

Minority Statement of the NonCommercial Stakeholders Group (NCSG)

NCSG has not agreed to Recommendations 22, 20 and 7, for the reasons set out below

Recommendation #22: Purpose 2

Purpose 2 in Recommendation #22 currently says: *“Contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission.”*

NCSG strongly opposes this purpose. It is far too vague and open-ended, allowing ICANN to process gTLD Registration Data in any way it sees fit. All it would require on ICANN Org’s part, is to divine a reason consistent with its interpretation of its Bylaws, as Becky Burr admitted in an email [sent to the EPDP Team on behalf of the ICANN Board](#).

In that email, Burr says, *“SSR, as defined in the Bylaws, ***is*** ICANN’s mission. Article 1, Section 1.1 of the ICANN Bylaws, clearly states that ICANN’s mission is to ensure the stable and secure operation (SSR) of the Internet’s unique identifier systems. The Bylaws themselves go on to provide significant detail regarding the scope of that mission in the context of names, the root server system, numbers, and protocols.”*

In Phase 1, we developed [worksheets for each ICANN purpose](#) detailing the legal bases and processing activities for all of them. Phase 2 failed to do this. Consequently, this reformulated Purpose 2 does not indicate why data would need to be disclosed, nor to whom, nor does it indicate why it would need to be retained and for how long. Purpose 2, as currently drafted in the Phase 2 Final Report, is also in conflict with the Purpose limitation Principle of GDPR - Article 5(1)(b), which requires that data be *“collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes”*. Ensuring the stable and secure operation (SSR) of the Internet’s unique identifier systems is hardly specific, nor explicit, and the ICANN Board’s interpretation of SSR within ICANN’s remit makes it even less so.

The NCSG has requested on multiple occasions that the EPDP Team come to a common understanding of what is involved in ICANN's mission regarding SSR, and how that applies to the processing of gTLD Registration Data by ICANN. These requests were consistently denied, despite being required to fulfill ICANN's legal obligation as a Data Controller for this purpose.

The EPDP Team has not successfully reached an understanding of how SSR within ICANN's mission is applicable to this purpose, nor has ICANN indicated its possession of any insight to the same. However, as with other legal bases in GDPR, 6(1)(f) creates additional obligations on the part of the Controller towards the Data Subject, including protecting their rights and interests.

In its [guidelines on using Article 6\(1\)\(f\) as a legal basis](#), the United Kingdom's Information Commissioner's Office says that using this legal basis is most appropriate when (among other circumstances) use of people's data is done in ways they would reasonably expect and which have a minimal privacy impact. It is virtually impossible for gTLD Registrants to have any expectations on why or how ICANN would disclose or retain their data based on Purpose 2. These unknown circumstances have not been identified by ICANN or the EPDP Team, and the only means by which a Registrant can have some form of understanding of this is if registering a gTLD domain name requires that the Registrant also acquire expertise in the interpretation and application of ICANN's Bylaws. Such an expectation is not realistic; it is beyond the capacity of ICANN's own staff, Board members and members of the EPDP Team.

The NCSG believes this purpose is not actually required for ICANN to fulfill its mission; it was put there so that ICANN Org can satisfy the desires of third-parties, despite the reference to third-party legitimate interests being removed from the revised recommendation. The ICANN Board seems to believe that this legal basis provides it with cover from liability, which it likely does not, while completely disregarding the interests of the Data Subjects, which the GDPR is meant to empower.

In order for this purpose to be fair to Registrants, the purpose needs to be broken down into multiple clearly stated purposes identifying clearly stated processing activities, which would be communicated and explained to Registrants in a manner they can easily understand.

Recommendation #20: City Field

The NCSG does not believe that a convincing case has been made to change the recommendation made on the “city field” in Phase 1 of the EPDP, from MUST redact to MAY redact. The former recommendation requiring this field to be redacted was based on [legal advice](#) by Bird and Bird in which the following was expressed:

“3.16 Taking all the above into consideration, the relevant parties may be able to satisfy the legitimate interests test for the publication of the "city" field. However, this is not clear to us from the information available so far. In particular:

a) further information will be required to show that the benefits to rights holders are sufficiently meaningful as to justify universal publication of city field, rather than being of use in very limited cases; and

b) more information on the potential impact on the rights and interests of data subjects is needed.

3.17 The relevant parties would then need to conduct a detailed assessment of the facts and circumstances to determine whether the interests pursued outweigh those of data subjects.”

This clearly indicates that conducting a balancing test would be required to weigh the legitimate interests of the third-party seeking disclosure of gTLD Registration Data against the rights of the Registrant involved. The NCSG firmly believes that this needs to be conducted as part of the processing of a disclosure request via the SSAD, and shouldn't be conflated with ICANN's purposes in processing gTLD Registration Data, which is what the EPDP Phase 1 recommendations covered.

This finding by Bird and Bird was reaffirmed in their [email to Kurt Pritz](#), in which they said, *“The legal analysis is clear – this is personal data; in principle publication could be justified on the basis of rights-holders legitimate interests, unless the interests of individuals override this.*

How this is applied to the facts – establishing whether there is sufficient interest for rights holders and balancing this with the interests of registered name holders - is not clear cut.”

This is all highly suggestive that the City Field in gTLD Registration Data should be treated like all other personal information, and MUST be redacted.

Recommendation #7: Requestor Purposes

The NCSG maintains its disagreement with including a footnote specifying the EU NIS Directive as a legislative example creating obligations on applicable regulated entities. This example was added to the recommendation during a stage in the EPDP Team's work in which the final report and recommendations were being fine-tuned to achieve as much support as possible, and was not, in the NCSG's view, given sufficient time or attention to be included in the final report, nor were the implications to a policy allowing disclosure to third-parties sufficiently considered.

Furthermore, the NCSG does not believe that excluding this example will have any meaningful impact on the ability of applicable entities regulated by the NIS Directive, or other similar legislation, from requesting disclosure of redacted gTLD Registration Data from the SSAD.