The ISPCP welcomes the opportunity to comment on the draft EPDP Phase 2 Initial Report.

We would like to offer two overarching observations first and then suggest concrete comments on the report.

Overarching observations:

1. The EPDP team spent substantial time on the development of use cases. Whilst these were primarily worked on to serve as the factual basis for policy recommendations, we do think they should be made part of the report to inform both the communty as well as those tasked with the implementation oft he recommendations as they will then be in a position to test implementation for legal feasibility concerning our use cases (Are the use cases actually scenarios in which disclosure is legally possible?) and completeness (Have we considered all use cases that the EPDP team had in mind when drafting the policy recommendations?). If the EPDP team supports such reference to the use cases, we would be happy to help draft language for the report.
2. The SSAD shall be a globally applicable system goverened by ICANN based on community policy development. The SSAD might appear to be limiting and cumbersome to parts of the community and other stakeholders. We do think the report would benefit from a clarification describing that going through the SSAD is one of two avenues for requestors to ask for non-public registration data. Requestors can use the SSAD, but they can also approach contracted parties directly. This applies particularly to public authorities who wish to obtain information from domestic contracted parties. Again, we would be happy to offer language for this if the EPDP team is supportive of such approach.

Concrete Comments:

Section 1, last para

The next steps should include the publication of the second / separate Initial Report and what will happen after that. If a separate Initial Report is going to be published, will a consolidated Initial Report be published? We should be clear on the next steps.

Section 3.2.

We should consider suggesting one of the three variations as the “currently preferred” option. We support working on the first variation and centralizing as much as possible for reasons of consistency and to take work load off the contracted parties.

Section 4, p.12

The introductory paragraph suggests that the EPDP team might receive further guidance forom the EDPB. In fact, the EDPB has never offered guidance to the EPDP team, but to ICANN.

Section 4.4., p.18 pp

The section after the definitions has headings in between paragraphs. These headings are not always matching the content of the following paragraphs and are at times misleading. We suggest to delete the headings.

Secdtion 4.4. h), p.19

“Contribute to the proper application of data protection laws including the GDPR”

Several team members have asked for our report to be agnostic to any specific data protection law, but reviewing the report in its entirety, we should be clear that the recommendations are a response to the regulatory challenges posed by the GDPR. This manifests itself in many areas, such as legal basis and reference to the EDPB. Therefore, it appears disingenuous to make the report appear to work for multiple data protection laws without further explanation. Thus, we should state that the recommendations shall contribute to the proper application of the GDPR and – by doing so – likely to a huge number of other data protection laws.

Further, in the same paragraph reference is made to an Accreditation Body Auditor (a.k.a. monitoring body). We suggest to delete the addition in brackets and ensure we do not introduce two terms for the same function and stick to Accreditation Body Auditor throughout the report.

j) “MUST define a dispute resolution and complaints process”

Add: ”to challenge actions taken by the Accreditation Authority” to clarify the scope of the dispute resolution and complaints process.

p. 22 Fees
Change language to:

The accreditation service will be a service that is financially sustainable. Fur further details, see the financial sustainability preliminary recommendation. The reason for the request for change is that the system will likely not only be designed to recover cost, but may also include a component to cover legal risk for the parties involved.

Preliminary Recommendation #4

This section requires further discussion. We recommend to not include the section until it is further matured.

Preliminary Recommendation #6

Section 2 makes reference to building block a and Section 4 makes reference to preliminary recommendations 3 and 5. The reference to the building block needs to be removed and the preliminary recommendations do not match this report.

Section 5, second bullet point: Replace current language with: If the requested data contains personal data, the authorization provider must establish the presence of a legal basis for disclosure according to Art. 6 of the GDPR.

Section 6, first bullet point: Remove the footnote. There is no specific section in the GDPR on this. The language was discussed to ensure that the authorization provider takes into account the risks for the data subject under the given circumstances for each case. It may well be that an alleged crime might lead to financial fines or prison in most jurisdiction (“normal risk”), but it may lead to corporal punishment or torture in other jurisdictions, which is what would establish an increased risk. We can be more wordy, but the essence is that the legal framework of the jurisdiction of the requestor needs to be taken into account. The same would go for alleged crimes that could lead to death penalties. We could clarify that the balancing test should take into account criteria for MLADs. In other words: The SSAD should not go further in offering information on alleged criminals than would be given through “official channels”.

Implementation Guidance, p.26, second bullet point:

“An interest is generally legitimate so long as it can be pursued consistent with data protection and other laws”.

This statement is too broad. We cannot tell what all data protection laws globally would allow for and whether that would meet our legal standards. This reservation is even more true for “other laws”. A lot of laws would permit for exactly what we are trying to protect registrants against.

The implementation guidance does not seem to offer a lot of benefit, so we suggest deleting this entire section.

Implementation Guidance, p.27

The section on Implementation Guidance starting at the bottom of p.27 seems to be mostly duplicative of other parts of the report. We suggest deleting it.

Preliminary Recommendation #8 g)

This section only refers to the right to erasure. We suggest to include all rights of the data subject that need to be informed about under the GDPR or – in more general tems, just make reference to the information duties in the GDPR.

Preliminary Recommendation #9

The contents of this section must be mirrored or made reference to in the Acceptable Use Policy.

Preliminary Recommendation #10 Privacy Policy

We should make reference to the component parts and information that a privacy policy must have under the GDPR.

Preliminary Recommendation #10 Terms of Use, first bullet point

Not only the disclosing party and ICANN, but all parties involved in the SSAD must be indemnified.