just routinely exceeds to every request, as they have done for the past 20 years? Those people—and there are bad actors out there that will do that rather than spend the time interrogating a request—are equally a problem, I would suggest, because we're going to get complaints on them. And in any case, we haven't said a word about ICANN protecting a registrant's rights here.

So where are we going to do it? Somebody refresh my memory as to where we are looking at verifying compliance with data protection law. Thanks.

JANIS KARKLINS: Thank you, Stephanie. Mark SV, please.

MARK SVANCAREK: Thank you. I think most people agree that this is a real issue. Even in the new system where you can't ignore the response anymore, you could certainly auto reject it. We see people auto rejecting RDAP requests right now. You're out of quota. Okay, it's my first request.

And we also hear most people say this could certainly be abused and get out of hand. So the request for safeguards is really the way to go. I think we should be discussing safeguards, guard rails, whatever you want to call them rather than debating whether or not this is a real scenario or whether it can really be abused. So let's move on to discussing safeguards and implement [inaudible] guidance. I think that's important.

Regarding the chain effect, I have disclosed to someone who subsequently discloses who subsequently does something bad, I don't think it's established what the liabilities are in that case. So we should keep that in mind, but I'm less worried about it than some. Not because I'm not a controller, just because the guidance I get.

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And then finally, Amr's point about this is a new policy, that's a great point, and I think I've been making it all along. So let's keep that in mind in other aspects of this policy development when people are concerned about this is something that happened in the past. If we're putting guardrails and safeguards to it in the new policy, let's not dwell on the past. Thank you.

JANIS KARKLINS: Thank you, Mark. Alan Woods followed by Marc Anderson, and then I will try to draw a line.

ALAN WOODS: Thank you, Janis. Ver quickly because I think a lot has already been said. I just want to kind of point out two main things. First, I think we're actually talking completely across each other on sides of the divide here. I think the suggestion here was to have those guardrails, to say that it should always lead to the registrar. But there are defined procedural elements which can be looked at by ICANN Compliance and then taking into account the fact of the registrants' rights are at core here, the data subject rights and the registrant rights are at core here. We're trying to create a system which respects that by also making it workable for the people who are making the requests. So it should always go to the registrar, it should always not have a direct route to the registry, and we should be looking at reasonable situations where in a specific instance, there can be a route to the registry. But it needs to be

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stated and I think that's what Georgios is saying and even Margie and Alan are saying.

I do want to—not take the exception, but I just want to point out, again, we're the ones who are always being told that we can't always focus on the bad actors making the requests. But at the same time, we're being forced to listen to those things saying that it's always the bad actors making the responses. Can we make policy to be followed, not focus on creating policy for those who don't follow the policy? Because that still falls under ICANN Compliance's remit. And I think it's unfair of us to question ICANN Compliance.

So I just want to say as well that when it comes to the things that we're saying that the problems that we could find with certain registrars not making decisions, Alan gave a lot of examples there and they were all procedural in nature. They're ones that can be patently shown based on the procedure that there's disclosure without proper response, there is no disclosures whatsoever, there's no responses. These are all things that we've envisages that ICANN Compliance can look into. These are all things that are linked possibly as well to SLAs. Procedural, yes. I think ICANN Compliance should step in and take them. but when it comes to the actual legal decision, there's still a recourse, but that is through the data protection commissioners as EC relevant in that. Nothing's going to change. We can't change that. That is what the law states and we need to make sure that there are other recourses, and not just within the ICANN policy. And I know that's

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more difficult, but unfortunately, that's the situation we're in with a law that is now only a year and a half old.

So, can we just maybe start working together in this? Because I think we are completely missing the point together.

JANIS KARKLINS: Thank you, Alan. I think you concluded very well this. I got signals from the staff that they are fine with this conversation in order to fine tune what is suggested. I think that grosso modo, we have understanding that what is proposed is feasible for majority of cases, and then we need to put maybe some additional safeguards to fine tune this recommendation, including also that the requestor cannot go to other contracted party in case of request is denied.

So, may I suggest that staff, based on this conversation, will fine tune the proposal and will put it in the draft recommendation? Thank you. So let me look now to other element and see what is the take of the group, opinion of the group, what would be the right way forward.

Brian, please.

BRIAN KING: Thanks, Janis. Just so I'm clear, are we moving to section two here that we have highlighted on the screen?

JANIS KARKLINS:	Yes.
BRIAN KING:	Fantastic. If I can have the floor, I can speak to our thoughts on this.
JANIS KARKLINS:	Yes, please, go ahead.
BRIAN KING:	Excellent. Thank you. I think there are three or four different questions here. Two of them might ultimately be the same. The most important question here, I think, is that what specifically must be related to the contracted party, and I think the answer to that is all of the data that the gateway has about the request and the requestor if that's needed to make a decision, the contracted party needs to be provided with all of that data is our feedback on that. And then the other question—I think that's the most important one. I'm going to leave it at that and see if anybody else has any thoughts.
JANIS KARKLINS:	Thank you. Hadia, please.
HADIA ELMINIAWI:	Thank you, Janis. So as Brian said, we have separate questions here. So to answer the first one, requests that actually meet the

criteria for automatic disclosure are related to the contracted parties after a decision is made by the central gateway. And this is unlike requests that do not meet the automatic disclosure criteria.

So to answer ICANN's first question, yes, the requests could be relayed to the contracted party, but not in the same manner as an automatic request. So in case of an automatic disclosure, the request as is could be relayed, but it also includes a decision in relation to the request and this decision is relayed to the contracted party in order to be implemented in an automated way.

So automatic requests are relayed but not in the same manner. They have some additional information that needs to be relayed also to the contracted party in order to implemented.

The other question that asks if a confirmation or a check of how the criteria was met, I guess this question is in relation to automatic disclosure, and if the central gateway should also relay to the contracted parties the checklist of how the criteria was met or how the decision was made.

And this will depend on who is liable for the decision, who's going to be legally answerable to the decision. So if the contracted parties are also liable to the decision, then yes, a checklist of how the decision is made could be relayed to the contracted party. However, if they're not, then it is better for them not to receive this checklist.

And the final question is, do they relay the entire request or not? Well, yes, I think just as Brian said, the entire request should be

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relayed to the contracted party. There is no reason not to relay it. But again, in case of automatic disclosure, it could be or could not be, but again, depending on who's liable, but just to be clear, in case of automatic disclosure, it is relayed but not in the same manner. Thank you.

JANIS KARKLINS: Thank you, Hadia. Now, look, I think we're a little bit in the weeds here. What is are options how system would work? And this is what is described in point V. So request comes in, and central gateway will define whether request, the answer could be given in automated way at the gateway level, or it should go down to the contracted party.

So that is how we agreed system would function. So at the beginning, of course, automation level would be very small. Potentially, it may increase with time. So the question, what ICANN Org is asking, in case central gateway determines that they can make a disclosure decision, whether request itself should be sent to contracted party or only decision and request for disclosure information should be requested from contracted party to send to requestor.

So that is the question of clarification as I understand ICANN Org is asking. Brian.

BRIAN KING: Thanks, Janis. I agree with Hadia. I see Amr's question in the chat about what we're talking about with automated versus

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non-automated responses. I think that is the question, and the answer to that, I think we might be one call premature on this because Bird & Bird just sent some legal advice on automation to the legal team, and I don't think that's gone out to the plenary yet. I saw it just before this call.

So there's some guidance on that that might be useful, and I think the general principle, as Hadia said, it depends on if the contracted party has liability. And if they do, then they should be given a lot of this information. But since the law turns often on what you know and what you did, in some cases it's beneficial to your liability if you know less. Then the contracted party would not want to be provided with this information if that provision of information would add liability. So we may want to take a look at that legal advice and kind of park the final decision on this until we take a look. Thanks.

JANIS KARKLINS: Okay. What I referred was more architectural issue, how a system, at least how I understand system would function. So we do not know how many automated disclosure decisions would be made, but we agree that there may be situation when disclosure decision is made at the gateway level.

If it is so, then the contracted parties will simply receive the decision and the joint controllership agreement will define who is liable for what in those circumstances. I see Hadia's hand is up again, and then Volker.

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HADIA ELMINIAWI: Thank you, Janis, for this clarification. I totally agree with you. In case a decision is made by the central gateway and you have a contract that defines my ability and in case the contracted parties are not legally answerable for this decision, then there is no reason for them to receive the request in itself or the checklist of how the criteria is met. And in such case, the decision will be relayed to the relevant contracted parties in order to implement it, and if the decision is yes, then it would release the data to the requestor.

However, what if the answer is no? The decision to disclose the data is no. My understanding is that the contracted party is also the one who's going to relay this no. Or is it the central gateway? And that's a question. I know it's not what we're discussing now, but it is related to the responses. Thank you.

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

VOLKER GREIMANN: Thank you, Janis. Sometimes I'm a bit worried about what Brian says. Willful ignorance certainly isn't a legal defense in any case. Data protection is not something similar. So saying I would like to know less so I can answer your question is probably not the way that we can proceed on this. The only choice that we have is

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provide us with full information, and based on that information, we must make a decision on whether we can provide that data or not.

Everything else is a no go and a nonstarter. Thank you. And for automation, I agree we need to have some time to process the response. I've skimmed it, but I wouldn't say that anyone has had the chance to read this properly. Thank you.

JANIS KARKLINS: Okay. I think in the initial report, we indicated that automation would be possible for cases like law enforcement requests in the same jurisdiction. And let's think that this is the case. And the central gateway has all reasons to make a decision. So does not require this 6.1(f) evaluation and so on.

So if that is the case, can we say that in that case, gateway simply sends decision to the contracted party who is in the possession of required data? And instructs contracted party to send that data to requestor.

And again, we don't know about automation, how big automation will be, but simply from systemic point of view, if there will be automation. And if there's all the rights to do decision. So then it is, as I suggested, and if the decision is no, then the central gateway answers to requestor that decision is no, that there will not be disclosure, and carries fully liability for that decision. That's also important. Georgios.

GEORGIOS TSELENTIS: Yes. I wanted to ask you whether we are talking here about the decision or about a recommendation. To my understanding, the central gateway is in a position based on information that has been accumulated and knowledge in the system to make a recommendation, but the decision was, at least in the initial phase, if I understood, always stayed in the place of the contracted parties. So it's like going—and for me, that's a very important distinction.

JANIS KARKLINS: Of course it is.

GEORGIOS TSELENTIS: If we're talking about a recommendation and then the final green light and push button is from the contracted parties, then what we are saying here about decision of the central gateway is not correct.

JANIS KARKLINS: No, here we're talking about disclosure decision. So we have two elements in this architecture. Once again, we agreed that the disclosure decisions will be made at the level of contracted parties, except those that are consensually agreed could be made at the central gateway.

We indicated in initial report for the moment two types of requests that may fall in automation category and we're working to other small group worked and will be working on potentially other cases.

So if the disclosure decision is made at the central gateway, then contracted parties would simply receive a request to disclose that and that data to requestor. Or in case of denial, the central gateway would send the reply to requestor.

So with the recommendation, that is different story. This is one of element of evolution of the system whereby central gateway in automated way may provide recommendation to every request, and together with request, send this recommendation to contracted parties.

Contracted party examines request and makes a determination on disclose data or not. And if recommendation coincides with the decision, then it's fine. If it is different, then contracted party sends back feedback to the central gateway explaining why decision was different from recommendation.

All that is done to train the algorithm at the central gateway who produces recommendations, hoping that in a certain period of time, six months, one year, two years, the recommendation rate will coincide with the decision rate, let's say, 99.9%. That would then mean that recommendation algorithm is fairly robust and can be used also for decision making with the reasonable confidence that risk will not be so high and allow to scale up system.

So this is just a reminder why we are talking about these issues and we discussed them, it seems to me, agreed in Los Angeles [inaudible]. So, no one else? So then may I take that the way how I explained might be something that staff can look at and fine tune the recommendation?

Okay. Thank you. Let us move then to the next question. Caitlin, please.

CAITLIN TUBERGEN: Thank you, Janis. So the next questions deal with bullet point C, which is actually what you were just referencing in relation to the central gateway manager providing a recommendation to the contracted parties whether to disclose the information or not. And the first takeaway that we received in the comments is that any recommendation from the central gateway manager would be optional for the contracted parties to follow. Everyone is in agreement on that. However, there were some questions that came up in public comments in relation to the utility of that central gateway manager's recommendation. Specifically, is this recommendation envisioned to be automatic or manual? How would the central gateway manager go about making that recommendation?

And there was also a disagreement about if the contracted parties should be required to send its rationale for denying a request. However, we note that this was a compromise that was previously agreed by the EPDP team to allow the central gateway manager to learn and improve its recommendations, which is why the

rationale for denying the request would be provided back to the central gateway manager.

JANIS KARKLINS: Is there any need to discuss it further? I think I tried to explain the rationale as we discussed, and it is to train algorithm, which would also be based on self-learning sort of features and then see how smart this algorithm will get with time and whether at any point in time contracted parties will see that algorithm as sufficiently robust to be followed.

Again, for the moment, this is just a recommendation. Anyway, anyone wants to speak about it? Or we can go to the next one. Milton.

MILTON MUELLER: Yes. I'll probably surprise you all when I say that I think this is an example of kind of a poorly thought out middle ground between people who want centralized decision making and people who don't. And the idea that this is some kind of a machine learning mechanism really doesn't make any sense. If you understand machine learning, you would actually not want the central gateway to make a recommendation, you would want to study all of the decisions that were made and then you'd want to find out which ones were correct and which ones were incorrect, which would be your so called ground truth.

So you would really not need the centralized gateway to be starting off by making decisions. There's also really unresolved

questions about how the central gateway manager makes these decisions. Do they literally read all of the materials that are submitted in a request, or are they mainly a relay function? We thought they were a relay function.

Anything that does turn out to be automated should be very simple algorithmic things, like one of the things—and I'm not saying I necessarily agree with this, but if you say—if it's a law enforcement authority in the same jurisdiction, that's pretty cut and dry. Maybe you can successfully automate that, but even, again, that doesn't require the central gateway manager to be making any decisions or reviewing materials.

So I think this is kind of an incoherent recommendation. If we somehow arrived at this as some kind of a compromise, the fact that it says "may" I guess makes it less of a problem, but again, you can't really make this into a sensible recommendation because the whole premise behind it doesn't make any sense.

JANIS KARKLINS: Thank you, Milton. Brian.

BRIAN KING: Thanks, Janis. I'm happy to give you our perspective on these questions here. To the first one, I think we would not preclude either option. I think it would be good for the central gateway and helpful for the contracted parties to have some recommendations, and I think if the gateway could do that manually or automate that,

I'd be happy either way as long as it's getting some quality recommendations out. That's our response on the first one.

On the second one, I think the central gateway should use all the information available to it, so it should look at who the requestor is, their accreditation type, any identity providers associated with that, details of the request, history of activity by the requestor, all factors that could be considered as part of the recommendation.

And then to the third bullet, yes, I think that we envision that a contracted party should send its rationale to the gateway and that is something that we had agreed on before. And it's important for a couple of reasons. One, it helps the gateway get smarter. Two, it adds transparency to the SSAD and three, it's helpful for the requestors to learn if their request is being denied, why that is. In fact, if you're paying money to submit the request, it's almost owed to the requestor to tell them why a request that they paid for was denied. So there's our feedback on those three. Thanks.

JANIS KARKLINS: Thank you. Marks SV, please.

MARK SVANCAREK: Thanks. This is probably not the right time, but we can take this offline, and I'd be happy to think how I imagine a system like this would be implemented. And I think I could probably address Milton's concerns.

In Microsoft, we've already built systems like this to do online transaction reputation. So we have a service where people tell us about requests for an online transaction and we tell them we have high confidence this is a legitimate transaction, low confidence, we think you should probably reject this. And then that's nonbinding on them and they go off and either follow our advice or not.

And that's something that started as a rules engine a decade ago and has gradually evolved as more and more data was available to become a mailing list mechanism.

So since we're already sending a lot of information into the gateway, the request information's going in there and being logged, the response data, either it was a yes, or here's why it was a no. All that's going to the gateway and being securely logged.

There's going to be a lot of information in the gateway that over time will generate patterns about confidence in various requestors, various types of requests, other things like that that can, I believe, generate some pretty good recommendations.

Now, whether there's a manual element that's providing some of the seed information to that, I would [have objection] to that. So if we want to take this offline, we could talk about it. We probably don't have enough time to do it today. But I think this could really be a viable system so long as all the information is available to the gateway. Thank you.

JANIS KARKLINS: Thank you, Mark. Alan G.

ALAN GREENBERG: Thank you very much. I think this is a good recommendation that should be there as an option. I'm not at all convinced how well it can be implemented and how quickly it can be implemented. One of the potential problems is that although artificial intelligence can make decisions with a high level of confidence, generally, this kind of learning system does not provide the reason for making the decision. It simply can give you a high level of confidence that the pattern says what the answer is. That may not be sufficient for data protection law. So that's something to take into account.

But I think the system should have the ability to do that, should we be able to develop this capability. And one of the other things is every time we talk about the central system making a decision or recommendation, we use the term "automation." We have not discussed really to any extent either the implications—which have both cost and operational implications—of there being manual intervention at the central system to help make the decision.

So I think it's a recommendation we have to keep. How well it can be implemented, how effective it can be implemented is going to be an interesting question and that may well change, as Mark says, over time as we learn things. Thank you.

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

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MARC ANDERSON: Thanks, Janis. I raised my hand—I wanted to dive into the question of, is the recommendation envisioned to be automated or manual? I don't think that's something we specifically talked about previously. I have to confess I've always assumed that that would be an automated evaluation and recommendation. Of course, making assumptions is always dangerous, but in my head, as we've discussed this concept, I've assumed that the central gateway would make some kind of attempt based on the data it does have at an automated decision and forward that to the contracted party along with the data.

I raised my hand because when Brian noted that he would be fine with either automated or manual, I was a little surprised by that because I had sort of been imagining it to be automated, and I guess if it is manual, I think we would have to consider what that means to the SLAs, how that factors into the SLAs. And I think we would have to understand what it means for sort of the costing of the SSAD system to have this be done in an automated manner or in a manual manner.

So I think there's a lot to that question, and if we're making this recommendation to ICANN to make this recommendation with the forwarding of the information, we need to provide a little more guidelines to staff for them to consider with implementing this.

It might be good to hear from staff if they're not prepared to answer now on the call. Maybe as a follow-up homework item to

get back to us with maybe some of the costing and implementation considerations around automated versus manual.

JANIS KARKLINS: Thank you. Mark, I think when we discussed it in Los Angeles, it was a clear understanding that that would be a computer who would make that recommendation based on algorithm. Humans would not be involved, otherwise it doesn't make sense.

Milton, are you convinced now, or not really?

MILTON MUELLER: No. My point is that you're really not responding—nobody here is responding to the fundamental facts about how AI and big data systems actually work that I made in my first intervention, which is you get very large quantities of data, you look at patterns and you look at outcomes. So this recommendation is suggesting that the central gateway manager begins by making recommendations based on patterns without any data about what patterns actually work and which ones don't. This is just a very obvious fact. I can just see real AI experts laughing their heads off at this assumption that you can have an algorithm in place from the stat making recommendations.

You can't. When Mark refers to the recommendations that Microsoft is making to transaction processors or the banking industry, he's talking about having a database of trillions of

transactions and then knowing which types of transactions actually turn out to be fraudulent.

You don't start by saying, oh, I think this transaction is fraudulent based on no data about what has actually happened in the real world. You just can't do that.

So at best, this recommendation might say something like, after two years of operation, the central gateway manager may provide a recommendation based on collected data and known results of actual recommendations, which ones turned out to be illegal, which ones turned out to be acceptable. That's the way you would have to do this if you wanted it to be an automated algorithmic recommendation. There's just no way around that. we have to respect basic data science here.

JANIS KARKLINS: Thank you, Milton. I would like to cut the conversation on this topic unless there's really desire to drill down. I have four requests that I see, maybe more. Brian, Stephanie, Mark SV and Alan G. In that order.

BRIAN KING: Thanks, Janis. Respecting the decision to cut this conversation short, I'd just note that I don't share Milton's concern primarily because it says the central gateway "may" do this and there's no requirement that it does it on day one, and I think it's not likely that it has any data about ground truth on day one. So I think it would be silly for the gateway manager to do this on day one or to have

any confidence in the recommendation. So I don't share the concern. Thanks.

JANIS KARKLINS: Thank you. Stephanie, please.

STEPHANIE PERRIN: Thank you. Milton has made my points on artificial machine learning. I would respond to Brian by saying we perhaps should clarify that in our language in the recommendation. And my point is—and I apologize because if Thomas were here, he would say it much better, but we really have to be operating from the controller, co-controller agreements that are set up to figure out the parameters of how this machine is going to work, because it's not as if the registrars own this machine and that it is part of their process. ICANN owns this machine and it is part of ICANN's process.

So in terms of who's the controller and where does the liability reach, that has yet to be determined. So we keep making compromises as if we were running a PDP, and that is not trying to implement data protection law, and that's actually what we're trying to do. We're trying to implement data protection law and we don't seem to be keeping that foremost in our minds. we need those controller agreements to be part of this discussion. Thank you.

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JANIS KARKLINS: Thank you, Stephanie. Mark SV, please.

MARK SVANCAREK: Thank you. I actually don't disagree with what Milton said, but I share Brian's confidence. On day zero, yeah, the recommendations are basically going to say, "I have no opinion about this. I don't have enough data." Because everybody entering the system would be accredited, so that won't be a factor. But over time, it'll be generating a lot of data. So we should clarify this, as I think Stephanie said. We should clarify this in the wording, that we expect this to get better over time and that the recommendations—well, maybe we clarify it in policy or not. I guess that's not really policy language. But yeah, the expectation is that if something learns over time, on the first day it doesn't know much or anything at all. So that should be well understood by everybody, I hope. Milton made a good point.

Other than that, I think Brian made my other point too, that I'm confident that this system learns over time, and I agree with Stephanie, of course, that if this thing is going to be inspecting the data subjects' data in order to make that recommendation, then we better have a controller agreement in place, otherwise it's going to be looking at a smaller subset of data and the value of its recommendations—although still quite valuable, I'm certain—will be less valuable.

JANIS KARKLINS: Thank you, Mark. Alan G.

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ALAN GREENBERG: Thank you very much. I'll be very brief. I think we're getting to the point where we're all violently agreeing with each other. Clearly, the operator of the SSAD would be stupid to have it start making recommendations day one, and any registrar or registry that listens to them would not be particularly bright either. So this is going to have to be an evolving thing. We're going to learn from it. We may well develop reputations of requestors pretty quickly. So I wouldn't want to see a two-year limitation or an absolute time in the policy. I have no problem with the saying the recommendation saying this is going to be a learning exercise and give some idea of how it works. But I don't think we should make the presumption that ICANN is going to be completely foolish and start making recommendations day one. If it is, no one is going to listen to them. So it would be rather pointless. So I think we're getting towards something that may be operational. Thank you.

JANIS KARKLINS: Thank you. So I think as Alan said, we're reaching that understanding that this recommendation may be fine-tuned with a clear notion that these recommendations would be maybe generated not from day one and no one expects that the algorithm will be intelligent from day one of operation, whenever that algorithm will start operating.

And that would be up to ICANN to decide how and when to launch this machine that generates recommendations. So with this

understanding, staff will fine-tune that part of recommendation and we can move to the next question. Caitlin, please.

CAITLIN TUBERGEN: Thank you, Janis. As you can see, the next takeaway and questions deal with bullet points D and E and the problematic text that has been noted in the comments is bolded above for our reference. Quickly, the takeaways on this are that any references to SLAs or logging will be handled in those respective recommendations to ensure consistency, we'll also note that in the third bullet there was a disagreement regarding this sentence in D that such exceptional circumstances may include the overall number of requests received if the number far exceeds the established SLAs.

There was a disagreement on that text. We'll make sure to revisit that in recommendation 9 with the SLAs, but we did want to note that within recommendation 12 on the query policy, there is some language about abusive use of the SSAD that we can put in a footnote here since there was uncertainty what it meant to have the number of requests exceeding the established SLAs. So that was a proposal there.

In terms of the questions about this, there were questions about the appeals process that some of the commenters put forward. If a requestor believes the request was erroneously denied, some commenters noted that the only appropriate path would be for the requestor to contact the DPA directly. In the event that the team

agrees that an appeals process is still necessary, who would be the decider here?

With respect to question five, if there is a rejection, should Compliance be notified? And how would that work in terms of what information would nee to be provided to Compliance?

For question six, again, the problematic text in E is bolded above, but some commenters had an issue with an analysis and explanation of how the balancing test was applied as problematic because they believe that the response should be lightweight as to not risk disclosing protected information. We note that there is the use of "for example" here, so would that be acceptable to leave, or does the terminology need to be updated?

For question seven, there were some concerns expressed regarding the clause, "The entity receiving the access disclosure request must include information on how the public registration data can be obtained." Specifically, the concern was how would the contracted party be expected to know where all public information could be accessed. Instead, is it that the central gateway manager would be asked to provide information on how to access publicly available information in RDAP? Or is that something that the contracted party is expected to respond with?

And I think part of that confusion is because we used the term "entity receiving the request" and also there was a question on if that was purposeful or if that's supposed to say the contracted party or the central gateway manager.

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JANIS KARKLINS: Okay. Thank you. So let us take then question by question on question four. Margie.

MARGIE MILAM: With regards to the issue of an appeals mechanism, we do believe that it's necessary to allow some sort of appeals mechanism. I know people have been talking about the ability to go to a DPA, but there may not actually be a DPA involved, and I think that that is important as part of the policy to have some sort of an appeals process, especially in the event that there's a situation like we were talking about previously where potentially there's no answer from a registrar related to a request. So I do think that this is something that we should think about from the policy perspective and that it would be a good idea to include that as part of our recommendations.

JANIS KARKLINS: Okay. How do you see that in practical terms? If you would need to design this appeal mechanism, what that would entail?

MARGIE MILAM: Sure. I think you could look to examples already in the ICANN space. There's dispute resolution mechanisms that we created in the new gTLD space as an example. It's certainly not something that's unusual in the ICANN space, and there's also, I think, a usefulness in allowing the appeals process to be an option,

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especially when we talk about the fact that ICANN has indicated that they're not willing to look at the disclosure decisions and question them.

So without some sort of fallback, it really leaves the system in a way where it may not be operational, functional for those that need to use it.

JANIS KARKLINS: Okay. Thank you. Volker.

VOLKER GREIMANN: Yeah. Margie made an interesting point because there are indeed ICANN processes out there that already have working appeals mechanisms, for example the UDRP. If someone doesn't like the decision of the UDRP panel, they can always go to court and appeal the decision in more public venue. So that's something that might be appropriate here as well. Thank you.

JANIS KARKLINS: Thank you. Milton, please.

MILTON MUELLER: I'd be willing to entertain the concept of an appeals for a negative decision if we also introduced the idea of an appeals for a positive decision. So we would allow the registrant, the data subject to know and appeal what they considered an adverse decision when their data was disclosed to a third party. I think that would be fair.

But all this starts to kind of break down when we contemplate the scalability of what we're doing here, and I think we're talking probably about hundreds, if not thousands of these requests a month, maybe even millions. I'm not sure, but to make this into a legalistic thing which every single decision can be appealed does sound like it might slow things down a bit and be rather costly, particularly if we are providing the same appeal mechanisms to both sides of the transaction.

So probably, we shouldn't do this. We should consider ways to use compliance practices against registrars who are making consistently bad decisions in either direction. That's all.

JANIS KARKLINS: Thank you. I think we also need to remember that there will be auditing of the work of the system as well as where we're talking about this evolutionary mechanism that would review how the system operates and in order to review, it will base this review on facts where the statistics on disclosures and rejections will be also part of that dataset that will be examined. So, do we really need to create a mechanism that may simply crumble under the volume of appeals, provided that every rejection would potentially be appealed? Brian.

BRIAN KING: Thanks, Janis. On this point, on appeals, I think an appeals mechanism is necessary because the response that we received from ICANN Compliance, while somewhat frustrating, was very

helpful in that it said that ICANN Compliance would not substitute its judgment for a contracted party who did a balancing test in a certain way. and based on my experience, contracted parties have gotten that wrong. If they got it wrong once, then that's enough and we need to be able to address that. And if ICANN Compliance won't do it, the difference in this scenario versus the one that Volker helpfully described is that in that world, there are trademark laws in many countries that will allow the party being infringed to take the matter up in court. And I'm not aware of any law in a jurisdiction that requires personal data to be disclosed for a given purpose, for IP or otherwise. And the existence of that law as a backstop is helpful in the UDRP context, but we don't have such a thing here. I don't think we want such a thing.

So we need to be able to have an independent appeals mechanism that gets this right. The economics of this do influence or at least apply pressure as we've indicated previously for the contracted parties to have a particular outcome in mind or to have a preference on how that balancing test will be weighed. And if we ask them to do that and it's not going well, we need to be able to address that. so I support Margie's suggestion that we use something like what was done in the new gTLD program where there's an independent body like the International Chamber of Commerce I think was the arbitration body that folks could use to appeal decisions from that program. So I think something like that would be appropriate here. And I'd note that the cost of that would be very high and that alone would limit its use to only the most

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important cases. So I don't think that we'd be looking at a high volume of appeals if that was what was required. Thanks.

JANIS KARKLINS: And the ones who make appeal bear the cost, right? Brian.

BRIAN KING: Hey Janis. I believe that's often the case, yes.

JANIS KARKLINS: I think that normally in the justice system, the one who is wrongdoer bears the cost, at least cost of judgment.

BRIAN KING: Janis, that actually varies by jurisdiction. It's different in the US, for example, than in many other countries.

JANIS KARKLINS: Okay, so then there is a proposal to add something with independent appeal mechanism where costs are borne by those who make appeals. Would that be something we could try to work on? Milton says no. No hands up. Again, I can only say my personal view that I think that existing auditing and this evolutionary mechanism could be used to address, let's say trends, of course, not appeals to each specific denial of request, but maybe I will ask staff to give a try and see what comes up with that type of appeal mechanism. But immediately, we need also to

add a price tag to it because if something similar exists already in new gTLD space, then also the cost should be more or less known.

Laureen.

LAUREEN KAPIN: I'm wondering if there's a way to come up with some sort of fast track process either though ICANN Compliance or some other streamlined mechanism, because I am mindful of the point that Brian and Mark and Margie have raised about the need to deal with systemic problems, but I also recognize Milton's point about not bogging down the process so it is so laden with layers of review that it becomes too cumbersome to work efficiently.

So I just pose this as an idea if there could perhaps be some sort of fast track or streamline process, whether through ICANN Compliance or some sort of standing panel that's convened every so often to deal with problems of systemic abuse. And that could be on the side of giving information over incorrectly or withholding information incorrectly if we were to decide that it should be for both sides.

JANIS KARKLINS: Laureen, you know that in the small group we're working on the proposal for this evolutionary mechanism and systemic assessment of functioning of SSAD is one of the tasks of that mechanism.

LAUREEN KAPIN: So this is something that perhaps could be considered by this existing small group. I'm not speaking for everyone, but perhaps [there wouldn't be resistance] to including that, especially since we're already up and running, so to speak.

JANIS KARKLINS: Yeah. And for knowledge of everyone, there is a small group working on this evolutionary mechanism. We have a draft text that will go to the last sort of reading, maybe tomorrow if it will be ready. If not, next week. And then this draft text will be presented to the team for consideration. So that's for your knowledge.

Stephanie please.

STEPHANIE PERRIN: Thank you. I just wanted to say out loud what Milton has said in the chat. You can't possibly have an appeals mechanism for requestors of data without having a mechanism to protect the rights of registrants. And it's not clear to me how you're going to build that into one of these external policies unless you're going to involve data protection authorities or experts. And I don't see any discussion of that. Possibly, the small group is going to come up with that. But to provide a right that doesn't exist in law for requestors to challenge decisions of an instrument that is basically implementing law strikes me as pretty wrongheaded. Thank you.

JANIS KARKLINS: Thank you. So then let me suggest the following. I ask staff to note this appeal mechanism idea and see whether we can factor it in in this evolutionary mechanism which will be assessing efficiency of the work of the system. And in case if that will not be supported or feasible, then flag it at one point when we will be looking at the final report.

So on five, what do we do, Milton?

MILTON MUELLER: I just think you may be overlooking a constructive suggestion that Laureen made, which is it's too granular to have an appeals mechanism for individual requests but there could be some kind of a flagging mechanism where people on either side of the transaction, requestors or subjects who think that a registrar is ignoring legitimate requests on a repeated basis or the opposite, just opening up everything. They could be flagged and reviewed or something. I think that's the kind of check that we want that's proportionate to the problem. We don't want an appeals mechanism for individual requests. The administrative burden of that just seems self-evidently excessive to me.

So, did you hear Laureen's suggestion?

JANIS KARKLINS: Yes, this is what I said about this mechanism. This is part of the mechanism and Laureen is part of the small group.

MILTON MUELLER: Okay. Can we not call it an appeals mechanism?

JANIS KARKLINS: Again, this concern is noted and we'll see how we can factor that in, including also from perspective that you just outlined. Not individual or appealing individual decisions but rather systemic analysis and see whether there are any patterns of behavior or decision making o contracted parties that need to be sort of reviewed or signaled to somebody who can review that.

Okay. So on five, on each individual rejection, I don't think that ICANN Compliance should be notified. Am I right? Chris.

CHRIS LEWIS EVANS: Very quickly, just agree with you, yeah, it's right for them to reject requests that aren't justifiable, so there's no real reason for every request to be pushed to Compliance. That's then the requestor's decision if they believe that they've been unfairly treated.

JANIS KARKLINS: Okay. Thank you. Brian.

BRIAN KING: Thanks, Janis. Yeah, might be surprised, I agree with Chris, these don't all have to go to ICANN Compliance. We would note though that Compliance should have access to all the same data as the central gateway manager and be able to use the data that's been collected, just about response volumes and response success rates and things like that, that that data should be available to Compliance. But no, they don't have to send every single one.

JANIS KARKLINS: Thank you. Volker, please.

VOLKER GREIMANN: Yeah. One of the rare instances where I also agree. If every single rejection were to be sent to be sent to ICANN Compliance, then we'd be in a situation where ICANN Compliance would no longer be able to do their job. So I think compliance reports should be limited to exceptional circumstances. And we might have to define them down the road, but yes, this is going too far [inaudible]. Thank you.

JANIS KARKLINS: Thank you. So we are in agreement on question five. Let us now move to next item, and that is question six. If you could display E on the screen, that relates to the last part of the recommendation E. Brian.

BRIAN KING:	Thanks, Janis. The second sentence in the number six is problematic for us. I think the recommendation as drafted has the caveats that folks need here, for example, if applicable. If you read that bullet—I think it's E—with those in mind, I think that that does what this comment was trying to achieve, and that sentence that's highlighted now is not something that we would agree with. But I don't think that we would need to have a big fight because I think the language already covers what the concern was here. Thanks.
JANIS KARKLINS:	Thank you. Anyone else? So I have a recollection that this was fairly complex conversation that we had, and I'm just now trying to get the whole text in front of me.

Volker, psl. |
| VOLKER GREIMANN: | Yes. Part of where that language came from, I think, was the concern that if you include details on how you perform the balancing test, you might already be disclosing details that might be considered personal, provided that the requestor already has an idea. So it could give valuable hints to a requestor that has been denied as to the identity of the data subject that we have to protect in a specific circumstance because of what the balancing test turned out to be. |

So I think the "for example" is already very helpful, but it should be clear that there are circumstances where such reasoning simply cannot be provided to protect the data subject. Thank you.

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

MARC ANDERSON: Thanks, Janis. I had thought we covered this one already, and I think we did—I think it's overlapping a little bit with preliminary recommendation number six on contracted party authorization, and if you look at—let's see, it's on page 28 of the report at the end of section 5. It says the rationale for the denial must be documented and must be communicated to the requestor, with care taken to ensure that no personal data is revealed to the requestor with this explanation.

So I think this is a topic we specifically considered, and I think we settled it with that sentence in section 5 of preliminary recommendation 6, and I think we're dealing with a little bit of overlap between recommendation 6 and recommendation 8.

I'm not sure—so I think basically, the solution is we need to address the overlap, but I think the language in recommendation 6 section 5 addresses those concerns.

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JANIS KARKLINS: Okay. Thank you. I think you're right; there is overlap and I'm just thinking, since that is already covered, either we do the reference to other recommendation or we simply delete this one as a whole, the whole E.

The only question is about must include information how public registration data can be obtained, and even here, in the next question we're talking about whether contracted party may be in a position to disclose where this public data could be found and they simply do not know it.

So maybe in order to save time, let me ask staff to think how this could be merged, integrated—the point 6, question 6, merged, integrated with the recommendation 6, what Marc referred to, which explicitly basically says the same. And can we address now 7? Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. On 7, I guess there's a couple things here, but specifically, I don't like having the contracted party responsible for having to identify where the data can be publicly obtained. The suggestion there of having the central gateway manager providing that information to the requestor, that seems a much better approach. So maybe having the central gateway manager provide information about where data can be publicly obtained and providing that to requestors is a better approach than having the contracted party having to identify to the requestor in a rejection response where to go to get public data.

I think that does not make sense to me. I think the contracted party is not the researcher for the requestor, so I don't like that language in there. But having the central gateway manager provide that information does seem okay to me.

JANIS KARKLINS: Thank you, Marc. I think there was a logic in this recommendation if I recall correctly. When we discussed in case of rejection—the request for nonpublic data in response should be accompanied also with the publicly available data, not to go to system twice. I think that this is one of the recommendations that we have. But in case of rejection, this public data should be—the requestor should be pointed by this public data is available. I think this is the logic in this combination. But let me take Volker, Margie and Mark SV in this order.

VOLKER GREIMANN: [inaudible] current practice [inaudible] something that we often do when we get a request for registration data that is somehow deficient and we find that the same data is for example published on the website under the domain name, then that is something that we usually tell the requestor to speed up the process and having to deal with multiple requests back and forth. If the data is already published there, then we don't need to disclose our data, we just have to show them or give them a hint where to find that extra data. So that's something that we from time to time do when

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the situation warrants it. I would therefore propose that we change the "must" to a "may" and be done with it. Thank you.

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

MARGIE MILAM: Hi. Yeah, I don't really care, I guess, where the information gets provided. It probably does make sense the way Marc is indicating that the central gateway manager would be providing a link to the—I think the most reasonable thing is the lookup tool that ICANN has. So that to me makes perfect sense as opposed to the contracted parties. No need to give them something extra to do when it's easy for the gateway manager to do it.

But I also don't think that Volker's response related to the website information is really that helpful when you're trying to decide whether or not you're going to bring a case against the registrant. It doesn't really matter what's on the website because the registrant is the one that's legally responsible for the website. So that's just a different legal thing as opposed to what might be posted on the actual website. You may have a totally different party there. So I just don't want to leave the impression that the fact that something's on the website is an answer to a WHOIS inquiry when it really shouldn't be.

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JANIS KARKLINS: Okay. Thank you. Okay, I don't know how to conclude that. Probably Alan Woods will help me.

ALAN WOODS: Thank you. Sorry, I'm just trying to wrap my head around something that Margie just said there. So Margie, you're saying that even though you could have contacted the website, that you couldn't ask the website to just confirm that they're also the owner of the domain? I'm not getting—my brain straight away went to why would you ever ask a registry to take down content on a website, because you're saying, oh, the content on your website is to do with the registration. And we get an awful lot of pushback on that sort of thing where you say, well, it's one and the same. And they were using it as an opposite example. I'm just a little bit shocked with that.

Of course, [inaudible] saying, I think I just want to give a little bit of an anecdote where, again, one of the people who asks me an awful lot of requests via the registry, I specifically pointed out where the WHOIS actually printed the contact detail they were looking for, and when I went back to that person [and said you should really review the registrar's WHOIS,] and when I actually provided with a link to that company, they came back and they said it's not there. They didn't even check, because I provided a link and it was written in plain text. And this is the problem. We can lead the horse to water but we can't make them drink. And I think there's just a lot of issues with giving an expectation that we will always do that. Sometimes it just needs to be common sense

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saying—and this is why it should be a "may" and probably the central gateway, that if we can help, we will, but it should not be an expectation to do the impossible in every single occasion.

JANIS KARKLINS: Thank you. Mark SV and Stephanie, and then we will move on.

MARK SVANCAREK: Thanks. I think if the language is something like "must provide information on how to find the authoritative RDAP server" or "must point you back to lookup.icann.org" or some other place where you can get the publicly available data, I think that would satisfy the "must," and then ideas like Volker's could be made language if we feel like we need that also. Thanks.

JANIS KARKLINS: Okay. Thank you. Stephanie, please.

STEPHANIE PERRIN: Thanks. There's a fundamental principle in data protection law that could be summed up by saying exhaustion of administrative remedies. The instrument itself clearly under data protection law must tell people where to go to get the public data first. And in my view—and this is my opinion, of course—the registrar should not be providing access to nonpublic personal data if the requestors have not exhausted their administrative remedies first.

In other words, go get the public stuff first, and if it doesn't solve your problem, then come and ask of the nonpublic stuff. That's basic. And the system has to build that in. So that's an ICANN co-controller responsibility in running the SSAD. Thank you.

JANIS KARKLINS: Okay. Thank you. Mark, you really want to talk? No. Look, let's stop here. Since staff will be thinking how to change this text in light of our previous conversation, I would like to ask also staff to see how this may/must issue could be factored in in this new version.

And let me go and highlight the next issue, and I would say this is for dessert for all of us. Let me invite now Caitlin to walk us through the issue of urgent. And I'm not sure that we will be able to address it today, but still, I would like to listen to introduction of staff.

CAITLIN TUBERGEN: Thank you, Janis. So the takeaways that we got from the comments on urgent requests, the first takeaway is that a commenter recommended that urgent requests should be separated into a different recommendation to avoid confusion with a nonurgent request, and there were no objections to that.

The second is that as we had previously discussed, contracted parties can always either update the priority or demote the request priority if after they review it, they determine the request does not

meet the criteria for an urgent request. And then following the discussion on recommendation 9, there was a disagreement in the team about whether urgent requests should be limited to public authorities.

So staff proposed updated language that you can see, but we'll note that it hasn't been agreed to yet, and as some of you may have observed, Mark SV and Volker had an exchange on this earlier today. So further discussion is still needed on drafting an agreeable definition of what would be an urgent request, and we're asking if the team could consider keeping the current definition and providing a non-exhaustive list of examples to assist in the policy implementation.

JANIS KARKLINS: Okay. Thank you. Since we have five minutes before the closure of the call, I would like to ask only Mark SV and Volker. In your opinion, is it realistic to draft a new definition of urgent request? Or we should follow the suggestion of the staff and then try to use existing and then populate the list with the examples? Mark SV.

MARK SVANCAREK: Thanks. I think staff can come up with the non-exhaustive list of examples, I just wanted to make sure that we didn't maintain the language about you have to go to a government authority in order to do an urgent request without having a discussion on that. Thanks.

JANIS KARKLINS: Okay. Thank you. We'll be discussing it next call.

MARK SVANCAREK: That's good. Thanks.

JANIS KARKLINS: Volker, please.

VOLKER GREIMANN: Yes. Thank you, Janis. You probably have seen the discussion of—

JANIS KARKLINS: Yes, I did. That's why I'm asking you.

VOLKER GREIMANN: So you can see that we're not quite there yet, but there's some points where we probably align on and some points where we still need some definition and there might be some categories for urgent requests that might become acceptable if certain safeguards or further roles and policies are implemented that we don't have yet. So at this stage, I don't feel comfortable with expanding the scope without those safeguards. But yeah, it's not just between myself and Mark, it's the whole group that has [to decide on that]. Thank you.

JANIS KARKLINS: I agree. Of course, the whole group needs to discuss it. But it is always better to discuss when you have something to discuss rathe than discuss an abstract. And my question to you and Mark is, taking into account that we haven't examined until the end recommendation 8, but neither 11 and 6, which means that next week, for the homework, it may be slightly lighter than usually, would you and Mark agree to continue your conversation? Of course, with assistance of staff and try to come up with the proposal that team could examine during the next call?

I take your silence as acceptance. So thank you very much. With that, I think we have come to the end of today's conversation, today's meeting, so we will meet next time on Thursday, 30. We will continue working on recommendation 8, 11 and 6. And maybe we will ask you to look at some things further, but for the moment, it's not my plan. I will consult with staff.

So that said, there will be a meeting of legal committee on Tuesday, 28th of April, and also, I would like to encourage GAC to come up with a recommendation too. That would be very helpful to move process forward.

So with this, I thank all of you for active participation in the meeting, and I wish you good rest of the day. This meeting is adjourned.

[END OF TRANSCRIPTION]