ICANN Transcription
GNSO Temp Spec gTLD RD EPDP – Phase 2
Wednesday, 17 June 2020 at 14:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the GNSO ePDP Phase 2 team call taking place on the 17th of June 2020 at 14:00 UTC. In the interest of time, there will be no rollcall. Attendance will be taken by the Zoom room.

If you're only on the telephone, could you please identify yourselves now? Hearing no one, joining us a little later in the call will be Brian King of IPC. We have listed apologies from James Bladel, RrSG, and his replacement will be Owen Smigelski.

In addition to that, Matt Serlin from the RrSG will join for the first hour, and Sarah Wyld will be taking his place for the second portion. These alternates will be in place for this call and any remaining days of absence.

All members and alternates will be promoted to panelists for today's meeting. Members and alternates replacing members, when using chat, please select "all panelists and attendees" in order for everyone to see your chat. Attendees will not have chat access, only view to the chat access.

Alternates not replacing a member are required to rename their lines by adding three Z's to the beginning of their name, and at the end, in parentheses, your affiliation, dash, "alternate," which means you 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 chat, apart from private chat, or use any other Zoom room functionality, such as raising hands, agreeing, or disagreeing.

As a reminder, the alternate assignment form must be formalized by the way of the Google link. The link is available in all meeting invites toward 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 with your statement of interest, please e-mail the GNSO secretariat. All document information can be found on the ePDP Wiki space. Please remember to state your name before speaking. Recordings will be posted on the public Wiki space shortly after the end of the call.

As a reminder, those who take part in the ICANN multi-stakeholder process are to comply with the expected standards of behavior. Thank you. 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 84th call of the team. So, today we will continue going through the "cannot" live

items. So, we finished consideration of ten, our of which one remained open. So, we will see how far we can get today.

The method of work will be as it is. Marika will introduce the question and we will see what kind of input we could provide. Any objections? I see none. So, off we go. Marika, please. Item 11.

MARIKA KONINGS: Thanks, Janis. So, we're continuing from item 11, and Berry is scrolling, there, which is related to a section in recommendation number eight. So, the first … This was actually blue-coded because there was a suggestion from the Registries Stakeholder Group to delete the sentence that's also highlighted in black which reads, "Information resulting from the alert mechanism is also expected to be included in the SSAD implementation status report—see recommendation number 19—to allow for further consideration of potential remedies to address abusive behavior."

And it wasn't clear to us why it was a suggestion for that sentence to be deleted. The Registries Stakeholder Group, in the meantime, has provided some further feedback. They're suggesting that, maybe, this should be considered in the context of recommendation number 19.

They pointed out that, actually, potential remedies to address abusive behavior is not currently contemplated as in scope for the evolutionary mechanism. The contents of the implementation status report and the scope of the evolutionary mechanism should be described in Recommendation 19 to avoid confusion, and not here.

The BC had indicated that they didn't agree with deleting that information, but I'm not sure if, with that clarification from the Registries Stakeholder Group, they should be considered in the context of Recommendation 19, if that's something we can move to that conversation and not have it included, here.

So, I think the question is, does anyone feel uncomfortable in moving this sentence to the small team that's looking at the Recommendation 19 conversation to see if that can be added in that context?

JANIS KARKLINS: Thank you, Marika. So, I can confess or confirm that, for the moment, there is nothing of that type in the proposed scope for the mechanism. So, if that is the wish of the team, we could take note and then put that as item "vi," or letter "v" in the mechanism, making current "v" "vi." So, any reactions? No reactions. How shall I read, then? What shall we do? Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. I think at the very least, it needs to be moved to the small group consideration for Rec 19. Having this language here in rec number eight that, in effect, increases the scope of the evolutionary mechanism without stating in the evolutionary mechanism scope section itself is problematic and prone to confusion. So, I think, at the very least, let's move that to consideration by the small group in Rec 19.

JANIS KARKLINS: Okay. So, would that be, then, acceptable to BC? So, we would add this element in the suggested scope of evolutionary mechanism. Margie, please.

MARGIE MILAM: Hi. I don't have a strong preference as to where it should go, but I want to understand that there's no objection to the concept of that being part of the evolutionary mechanism. In other words, if this is something that is going to be discussed, debated, and deleted, then it's a problem.

But assuming that we come up to some appropriate mechanism for the evolutionary model, that we're allowing it to be moved there with the understanding that it would be part of it, does that make sense?

JANIS KARKLINS: Yeah, it does. And so, it is now under consideration. So, I ask staff to, maybe, fine-tune the proposal for the scope of the mechanism. And so, it has not been, yet, distributed to the small group, which means that we can easily add, at this point, before sending out the updated version of the scope of the mechanism, and we will take it from there. Laureen, your hand is up.

LAUREEN KAPIN: Yes. And actually, this is a placeholder. I just sent out an e-mail in apologies for the late input, but I do, also, for the GAC, have a "can't live with" comment on this recommendation that I would like to discuss before we move onto item 12. So, whenever an appropriate time is, I'm just putting in a marker, there.

JANIS KARKLINS: [inaudible]. Marc, please.

MARC ANDERSON: Thanks, Janis. Just to respond to Margie. To be clear on the RySG position, our ask was to delete it altogether. And as a compromise, I suggested moving it to consideration by the small group on the evolution of the SSAD mechanism. That wasn't a commitment on our part that we would support having it included in the scope, there.

I think it is important that that small group consider it because that small group has not, up until now, considered this in scope of the evolutionary mechanism at all. So, this completely is expanding the scope of that evolutionary mechanism without describing it in the recommendation for the evolutionary mechanism.

So, that's certainly problematic. But I just want to be clear that our agreeing to have it considered in the small group is not a commitment that we're supporting it, just in full transparency, here.

JANIS KARKLINS: Okay. So, in that case, what I can suggest is that we simply, here, in this recommendation, put this sentence in brackets with an understanding that we will revisit this sentence after a conclusion of examination of Recommendation 19, and see whether we can delete this sentence, or then, we will do it afterward. And I think that hands have disappeared, except Marika's, so I take that that might be the way forward. Marika, please.

MARIKA KONINGS: Yeah. Thanks, Janis. And just, maybe, a note for the small team, but also for the full team itself, to kind of remind everyone that I think everyone has agreed that the focus of the mechanism is on implementation aspects only and, at the moment, quite a number, I think, of the abusive behavior recommendations are part of the policy recommendations.

So, I think is there is a desire to have aspects of that move to implementation guidance so the mechanism can also deal with that, of course, that's something for the group to consider. But of course, it does mean it's no longer a policy recommendation. So, I think that's something that the small team may want to look at, as well.

JANIS KARKLINS: [inaudible]. Laureen?

LAUREEN KAPIN: Ah. Thank you, Janis. This is regarding the footnote to Recommendation 8, footnote nine. The last sentence of that footnote reads, "ICANN Compliance will not be in a position to address the merits of the request itself or the legal discretion of the contracted party making the determination," and our request is to delete the end of the sentence after "the merits of the request."

So it would read, "ICANN Compliance will not be in a position to address the merits of the request." The reason for this modification is we believe that second part is unnecessary, as the guidance provided immediately prior includes how the contracted party

applied the balancing test, if it's applicable. Also, it's unclear what "legal discretion" means in this context.

And finally, with DPA guidance that may be coming in the future, there may be more clarity on how to weigh disclosure decisions. And indeed, ICANN Compliance may be able to identify and provide guidance on flawed decision-making as a result of that guidance. So, that is why we urge the deleting the last part of that sentence in footnote nine.

JANIS KARKLINS: Okay. Thank you. So, any difficulty in [inaudible]?

VOLKER GREIMANN: I think you said my name. I think we would have a bit of a problem if this change went through as proposed. We don't think it's a duplicative or unnecessary statement. I think it is clear that ICANN Compliance is not a legal team qualified to determine whether contracted parties have the legal ability to disclose in a certain case, when we assert that we don't.

Therefore, we very much would like to keep this limitation of the ability of Compliance to adjudicate our decision that has been made, based on what we perceive to be our legal obligations. So, that's something that we do not trust Compliance to be as capable as we are. Thank you.

JANIS KARKLINS: Okay. Thank you, Volker. Alan Greenberg.

ALAN GREENBERG: Thank you. I don't object to omitting it but I am troubled by the fact that I believe we were told that ICANN Compliance would not do it, even if they were allowed to do it. So, I think we have a problem that's deeper than just the words in our recommendation. Thank you.

JANIS KARKLINS: Yeah. That's a capacity issue.

ALAN GREENBERG: Not capacity. It's willingness.

JANIS KARKLINS: Okay. Margie, your hand is up.

MARGIE MILAM: Yeah. I'm troubled by a lot of comments, right now. I don't understand, at this juncture, why the contracted parties have difficulty with the bracketed language we were talking about that was to be discussed in the evolutionary mechanism. To me, that's news that there's no longer an ability to raise abusive behavior.

And the whole point, I think, of having that language to begin with was to see whether there were just systematic failures on the contracted party side to actually, reasonably, disclose information as allowed by GDPR.

And so, now you've hobbled our ability to even have that be assessed. So, I'm very troubled by this, and I'd like to understand why that section is problematic at this juncture, when it has been there for quite some time.

JANIS KARKLINS: Margie, we discussed that. So, that's why this is deleted, here. We will talk about the abusive behavior in the small group within the remit of discussion of Recommendation 19. One can argue that abusive behavior is part of the efficiency of the system, and efficiency is part of the scope. At least, for the moment. So, therefore, let us move on and discuss that issue next Monday in a smaller group where the BC and IPC are ably represented.

MARGIE MILAM: Okay. Thank you.

JANIS KARKLINS: Thank you, Margie. Laureen, you heard Volker.

LAUREEN KAPIN: Exactly. So, I wanted to respond because I do appreciate Volker's point about—I'll rephrase it—ICANN Compliance not second-guessing the way contracted parties assess their legal obligations. And I can appreciate that. I do think the first part of that sentence, "ICANN Compliance will not be in a position to address the merits of the request itself" … Oh, I see his point. The merits of the request don't relate to the decision.

I'm wondering if there's a way we can rephrase it, because I think the legal discretion of the contracted party isn't very helpful. And I think what I want to get at, Volker—and maybe it's a subtle point—is that I can contemplate scenarios where we get DPA guidance.

And this gets to the correspondence that ICANN recently had with the DPAs regarding the scenario where the German DPA itself was denied access to data it believed it should get.

There could be guidance given on, basically, how to apply the GDPR, whether it's the balancing test or whether it's in regards to other permissible bases under Article 6 for obtaining data.

And there certainly could be the scenario, then, where a contracted party does not comply with those principles, and that's something that I think ICANN Compliance should be able to get at.

So, I'm wondering if there's a way to phrase this to deal with that scenario where there is legal guidance forthcoming, and then that does become the law of the lands, so to speak, and it would be a problem for contracted parties not to abide by that.

And then, I think it would be in the remit of ICANN Compliance to be able to act upon that. So, that is the scenario I would like to get at. What I don't like about this language is that it forecloses any role but for ICANN Compliance to make sure that contracted parties are, basically, abiding by the law, which is the whole raison d'être of this group coming up with policy recommendations in the first place.

JANIS KARKLINS: Okay. Thank you, Laureen, for the explanation. Let me take, now, Marc Anderson and Owen, in that order.

MARC ANDERSON: Thanks, Janis, and thanks, Laureen, for explaining that. Hearing your explanation, though, I am in this … The scenario you have described, I don't think it's ICANN Compliance's role, job, or remit to ensure that contracted parties are complying with the law in this scenario.

I think what you've described is a scenario where we need to ensure that the policy recommendations themselves are flexible enough for contracted parties, the groups ultimately responsible for complying with the law in this scenario, to have the flexibility so that they can comply with law that, as we've discussed since day one, can and will change over time.

I really don't think it's appropriate for Compliance to be in that role as, ultimately, it's the contracted parties that have that obligation to comply with the law.

JANIS KARKLINS: Yeah. Thank you, Marc. Owen, please.

OWEN SMIGELSKI: Hi, everyone. I just want to add onto what Marc said. I agree with what he said, but speaking as someone who has worked with a contracted party but also somebody who spent a good six years with ICANN Contractual Compliance, Compliance does not

interpret the law. Period. ICANN does not interpret the law on how contracted parties implement in.

ICANN and Compliance defers to the contracted parties, who are in a much better position to analyze and interpret the law to their own specific situation. I'm sorry, this is just not something that's going to happen.

I saw dozens and dozens of times where contracted parties, registrars, registries, responded to ICANN Compliance about how they had their own interpretation about the law and ICANN Compliance accepted it. They didn't tell them what to do.

And so, any change in that is just going to be unacceptable. ICANN Compliance works with the contracts. That's it. They don't interpret the laws. So, I'm sorry. I got a little worked up over that. I just don't think this is within the scope for Compliance. Thank you.

JANIS KARKLINS: Thank you. Let me take two more, and then see what Laureen can [inaudible]. Alan Greenberg and Mark SV, please.

ALAN GREENBERG: Thank you. This conversation seems to be revolving around the presumption that every rejection is because a balancing test was done and the contracted party believes that the information cannot be released.

But we also know there are cases where, for instance, there is absolutely no personal data – therefore, the law is not protecting it,

and it may not be being released by some contracted parties. And this is something that ICANN Compliance could judge.

So, let's not presume that every case is a balancing case. We were told months and months ago, when Alan Woods went over the cases he was looking at, that he never actually did a balancing case at that point, that everything was resolvable prior to that. Those are the kinds of situations that we're trying to cover, here. Thank you.

JANIS KARKLINS: Thank you, Alan. Mark SV.

MARK ŠVANČÁREK: Thanks. Alan covered my fist point, which was that sometimes the law will be clear cut, and it can be [honored]. I had a question for Owen, and I guess we can take it up privately on the chat, which is it sounded to me like there's a waiver process whereby a contracted party says, "Hey, I can't do this because it's local law."

And based on what Owen said, it sounds like ICANN would, 100%, without question and hesitation, always grant a waiver, no matter what. That doesn't sound like that's right, so I'm curious to learn more about that. Thanks.

JANIS KARKLINS: Look, there are many things to learn about. I'm trying to proceed further and then see whether Laureen, based on what was said so far, would be in a position to withdraw her proposal. While Laureen is thinking, Alan Woods, please.

ALAN WOODS: Thank you, Janis. I just wanted to … Obviously, when my name is mentioned, I need to jump in a little bit and say, yeah, Alan, I agree, in the sense of there are paths which we can take where it can turn out that non-personal data, or data that is not technically currently covered under the GDPR, is involved.

This is something that we were going to bring up mainly when we get back to Recommendation 6. The whole point of the matter is that you need to assess whether or not there is a valid case for disclosure, regardless of what that data is, as a first port of call.

And I note that there has been kind of a "mix them and gather them" on Recommendation 6 at the moment where that has absolutely been turned upside on its head, where you must look at the data first in order to assess whether or not it falls under processing.

But what we're missing is a subtlety there that, if you look at that data and that data turns out to be protected data, well, then that's technically processing outside of what you should have done.

So, you have to start at the beginning and work your way through, and there are many instances in that instance where a denial might come through, not because the contracted party is standing in the way or not applying the law properly, as being claimed, but because the actual requests just do not meet muster.

And as you said, I've gone on the record before. I'll go on the record again saying I'm still getting the exact same copy-and-paste requests from very large requesters that are just exactly, "I have a trademark, give me the data."

I do not look at the data underlying that because, at a very basic, beginning level, that is just simply not good enough. And even if it was GDPR-compliant, I wouldn't be able to give that data out.

So, this is completely different. We're not having a conversation about … At the moment, what it is is like we're trying to create a policy which is saying, "All contracted parties are going to be trying to break this policy from day one," when we really need to be focusing on, what is the policy and what are the safeguards that, in the event there is a bad contracted party, what can we do?

I think the focus of this has gone completely backward. We're trying to move forward. We're trying to make compromises, here. I just am so surprised we're getting caught up in things like this.

JANIS KARKLINS: Thank you. if I may ask to concentrate on the topic that we need to resolve and not go outside that one, because time is ticking. Laureen, will you withdraw based on conversation?

LAUREEN KAPIN: Not at this point. I would like to mull it over further, but I'd also like to build on Alan Woods' last point, because I think, actually, surprisingly, we are absolutely in sync on a certain issue, which is, what happens not for all the good contracted parties who we're not worried about, and they're on this call, but how do we deal with the bad contracted parties?

And my concern is that this language seems to, basically, give a free pass. I want to make sure that there is a way for ICANN Compliance to step in. I'll give the very extreme example.

There is a contracted party, for example, that just denies every single request, regardless of whether it's a valid request or whether it should be disclosed, consistent with the GDPR. I want to make sure that there is room for ICANN Compliance to act in that scenario, and this language seems to foreclose it, and this gets to the point that Alan Greenberg raised earlier.

So, that's my concern. I'm certainly open to refining an approach to meet that concern, and I welcome everyone's assistance, but that's my concern. So, I'm not willing to withdraw it because I think this language unduly circumscribes ICANN Compliance's ability to deal with even a clear path that that contracted parties would be acting inconsistent with our policy, which is to allow disclosures when the request is valid and it's appropriate under the law.

JANIS KARKLINS: Yeah. Laureen, I think that the situation that you are describing would fall under the category of systemic abusive behavior, because if somebody denies every request 100%, and systematically, for a long time, then there is … And I think that we have a mechanism to address abusive behavior of the SSAD users, and that is not only requesters but also the contracting parties.

And since we're looking into abusive behavior in Recommendation 19, again, we can take a note of your concern and try to resolve I tin the context of this mechanism.

LAUREEN KAPIN: Well, I don't disagree with anything you're saying, Janis. My point here is not that there isn't a place to deal with this scenario in our policy. It's that I think that this language is not clear enough and specific enough to get at the concern that's raised by the contracted parties and could unduly circumscribe ICANN Compliance's discretion to act in the scenario that I have described. So, I am going to continue to mull this over and come up with some alternative language, but I'm happy to move on for now.

JANIS KARKLINS: Okay. Let's do it. Then, in that case, I would suggest that, if you can think of the alternative language and your proposal came in late, it has not been reviewed by others as part of the homework and staff will put that as an action item and we will come back to this question, including what is, maybe your linguistic proposal at the later stage. This issue will be put at the end of the long list we still have ahead of us. So, with that, I would like to move to the next topic. Thomas, I understand you wanted to talk about this one. Please do your homework and react prior to the next conversation. Marika, please, let's move through next.

MARIKA KONINGS: Thanks, Janis. So, the next item on the list is item 12. This relates to the sentence which currently reads, "If a requestor is of the view that its request was denied in violation of the procedural requirements of this policy, a complaint may be filed with ICANN Compliance."

This sentence was updated in response to a comment from ICANN Org. it previously referred to a request being denied erroneously, and ICANN Org noted that that might be difficult to interpret and suggested changing that to, “Was denied in violation of procedural requirements of this policy.”

The BC/IPC have flagged this for discussion, noting that requesters cannot be limited to reporting only procedural violations. Substantive complaints must also be permitted.

And we put in a note here that, at least from our perspective, this change was not intended to limit the ability of requesters to submit complaints. I think they can submit complaints on whatever topic they want.

But as we just discussed, and the footnote is referenced here, as well, ICANN Org has made clear that, based on how the policy is written, what they can enforce and what are elements where they’re not able to enforce, as we just had that conversation, as well.

So, I don't know if that has addressed the BC/IPC’s concern, at least from our perspective, that the change in language does not change the ability of requesters to submit complaints about any topic if they believe a violation is in place. But of course, there are limitations on what ICANN Org can enforce based on how this policy is written.

JANIS KARKLINS: Okay, thank you. Margie, your hand is up.

MARGIE MILAM: Yes. No, we're not comfortable with the approach that has been discussed. This is a significant issue for us. If there's a situation like what Laureen has suggested, or where a contracted party is simply refusing every request, there needs to be a mechanism for that, and it's unacceptable that ICANN Compliance will not step in.

So, this is a problem for us. This is something we cannot live with. So, we need the ability to submit substantive requests. Whatever ICANN Compliance can do with respect to the given request is one thing, but we don't want to preclude the ability for them to look at systematic failures of the policy that are beyond the process. So, we need the inclusion that this allows for substantive submissions and that, where appropriate, ICANN Compliance will review.

JANIS KARKLINS: Thank you. Milton, please.

MILTON MUELLER: Yeah. If this is a "can't live with," I mean, I think we're sort of mixing our realms, here. So, as I understand it, Margie and some of the prospective requesters in the future are asking for some kind of a guarantee that simply cannot be given to them. So, again, if this is a "can't live with," then somebody is going to die.

Because even if you erase that language, which is obviously going to make the contracted parties feel like they can't live with it, you have no guarantee that Compliance is going to do anything.

All you're going to be able to do is to complain that the contracted parties are violating the policy, which, I believe, you can do whether

that language is in there or not. I mean, in effect, it would be a matter for ICANN Compliance if a registrar were flaunting ICANN's contracts in ways that make them completely scoffing at the fair application of the policy. And having this language in there or not is just not going to make a difference.

Now, in response to Laureen's chat comment, again, there's no language precluding ICANN Compliance from considering whether registrars, or any other contracted party, are actually violating their policies, as embedded in the contracts.

What this language does preclude is the Compliance overriding the legal judgment. And if that happens, if there is a dispute about the law, then it gets litigated. It's not a matter for Compliance. It's not a matter for unilateral ICANN decisions. It has to be litigated if there's doubt about what the law means.

So, I just view this as sort of an expression of a lack of trust and nervousness about the direction of the whole thing, and I don't see it as a problem that can be resolved by sticking things into the policy or removing a couple of phrases from the policy.

JANIS KARKLINS: Thank you. Marika indicated that there is already a mechanism in the recommendations. Marika, could you speak about it, please?

MARIKA KONINGS: Yeah. Thanks, Janis. If Berry can scroll up a little bit, you'll see the language is actually, I think, just a couple of sentences down from the sentence we just looked at, which talks about, "ICANN

Compliance must make available an alert mechanism by which requesters, as well as data subjects whose data has been disclosed, can alert ICANN Compliance if they are of the view that disclosure, or non-disclosure, is a result of systemic abuse by a contracted party."

"This alert mechanism is not an appeal mechanism. To contest disclosure or non-disclosure, affected parties are expected to use available dispute resolution mechanisms such as courts or data protection authorities, but it should help inform ICANN Compliance of potential systemic abuse, which should trigger appropriate action."

So, the systemic abuse and the ability for ICANN to undertake action is covered in that specific paragraph, and should be seen together with that other sentence for the full context.

JANIS KARKLINS: Thank you. At least, my understanding is that what we're talking about is fully covered, here. Mark SV, please.

MARK ŠVANČÁREK: I think there is some misunderstanding or misrepresentation about what we're talking about, here. This is not about guarantees. This is about forms of recourse. So, the language that's here says there may not be any real recourse within the ICANN system. You have to go to a court or a data protection authority. We think we could do better than that.

Matt was saying, “I'm worried that if I only get a small number of requests and I'm forced to decline them all because they all need to be declined, that that would look like systemic abuse.”

I supposed that’s of concern. We could figure out how to make that work. But if we go back to that bracketed language that we talked about earlier, being able to report on the number of alerts and being able to compare that to the number of requests will give us some statistical guidance as to whether or not there’s a problem.

And I think we could agree that, if you only get five requests and you only decline five requests, that would be less significant than if you received 900 requests and you declined 900 requests.

And that’s the sort of visibility that would be available if the alerts were made public in the reporting process, and that works both ways, of course. If the same person makes 900 requests and they're all declined, that would tell you something, too.

So, I think this all ties together. All the things we’ve talked about tie together and we shouldn’t be looking at them in isolation. But no, this really isn’t about guarantees that you get the answer that you want. It’s about ensuring that there’s some sort of recourse within the policy outside of the courts, because we’re here to make policy and work hard to do that. I had another comment but I’ve already forgotten it. So, thanks.

JANIS KARKLINS: So, I had a feeling that we are forcing an open door. So, here, what is in question is what ICANN Compliance can do and cannot.

ICANN Compliance told us very clearly that they are not interpreting the law.

Owen served on Compliance for a decade and knows it inside out. So, what ICANN Compliance can do, and this is what ICANN Org is suggesting, is they can verify whether the policy requirements have been followed and take necessary actions in that case.

But if there is a situation that Laureen described earlier that somebody systematically is not disclosing, no matter what, then that falls within the systemic abuse and ICANN Compliance takes note that that is through this alert mechanism. And then, we need to see who these systemic abuse issues could be dealt with within the mechanism that we're setting up. I think everything ties up together and we're a bit wasting time, here. Margie, please.

MARGIE MILAM: I also wanted to clarify that this provision is not just meant to address systemic abuse. If, for example, there's a request for disclosure for a domain name where there is absolutely no personal data, that should be enforceable. ICANN Compliance should be able to enforce that when it's clear there's no personal data.

And that's the problem I see with the way the recommendations are written, that it goes far beyond what GDPR requires and it doesn't give ICANN the tools necessary to address concerns.

So, while there may be areas where ICANN Compliance is, perhaps, uncomfortable enforcing, we don't want to [preclude] ICANN Compliance from evolving its processes as we all learn how to interpret the GDPR in the context of WHOIS.

And also, we have to be mindful of the fact that rules and regulations change. And so, it may become more clear that certain types of disclosures are easier to do. So, I feel that I don't want the group to think that this is only about systemic abuse. It's actually talking about individual cases where it's clear-cut; "That's an area where ICANN Compliance could do something."

JANIS KARKLINS: And we heard from Owen that ICANN Compliance will not do it because ICANN Compliance does not interpret the law. And again, that is a sentence we need to trust, somebody who has worked a decade in Compliance, and would not expect Compliance doing something that Compliance would not do in any circumstances. Volker, please.

VOLKER GREIMANN: Yeah. Just one thing. I mean, I absolutely agree with Margie that cases where there is absolutely no personal data to protect shouldn't be denied by the disclosing party.

However, I have issues with making that a compliance issue because the original question is, how would she even know that? If no disclosure happened, you wouldn't know that there's no personal information in there, so what would that complaint, ultimately, be based upon, and what would Compliance base their investigation on?

Ultimately, even disclosure to Compliance would be a disclosure that must be justified. But ultimately, where would the complainant

even base that complaint on if they have never received disclosure and, therefore, don't know if that's the case?

I mean, I absolutely agree that this shouldn't be the case, and this kind of disclosure wouldn't happen, but this is a fictitious complaint that's being carted out that can't happen because of the way that the system is structured. You would never be able to make that complaint because you don't know. Thank you.

JANIS KARKLINS: Thank you. Hadia, please.

HADIA ELMINIAWI: So, I raised my hand to state the issue. The issue here is not whether we put this language in or we don't, but the issue is that Compliance is not willing to do that. And unless we have Compliance saying, "We can, under certain circumstances, look to the substance," it doesn't matter if we put it in there or not.

So, again, there would be cases like Margie mentioned, and Alan, as well, where non-personal data is requested but is not disclosed, and that's not systematic abuse. But then again, if ICANN says, "I'm not going to look into such issues," then it doesn't matter what we put in there. So, I think that's the issue. Thank you.

JANIS KARKLINS: Thank you, Hadia. So, the issue is that we do not want to hear each other, in my view. We're spinning our wheels to issues that are not,

probably, the most important things here. We still have many issues related to automation, related to mechanisms.

And if we are stuck to discussing for half an hour a thing that it was clearly said that Compliance cannot and will not do, we need to accept that and accept what Compliance can do, and that is verify that the process of procedural requirements have been followed.

So, I would like to suggest that we accept the proposed change by ICANN Org and address systemic abuse issues when we are talking about Recommendation 19. So be it. The next one, please, Marika.

MARIKA KONINGS: Yes. Thanks, Janis. So, we're now moving onto a new recommendation that, I think, was previously called "Urgent Request," but has now become "Priority Levels."

And some information from Rec 9 has moved there to have it all in one place. We can take, I think, 13 and 14, basically, together because, as you may recall, we had a conversation around how to assess the criteria that were established for urgent SSAD requests, for which there is a separate timeline compared to other types of request, with the four aspects being imminent threat to life, serious bodily injury, critical infrastructure, and child exploitation.

And that point, it was suggested that, maybe, by providing some examples, it would provide some guidance to contracted parties, as well as requesters, of the type of request that would fall under that "urgent" category.

And there was an action item that the GAC team had. The GAC team came back recently, and I hope everyone had a chance to review their response. Berry, if you scroll a little bit down, it's also in there.

And of course, the GAC's rep can jump in to further amplify the response, but they basically indicated that they don't see a need to further illustrate the categories listed.

They reference the framework for a registry operator to respond to security threats, which refers to these. As such, an initial judgment of a request being high priority should be self-evident and require no unique skills in order to determine a public safety nexus.

High priority should be considered an imminent threat to human life, critical infrastructure, or child exploitation. And in addition, the GAC team has suggested or proposed that "critical infrastructure" should be understood along similar lines as being discussed or defined in the Phase 1 – to be "critical infrastructure" means the physical and cyber systems that are vital, that their incapacity or destruction would have a major detrimental impact on the physical or economic security of public health or safety.

So, I think the question here for the group is, is there any concern about the GAC-proposed approach? So, to not provide any examples but, maybe, consider referencing the guidance that's provided in the registry operator framework as implementation guidance and also adding the definition of critical infrastructure to this part. So, I think that's the ask to the group.

JANIS KARKLINS: Okay. Thank you, Marika. I think they're very straightforward. Any problem with that? So, I see none, so that means we will not complete with examples and leave only the four bullet points to be completed, and we will reference two documents that Marika mentioned GAC has submitted in a footnote. That is decided. 15, please.

MARIKA KONINGS: So, 15 also relates to a section in the priority levels recommendation, which I think we already had there from fairly early on, which basically talks about contracted parties having to publish their standard business hours and accompanying time zone in the SAAD portal.

And there's language there in brackets that says, "Or in another standardized place that may be designated by ICANN from time to time." The Registries Stakeholder Group had suggested here that that bracketed language should be removed, so that "in another standardized place that may be designated by ICANN from time to time."

And we had originally asked for some further details as why this is a "can't live with" item, and the Registries Stakeholder Group provided some further input on that. I believe that their view is that the language is too open-ended and it would allow for ICANN Org to insist that info might be published on a company homepage and, as such, they are requested that that bracketed language is removed from this section. So, I think the question here is, is there any concern about removing that bracketed language?

JANIS KARKLINS: Okay. Thank you, Marika. A very straightforward question. Any objections? I see none. Removed. 16, please, Marika.

MARIKA KONINGS: Thanks, Janis. So, the next one, also, is in the same new recommendation. There's a section that says, "The contracted party may reassign the priority level during the review of the request. For example, as a request is manually reviewed, the contracted party may know that, although the priority is set as a priority two, which is ICANN administrative proceedings, the request shows no evidence documenting an ICANN administrative proceeding, such as a filed UDRP case, and, accordingly, the request should be recategorized as priority three."

So, there was input here from the ICANN Org liaisons. They note that this paragraph seems to add complexity to both contracted party and the central gateway systems, and may be challenging to implement.

So, they're asking if the ePDP team could consider, instead, that a request that does not meet the requirements for priority one or two may be rejected and may be refiled.

In addition, should the recommendation remain as written, ICANN Org suggests a minor edit for clarification during implementation, and that's the language that's on the right-hand side, here. So, I think the question is probably twofold.

Is there objection from the group to, instead of having this reassignment of priority level, if there's an indication from a contracted party that the priority level doesn't align with what the designated level is, that they, basically, reject the request and recommend to the requestor to refile it in line with the appropriate priority designation?

Or is the group of the view that it should be possible to change the assignment, which, as ICANN Org noted, may result in potential implementation challenges?

JANIS KARKLINS: Okay, thank you. Please, reactions? Volker?

VOLKER GREIMANN: I mean, ultimately, that would be the easier way for us and for the system, if we could just reject if it's filed in the wrong category, and we could also say that, ultimately, it's the fault of the requestor to have chosen the wrong category, or even tried to get a fast result even though they weren't eligible for that.

However, as an option, I would not exclude the opportunity to still respond to that request with a longer response time, instead of denying it outright. Because ultimately, that would mean that we would have to deal with the ticket twice once it gets refiled in the correct category, and it's probably also in the interest of the requestor that recategorization is, at least, something that is possible. It doesn't need to be something that has to be there from day one. Let's just consider it as an option. Thank you.

JANIS KARKLINS: Okay, thank you. Mark SV.

MARK ŠVANČÁREK: I agree with Volker that there does need to be some recourse if someone has filed something that's clearly not the right priority. And also, I agree with him that simply sending it back and demanding that it be reassigned is going to impose delays in the system, and we haven't defined how the SLAs would be measured in that case.

So, the idea that reassignment is something that is not available on the first day and becomes part of the evolution—I think that's what he said—might be the right approach.

JANIS KARKLINS: Thank you. Actually, I think that the steps outlined in the recommendation itself are logical and could be followed, and also imposed; the contracting party may reassign priority level, and the second step is communicate on this recategorization to central gateway manager and requestor, but continue reviewing the request on its merits. So, I think that we simply can keep as-is and move on. Any objections? Volker, your hand is up. Is it new or old?

VOLKER GREIMANN: Old.

JANIS KARKLINS: Why didn't you say that you support my proposal?

VOLKER GREIMANN: I could have, yes. I should have, maybe.

JANIS KARKLINS: Thank you. Any objections? None. Thank you.

MARK ŠVANČÁREK: I object to Volker not agreeing with your proposal.

JANIS KARKLINS: So, accepted. Stay as on the text on the left-hand side of the screen. Next one, please, Marika.

MARIKA KONINGS: Thanks, Janis. So, there's another clarifying question from the ICANN Org liaisons in relation to the definition of priority two requests, which currently state, "Disclosure requests that are the result of administrative proceedings under ICANN's contractual requirements or existing consensus policy, such as UDRP and URS verification requests."

So, they're asking for a clarification if this priority is intended to be available only to ICANN-approved dispute resolution service providers, or should it also be available to parties and potential parties in administrative proceedings?

JANIS KARKLINS: So, I will put Volker and Mark SV on the spot. Could you provide clarification?

VOLKER GREIMANN: Well, we have always foreseen it as something that would be essential for the panelists to make the decision, so, ultimately, this is something that we foresaw as only being released to the providers and those parties that work for the providers in furthering the process, not necessarily with the requestor or the complainant.

JANIS KARKLINS: Okay, thank you.

MARK ŠVANČÁREK: Well, yeah. I had trouble following this yesterday when I was reviewing it, and I still have trouble following. I'm really sorry. Could ICANN Org please paraphrase this so that I can make sure I understand what I'm agreeing to? Thanks, and sorry.

JANIS KARKLINS: Daniel, please.

DANIEL HALLORAN: Thank you, Janis and Mark. The question is, is this intended to only be requests for disclosure from the dispute resolution service provider and, let's say, panelists? Or is this other disclosure request … We weren't clear what it means, "Disclosure requests that are the result of administrative proceedings."

It's a little bit vague, and I could see a potential claimant, or a claimant in a proceeding, saying, "This is a request that relates to a proceeding, or a proceeding I'm thinking about filing, and, therefore, I want priority two," and we wanted clarity from the team if they intended for that to cover any requests related to proceedings or only requests from the provider and the panelists. Thank you.

JANIS KARKLINS: Okay. Thank you. Volker?

VOLKER GREIMANN: Definitely not to the requesters directly. So, the requesters would not have a case to make such a request. Basically, this is something where the categories of people being able to make those requests is very strictly limited to the providers, because only then do we know that such a process has been filed.

MARK ŠVANČÁREK: Yeah, that's correct.

JANIS KARKLINS: Okay. Thank you. Dan, is that sufficient?

DANIEL HALLORAN: The answer is great, but probably we should clarify in the text [in the case of] disclosure requests.

JANIS KARKLINS: Yes, yes, that's my next … Yeah, okay.

DANIEL HALLORAN: Thanks.

JANIS KARKLINS: Can we ask, then, support staff to take note and add the explanation provided by Volker and agreed by Mark SV? Thank you. With that, we can move to the next one, 18.

MARIKA KONINGS: Thanks, Janis. This is another clarifying question from ICANN Org which relates to a paragraph that talks about priority three requests. To provide a bit of context, I think at some point we discussed, as well, in the more general category, which is priority three, there may be, as well, issues that relate to consumer protection issues, and I think the group felt that they might warrant a different status, although, at this point, it may be difficult to frame that or define that.

So, I think the idea was to allow for the ability of requesters to indicate that the disclosure request concerns a consumer protection issue, which is defined as phishing, malware, or fraud, in which case the contracted party may prioritize the requests over other priority three requests, and persistent abuse of this indication can result in the requestor's de-accreditation.

Again, the idea being that, as part of the mechanism, it could then review whether it would be … It wouldn't be possible to define a separate category for these types of requests that are easy to

delineate from other types of requests, and which might warrant a different response time. But as said, I think, originally, the group felt there was not enough framing available to already do that at this stage. So, this was kind of the solution that was found.

And the ICANN Org question here is, "Priority three seems to contemplate a bifurcation within this priority level, resulting in four priority levels. For implementation, a purpose of the system would require a fourth category, even if the contracted party were to choose to treat the two priority levels the same. Would it make sense to create a fourth priority level to allow for this?"

JANIS KARKLINS: Okay, thank you. Any reactions? Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. I don't think there's a need to create a new priority level altogether, and that raises a lot of additional complexity sort of late in the game, here. I think this language gives discretion to prioritize certain types of requests, if contracted parties feel that's warranted.

But at the same time, it does not decrease the SLAs on requests that are not being prioritized. Sorry about the negative, there. So, I would think that that's desirable and acceptable to everybody. I don't think the suggested edits really add any value and create unnecessary complexity late in the gamer for us.

JANIS KARKLINS: Okay. Thank you. Mark SV.

MARK ŠVANČÁREK: When I read this, I didn't read this as an extra priority level. I read this as a flag that is in the requested itself, which is informative. So, "Requests must support a flag to indicate that the disclosure concerns a consumer protection issue."

That does not impose any additional obligations on a contracted party and it does not change their SLAs. It's just merely informative. So, I do think that it is a good suggestion. It is something that could evolve over time, but I don't see any reason why we wouldn't consider it. I don't really think it adds any complexity at all. It's just adding an informative flag to the request itself. Thanks.

JANIS KARKLINS: Okay. Thank you. So, we keep it as-is. I think that ICANN Org can be satisfied with this conversation, and that informative, also, for implementation. If that is fine with everyone, we can go to the next question. Hadia, please. Are you in opposition?

HADIA ELMINIAWI: Thank you. Not really in opposition but I'm thinking, if we do think that, actually, requests with regard to consumer protection issues is something that requires immediate attention or a higher-priority attention, why don't we put that in there?

JANIS KARKLINS: That is what is written, here.

HADIA ELMINIAWI: Yeah, I know. But then, if it's not enforceable, if Compliance can do nothing about it, then, basically, we are saying this is something that requires attention but you don't actually need to do that.

JANIS KARKLINS: But you may.

HADIA ELMINIAWI: Because yes, we do say that—

JANIS KARKLINS: You may, and that is what is written.

HADIA ELMINIAWI: Yeah. It is something that requires attention, but yeah, you may, and you may not. You don't really need to. But if we agree that this is something that needs attention, then let's put it where it belongs. That's just a thought.

JANIS KARKLINS: Yeah. In the comments, there were at least a few comments saying that there is no need for the fourth category. So, let us move on, not to prolong unnecessary discussion. Let's stay focused on the questions that we need to discuss. 19, please, Marika.

MARIKA KONINGS: Thanks, Janis. So, the next one also still relates to the same section, and another clarifying question from ICANN Org. This specific section reads, “Abuse of urgent request. Violations of the use of urgent SSAD requests will result in a response from the central gateway manager to ensure that the requirements for urgent request are known and met in the first instance, but repeated violations may result in the central gateway manager suspending the ability to make urgent requests via the SSAD.”

So, the question here is, “For clarity, during implementation, does the ePDP team contemplate any recommendations regarding abuse of the use of other priority levels? For example, what if a requestor regularly incorrectly cites priority two and those requests are downgraded? Would that be considered abuse?

JANIS KARKLINS: Thank you. Any reaction? Volker, please.

VOLKER GREIMANN: Yeah. As I stated earlier, I think if we limit the ability to make category two requests to only those parties that are able to make those request sin their function of, for example, being a UDP provider, I think that danger is negligible.

So, I don't think we need to have that in here. And urgent request, we have decided, as a compromised position, that everyone can make an urgent request. This is not the case for category two, so I don't think it’s necessary.

JANIS KARKLINS: Okay. Thank you for the explanation. I think that that provides a clarity for implementation, and we can move on, unless there is violent objection. None? Hadia, if you may lower your hand, I think that's an old one. Let us move to point 20.

MARIKA KONINGS: Thanks, Janis. So, this takes us to Recommendation 4, requestor purposes. I just note, in the Google Doc, there were also some suggestions for other changes that should have ended up in the, probably, non-controversial pile, but there was part of the comment missing, but we'll apply that in the next iteration. And of course, groups can have a look at that, as well, if there is any concern about that.

So, here, there was, originally, a comment from the Registries Stakeholder Group about what "digital service provider" means and how it actually fits in, here, because it also seemed that it was a type of requestor, instead of describing more the types of requests.

So, staff had originally clarified that we're changing "digital service provider" to "digital service provision," but I think that the Registries Stakeholder Group is still not sure what this actually means and what is a digital service provision requestor.

The IPC noted that DSP is a term of art on [INS] EU law, and should stay, and they've suggested that it should be obligations applicable to digital service providers, as an alternative. So, I think the question is, is there any concern about adding that? So, replacing the reference to a digital service provision to obligations applicable to digital service providers, or DSP.

JANIS KARKLINS: Okay. Thank you. It would good to have it on the screen, that we see the context of this. But in the meantime, I see that people understand what it is all about. Volker and Marc Anderson.

VOLKER GREIMANN: Yes. Even if it's a term of art under certain legislation, which in this case is applicable to my registrars, this is not the case for all other registrars, or a Chinese registrar that is dealing with a Chinese data protection law that might be similar, might still use different terms of art. So, I think we should not use these terms unless we also define what we mean and not rely on just one jurisdiction in the [therefore] definition. Thank you.

JANIS KARKLINS: So, your suggestion is not to change, right? Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. I continue to struggle with this one, and I apologize if it's just my ignorance, but I'm just not sure what the … I mean, this is Recommendation 4, requestor purpose. None of what's described here is understandable, at least to me, as a requestor purpose. And again, this may just be my ignorance, but maybe somebody can help explain what this purpose is as it stands now. I don't know what to do with it.

JANIS KARKLINS: Okay, thank you. Margie, can you provide that requested explanation?

MARGIE MILAM: Sure, The origins of this was the European NIS Directive that requires specific obligations that apply to digital service providers, and that's a defined term. And so, the notion was that it's in the same vein as the consumer protection/abuse protection.

The way it read before, digital service provision, actually, in my mind, make it broader and less clear as to what we were talking about. I understand Volker's concern that there may be other laws out there, but I assume the other laws would pick up some of the other language.

But because there are specific obligations that apply to digital service providers, especially in Europe, we want to keep that reference. And so, I'm happy to suggest, maybe, a footnote as to what we're talking about, to make it clear.

JANIS KARKLINS: Okay. Thank you. So, we would keep the digital service provider, with a footnote reference to this NIS that Georgios is referring to. Marc Anderson, please.

MARC ANDERSON: Thanks, Janis and Margie. I appreciate the background. Maybe if I can ask further how that relates to a purpose for disclosure of

registration data? Maybe that's where I'm stumbling. I don't quite understand what that link is.

MARGIE MILAM: So, if I can maybe respond?

JANIS KARKLINS: Yes, please.

MARGIE MILAM: The NIS directive requires additional security precautions that apply to digital service providers. And so, if your system is under attack and you need to identify who is behind it, that's an example of where you may make a disclosure request. And so, it's enabling the digital service provider to do what it needs to do under the European NIS Directive.

JANIS KARKLINS: Thank you for this clarification. Brian and Stephanie.

BRIAN KING: Thanks, Janis. Apologies, I had to join late today. I think I would directly answer Marc's question as that the purpose is the fulfillment of a legal obligation imposed by legislation such as the NIS directive. So, the purpose is to fulfill the legal obligation. Thanks.

JANIS KARKLINS: Okay, thank you. Stephanie?

STEPHANIE PERRIN: Thank you. As I put in the chat, it would be really good if we included the definitions both in the definition section and at its first use in the text. That's kind of standard practice, and it'd be very nice.

Even if we get a definition for this, that doesn't, as Marc Anderson was saying, make it a purpose. So, criminal investigation is a purpose. Criminal law is not. The consumer protection is a thing, but investigating abuse of consumers is the purpose.

Now, in order to do that, you need to break down what you mean by "consumer protection," and we continue to use it in a very broad and nondescript way that doesn't help us, with respect to the DNS, very much.

If we are talking about investigating security breaches, then we should say so. And if we could have specific examples of the types of security breaches that are being investigated that require DNS data, that would be more helpful, too. Just saying that this is way too high-level, needs definitions, and need specific instances that make purposes. Thank you.

JANIS KARKLINS: Thank you. Look, this is not an exhaustive list. This is, I would rather say, illustrative, because the paragraph starts, "For specific purposes such as, but not limited to." That's open-ended and these are, in my view, just illustrations.

So, I would suggest that, if there is a term that it's not current use in ICANN circles, then that may be specifically referenced. But for

instance, UDPR or URS, probably, abbreviations are well-known and no need, specifically, to reference. But thank you, also, Stephanie, for suggesting how the reference should be made.

So, with this, as I suggested, we would maintain the original version, "digital service provider," and with a reference to the definition which was suggested in the chat. Violent disagreement? No? Thank you. Marc Anderson.

MARC ANDERSON: Thanks, Janis. I don't want to violently disagree here, just that I look forward to seeing the new text from Margie, and I hope that clears up my question—

JANIS KARKLINS: So, something happened with your sound, Marc.

MARC ANDERSON: Sorry, can you hear me better?

JANIS KARKLINS: Yes, now it's slightly better.

MARC ANDERSON: Okay. So, I just wanted to raise my hand. I'm not violently disagreeing. I'm still just scratching my head over this one, and I look forward to seeing text from Margie. Hopefully, that will help clear up my confusion.

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

AMR ELSADR: Thanks, Janis. I'm pretty much in the same boat as Marc. Like I said in the chat, I think it's difficult for me to agree or disagree with this until I understand it a little more. So, it would be interesting to see whatever references Marc or Margie could provide us. And then, if there are specific parts of the NIS directive that we should be looking at, then it would be great if they could point those out, as well. Thank you.

JANIS KARKLINS: Okay. Thank you. So then, we can move to 21st.

MARIKA KONINGS: Thanks, Janis. So, we're now into recommendation number six, contracted party authorization. I think we can actually take 21 and 22 together. They both relate to paragraph A that you see here, as well, which notes …

Well, actually, I don't need to read it because the paragraph itself was suggested originally by the BC, IPC, and ALAC, that the paragraph which was originally a thing, step seven, should move up as the first step.

This relates to if it's found that the data that's contained, or that has been requested, does not contain any personal data, it should be disclosed and not no further consideration is necessary.

The ALAC made a comment here that, “It’s unclear that the reference to paragraph nine is appropriate. If not data is involved, the requested data must be disclosed,” and, at least, from our understanding, nothing changed to that wording and is, actually, I think, saying the same thing.

If there is no disclosure of personal data, there is no need to go through the steps that are outlined in paragraph nine. The Registries Stakeholder Group actually noted that they are concerned about the change of order. To make a determination on, they consider it a substantive change and materially changes the recommendation.

I suspect that the Registries Stakeholder Group can, maybe, talk a bit further to why it materially changes the consideration or the steps that need to be followed so the group can consider whether or not this should move back to where it originally was, I think as step seven, instead of the first step in the process.

JANIS KARKLINS: Okay. Thank you. Alan Woods, followed by Alan Greenberg, please.

ALAN WOODS: Thank you. So, I’ll try and keep this as high-level as possible, as the major issue with it. It simply comes down to the change in order has, basically, asked the disclosing party to process personal data where it doesn't have an actual reason to do so at that stage.

When we get in a request, there must be a prima facie reason for that request. It must be a good request that will, then, lead us to move to those next steps. And one of those next steps is, do I have a general reason? Do I have a proper reason to process data for that purpose, to see whether or not I can disclose it?

Because, yes, it might very well turn out that it's not subject to GDPR. It might very well turn out that it's natural or legal person data, but the fact of the matter is it might also not turn out to be legal person data, and it might also turn out to be somebody from the European Union EA GDPR-related, or CCPA, and that processing of data is technically not allowed.

So, you have to go through it in order. The first question is, "Is there an established reason?" so that I can have a legal basis, so that I can have a proper purpose to process the data with a view of thinking, "should I disclose it or not?"

But changing number seven back to number one, we're putting that out of order and it's creating a higher legal risk. The process as it is probably should be left the way it is, in that case.

JANIS KARKLINS: Thank you, Alan. Alan Greenberg, please.

ALAN GREENBERG: Thank you. I'll note this is not the first time this has been mentioned. We have been talking about this since we first came up with this order. Phase 1 allowed information that is not subject to GDPR or any other privacy legislation to be redacted. The SSAD is the way

to get access to that data which, among other things, did not need to be redacted to begin with.

If we can't do this then, again, we are weakening our ability to comply with GDPR but not over-comply with GDPR. Yes, it does substantially change the policy or the recommendation, which is why we're suggesting it. Thank you.

JANIS KARKLINS: So, I recall at least a three-hour conversation about this topic in Los Angeles, I think second retreat. Do we really want to repeat it? Brian and Mark SV.

BRIAN KING: Thanks, Janis. One thought here is, isn't the legal basis for the contracted party processing the request, or looking at the data to determine in the first instances whether it is personal data, the fact that the … Let's call them the "co-controller," sent the request from the CGM or the SSAD to the contracted party, and couldn't that trigger the contracted party to first check is the data is personal data?

There's at least something that went into checking the syntax of the request, and getting accredited, and the assertions that go along with that that I think would form a perfectly reasonable legal basis for the contracted parties to look into whether the data is personal data. Thanks.

JANIS KARKLINS: Thank you. Mark SV, please.

MARK ŠVANČÁREK: Thanks. Brian has mostly made my point. I think that, given the nature of these relationships, the controller already has a legitimate interest in performing this action. Like Brian said, it has already gone through all sorts of fact-checking and, at this point, I think it's perfectly lawful for them to look at the record to see if it's personal data. I don't think we're going to have an agreement on this, but my opinion of this is in disagreement with Alan's. Thanks.

JANIS KARKLINS: Thank you. Volker?

VOLKER GREIMANN: Yes. Thank you. I'm wearing the registrar hat, now. I don't take the same legalistic approach/strictly holistic approach as Alan did. I also take the approach of which way is most effective and least time-consuming. And I don't think this list should be a step-by-step, first, second, third, but rather these steps have to be run through in some order.

So, the order doesn't really matter to me, it just matters that I have to follow all the steps in some order that I feel is most appropriate for my organization in dealing with those requests. So, if I want to look at, "Is it legal person first and foremost?" and thereby save me the rest of the review, then that should be my prerogative. Thank you.

JANIS KARKLINS: Thank you. Alan, please.

ALAN WOODS: Yeah, and very quickly. I mean, I'll take Volker's point on that, but again, we're talking about a policy which we're being asked to follow and we need to be careful that we're not creating a cement, in that sense.

But my point was going to be, quite simply, again—and I showed my trump card a little bit earlier on this one—the fact is I still receive requests from people who should know far better, and those requests still state, "Give me the data because I have a trademark." That, to me, is …

If I read that first, which I do, because that is the way I do – I read the request fully. If that is the actual basis of the request then I, personally, can't stand over delving into whether or not there's personal data involved in this at that point.

I don't agree that that's a legal basis. But again, this is the call of the controller. I accept that I am a controller and this is encroaching on, again, just making the contracted parties … Pushing them into a very difficult position where we need to compromise our decision-making process in order to benefit that of third party requestors when, in reality, again, our focus should not be the third party requestor but of the data subject's right.

Yes, it might turn out that it's not a data subject under the law. It might turn out to be a legal person. But at the same time, we can't

expect that the requests being made are coming up to a basic level of sufficiency, a prima facie good-faith request.

And when we can see that, well, then we move very quickly onto that second stage. It's not as if it's a really, really heavy-barred door. It's just a basic sufficiency test, and I don't' see how an AI is going to be able to pick up on that, either.

I think we need to be very realistic, here, that there does need to be some sort of a review, and all we're asking for is basic agreement that this is something that we can move forward to that next stage, and then it moves very fast.

I don't see this as being an issue. I think it's just us ensuring that what we're putting out there into the ether is actually a good process that will not draw the ire of the data protection commissioners.

JANIS KARKLINS: Thank you. Look, we need to be cognizant or remind ourselves that we're talking about a standardized system. So, the recommendation in theory, and also, hopefully, in practice, will become a standard for all contracting parties. So, as a result, standard requires to be followed and, these steps, we worked out based on practical experience that Alan Woods gave us, based on his revisions of the text.

At the same time, it doesn't matter how we are discussing if the data needs to be disclosed. It will be disclosed and it will be disclosed within the response time allocated for each category of request.

So, honestly, I do not see any difference whether this point that we're talking about becomes number one or is number seven. It will be examined and, if the personal data is not involved, it will be disclosed to requestor within the limits of SLAs that are established for each type of request.

So, again, my question is whether we're prepared at this late hour to engage in a revision of the steps we have agreed, and sequence of steps that we have agreed, for initial report, when, at that time, it was not an issue, and suddenly it becomes a "cannot live" issue. So, I have three reactions. Hadia, Brian, and Alan Greenberg, please, in that order.

HADIA ELMINIAWI: Thank you, Janis. So, actually, to your point, the point here that the requestor actually could be denied the data in spite no personal data is required, just because, maybe, he failed to correctly indicate the legitimate interest or the purpose, or maybe due to a failure from the contracted party's side to actually see that legitimate interest.

And that's why we think that if there is no personal data required then there is no need to go through the steps of determining the legitimate interests and the necessity of the request. Especially that, in case there is no personal data required, this is not required by the law.

And second, actually, I think Volker made a good point, there. For some registrars, it could be, actually, convenient to see if it contains personal data or not, because it will save them time and the process will be much shorter. So, from a practical point of view, it's also

better for the contracted parties – for some of the contracted parties. Thank you. It could be.

JANIS KARKLINS: Thank you. Though, if that would be that simple then we would not have an issue of legal versus natural unresolved. Brian, please.

BRIAN KING: Thanks, Janis. I'm trying to distill this down. The main point here is that a system that would require a requestor to get accredited and pay to submit the request, and then direct the request to the contracted party for review and have the contracted party deny the request on some grounds unrelated to the fact that the data is personal data or legal person data, and deny the request when the data does not pertain to a natural person is just, simply, unacceptable.

If the contracted parties are worried about the validity of the request or having grounds to review a request then we're all ears and open-minded about ways that we can front-load the accreditation process, the central gateway manager process of how the request goes in.

But if the data is not related to a natural person, there are no grounds not to provide that data to the requestor. And in fact, it's very dangerous for contracted parties to get into deciding requests based on who knows what when they have no grounds for concealing the identity of the registrant – at least under data protection law. So, that's not going to be an acceptable outcome for us. That's why we want to move this up. Thanks.

JANIS KARKLINS: So, again, if there is no personal data, the recommendation says "must disclose data." And whether that is the first step or that is the seventh step … Look, what's the difference?

SLAs remain the same. The data will be disclosed. And again, I think that we're over-engineering, here, the thing. But of course, it's not up to me. It's up to you to agree. Alan Greenberg, Amr, and Hadia.

ALAN GREENBERG: Thank you, Janis. Janis, if what you were saying was correct, we would not be having this discussion. We've already heard from Alan Woods that he may reject a request before even looking at whether the data is personal or not.

Volker said that the order doesn't matter, but other people have said the order does matter, and requests may be refused, even though there was no legal basis for redacting the information, but our Phase 1 allowed it, and that's the problem.

Now, we can go on, at this point. It will just form another item in our descending report. But it's a really critical issue that we over-redacted to begin with, and now we're not providing any remedy for it. Thank you.

And by the way, this is not the legal/natural question. The legal/natural question is saying, if we try to address that instantaneously, registrars and registries would have to look at—I don't know—200 million domain registrations to see if they

contained data. In this case, we're looking at one-by-one. It is not a legal/natural question. Thank you.

JANIS KARKLINS: Okay. Thank you for clarification, Alan. Amr, please.

AMR ELSADR: Thanks, Janis. Just for the record, I agree with your last comment, Janis, that we're over-engineering this. I guess Alan kind of provided the segue for me to speak because I think this is an issue of legal versus natural person.

Like I said earlier in the chat, the Phase 1 recommendation was about contracted parties being allowed to treat the personal information of legal and natural persons in the same way.

And the reasons why certain groups were pushing for this were not only because of legal issues, but there are other issues that are economic issues or operational issues. And of course, there was the legal uncertainty issue. So, it's not just about what's lawful and what isn't.

And when Alan Woods said that he would reject a request before getting to the substance of it, the way I heard it is because the request itself was filed improperly. So, the reason why a request is being rejected is not just because he's not looking at whether the underlying data pertains to a natural person or a legal person. It's because the request was submitted incorrectly. So, I don't see why it's such a big ask to have people submit requests correctly.

And my understanding, also, is that the requestor would have no knowledge of whether the registrant is a natural person or a legal person, or, if it is a legal person, if the data included in the registration data is information pertaining to a natural person.

These are all issues that contracted parties need to look into when they're processing the data that they're holding, and they need to do it correctly, and that's all we're trying to get done, here.

So, when submitting a request, requestors should just stick to the rules and submit them correctly. If they do submit them correctly, then this problem will not be a problem. Thank you.

JANIS KARKLINS: Thank you. Hadia.

HADIA ELMINIAWI: So, Janis, you actually made a good point when you said that non-personal data must be disclosed according to this policy. However, according to the policy we're talking about now, if the answer to the first question, that the requestor demonstrate legitimate interest, is no, then my understanding is that the process stops there.

So, even though the request would contain no personal data, it will stop there and be rejected, unless you would go through the first, second, and third … If the answer to the first question is no, you still go to the second.

Are the data elements requested necessary? If the answer is, again, no, then you go to the third question. I don't think that's

what's actually going to happen. It makes no sense to do that. So actually, if we say non-personal data should be or must be disclosed, according to this recommendation, in some circumstances it won't.

JANIS KARKLINS: Okay. Thank you, Hadia. Stephanie?

STEPHANIE PERRIN: Thank you. At the risk of being tedious and repetitive—but hey, everybody else is doing it—I just want to reiterate that I have offered many times a cure for the problem of legal versus natural, and it would involve a very thorough authentication of legal persons/commercial entities.

And not just some sort of a guess that the registrars will have to spend a great deal of time checking but some kind of accreditation that involves demonstrating their existence as a corporation, as a company, as a legal person/entity. In other words, that would be globally applicable.

Until we do that, I cannot see that downloading this problem on to the contracted parties is fair, and I don't understand why nobody wants to put the onus on the legal entities. Thank you.

JANIS KARKLINS: Thank you. Alan Woods, after listening to this discussion, do you have any suggestions?

ALAN WOODS: Of course I do.

JANIS KARKLINS: Please.

ALAN WOODS: [inaudible], is it not? Yeah. I mean, listening to the people, I think the worry, here, is that our friends in the BC and the IPC are saying, "Of course, we're going to be making good requests. That's the point. And if it is a legal person, you should be giving us that data." I don't disagree with that.

So, I think that we need to do is we might be able to accept have step seven and step one if we can say, "Assuming that the request received is full and complete, as per the recommendations," or something along the lines of that, where we can say, "Look, if that request is something as simple as 'legal basis because I want it,'" or "legal basis," and then insert not-a-legal-basis here.

We have a right as controller to protect ourselves and say, "Yeah, but that's not a good enough basis for me to even proceed. If it's that bad, then I'm not going to proceed." So, again, let's put in some sort of a qualification there, saying, "Assuming that the basis is," and then we can leave part seven as number one.

But again, we need some sort of a recognition, here, that not all requests are going to be good. I mean, we've heard so many times today that not all contracted parties are good. So again, let's flip the tables a bit and say, "Not all requests are going to be good, either." So, a little bit of compromise would go a long way, here, I think.

JANIS KARKLINS: Okay, thank you. Your proposal is to start this step seven … Move it up, as it is now here on the screen, but start something along the lines, assuming that the request is … Could you put your suggestion in the chat, so that staff can capture that?

And my question to others is, would this tweak be okay? So, the meaning is that, with the qualifier, assuming that the request is submitted in … Whatever Alan said. Sorry, I'm a bit braindead already, after two hours listening and trying to understand where compromise may lie.

And then, we would move it to as a first step. Okay. So, Alan Woods will write it in the chat, the text which will precede "must disclose data," and staff will capture that. With this, I would suggest that we move on. Marika, please.

MARIKA KONINGS: Thanks, Janis. I think the next topic is somewhat related to the conversation that we've had. It relates to the removal of "without reviewing underlying data" in 5a. And in seven, the Registries Stakeholder Group has expressed a concern about that, and I think we've kind of heard already why that concern may be there.

One thing I think we can note, removing "without the underlying data" does not take away, at least from our understanding, the ability for the contracted party to do it without reviewing the underlying data.

The requirement is to make a threshold determination, and if a contracted party is able to do that or they believe they must do that without looking at the underlying data, at least from my reading—I'm happy to stand corrected, here—that would not prevent a contracted party from doing that.

I think Volker indicated that he may make a determination looking at the data or doing it in a different order. So again, I don't know if we can kind of leave this one there, if that is, indeed, the correct understanding of that removal.

It should not change the ability from a contracted party to do it without reviewing. But at the same time, if someone wants to review the underlying data, they are able to do so. I think that's point 23. 24 is somewhat related. Maybe we first want to pause on this point.

JANIS KARKLINS: Yeah, let's see if we can find a way forward on 23, first. So, any objections to the suggested deletion, "without reviewing underlying data"? I see no hands up. Deleted. Marc Anderson, please.

MARC ANDERSON: Yes. Thanks. Yeah, this is part of the problem with changing the order and moving seven up, because it materially changes the entire process outlined. And so, one of my concerns—I think I flagged this in review—by changing the order the threshold determination in five doesn't make sense at all anymore.

A threshold determination after you have reviewed the data is nonsense as far as I'm concerned, because you've already looked

at the data. I think this is one of the either intended or unintended consequences of changing the order.

It has materially changed the entire recommendation that we had previously agreed on. So, I'm having trouble looking at that and understanding. When you look at the entire recommendation on the whole, I think the order, here, becomes significant. This one is a casualty of that move.

JANIS KARKLINS: Okay. So, maybe we could look to this recommendation from a slightly different angle and agree that these are steps that each contracting party must perform, but there is no indication that they need to be performed in exactly that order.

So, if we, maybe, even make a note somewhere at the title or show that these are steps that need to be performed but that the sequence needs to be determined by each contracting party, something along those lines.

And then, all the conversation of whether that is step one or step seven becomes irrelevant because these are steps that need to be looked at, and then each contracting party does this in their own way.

That does not change, of course, the agreement that they will be the first part of the sentence on step seven, wherever that step will be placed in this recommendation. So, could that be, maybe, an additional safeguard that we could put in? Think about it.

So, I take, then, we could, maybe, think until tomorrow about the overarching statement, either explicit or in footnote, about steps, the order of which can be determined by each contracting party. And here, we could then delete that "without reviewing the underlying data," and we can go to the next point. Marika, you said that it is somehow related.

MARIKA KONINGS: Thanks, Janis. Yes, this is a question from ICANN Org. I'm assuming—but I'm giving Eleeza and Dan to raise their hand—the first part of this question has been answered, because it asks about what the threshold determination implies. I think Alan Woods has explained that, already, on various occasions, now – what is intended with that. But if that's not clear, I think Dan and Eleeza can raise their hands.

Another question that was flagged here in relation to paragraph seven, which reads, "For disclosure requests that are not subject to the automated processing of the disclosure decision must evaluate the request once the validity of the request is determined under paragraph 5a."

[Paul] notes here that, "There does not appear to be any mandatory requirements specifying what it means to evaluate the request. Accordingly, ICANN Contractual Compliance would only be able to assess whether the contracted party has conducted an evaluation," and, "Can the ePDP team confirm that there are no mandatory requirements specified for this evaluation?"

JANIS KARKLINS: So, can we confirm? Daniel, you can provide further clarification to your question.

DANIEL HALLORAN: Thank you, Janis. So, this item, 24, has two issues in it, apparently. The first one I think Marc A already addressed, which is our question, if you delete the words from what's not paragraph five, "without reviewing the underlying data," then we were sort of confused what it means to make a threshold determination.

Because it's now just saying, "You must make a threshold determination, and then you must evaluate the request," but it wasn't clear what the difference was. And it will be especially confusing if we now say, "You can do it in whatever order you want, and now you must evaluate the request, and then, after that, you must make a threshold determination."

So, when Org goes through this, we have an eagle-eye out for every "must," and we're looking imagining Compliance is going to have to enforce that "must," and we didn't know what the purpose of that threshold determination was once you got rid of "without first reviewing the underlying data." That's on the first point.

And I think we could live … I mean, we'd have to see the text, but I think we agree it's possible the whole recommendation could be rewritten to remove any implication that certain steps have to follow certain other steps. But I think that would take kind of a minor-to-major rewrite of the recommendation because, the way we read it … We can look at it again.

It seemed like certain steps were implied that they had to go in a certain order. And we're fine, we're just trying to make sure it's implementable, the way the team ends up with … Whatever the team agrees on. That's it on the first point. I don't know if you want me to address the second point, which is probably a much bigger point, and I'm not sure we have time to tackle that.

JANIS KARKLINS: No, maybe not. Look, again, I think that this is a good demonstration of attempt to change in the last moment a sequence or text that we discussed in length and agreed after face-to-face meeting. So, it seems to me that we're adding to confusion, not resolving confusion.

So, again, I am not sure that we are on a good path, here, and maybe we need to step back and think about these issues until tomorrow and start with the actual discussion on 23, and sort of try to wrap our head around.

Because there is a certain logic in our initial report, based on a real-life practice. And now, we're trying to pick out some things because we believe that this should be done. And now, we are, basically, not doing service to the quality.

But again, it's up to us. That's what I'm suggesting, that we stop here and we will start from revisiting 23 tomorrow. But I see Brian's hand is up. Brian, please.

BRIAN KING: Thanks, Janis. I'm not going to take us down a rabbit hole, here, but I would like to address your comment that we're revisiting things that we agreed in the face-to-face.

And I'll note that, when we had the face-to-face, we were indeed still under the impression that we would be able to address the legal versus natural person distinction in Phase 2 of the ePDP, and that really appears doubtful now, and many groups are not okay with that.

So, as some of those understandings and assumptions change, we need to change the language in the report to make sure that we can still live with it, and that's what we're trying to accomplish with this moving up the threshold of whether the data is even legal versus natural person data. I just wanted to address that. Thanks.

JANIS KARKLINS: Okay. Look, please think about these issues until tomorrow's call, and we will start with the systemic conversation. If somebody can offer a compromise write-up, that would be helpful. And I'm looking, of course, to Alan Woods, who was the lead in this conversation.

And by then, of course, also we'll have, already, the revised formulation of what used to be point seven, or step seven. So, with this, I see that we did 12 recommendations today, or 12 questions today. In total, 22 out of 84.

And we have two meetings remaining in initial planning, so please be prepared to work, also, in the week following the ICANN meeting, because it is probably unrealistic to think that we will conclude our conversation next Tuesday.

Please, be prepared to work on Tuesday, Wednesday, and Thursday, the week after the ICANN meeting. I'm hoping that we would finalize the SSAD review under my leadership, or my chairmanship, rather. And then, the rest will be done under the chairmanship of Rafik.

So, with this, I would like to thank all of you for active participation and constructive engagement, and have a good rest of the day. This meeting is adjourned.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and stay well.

[END OF TRANSCRIPTION]