

Tucows response to EPDP Phase 2 Priority 1 Policy Recommendations

Tucows is pleased to have the opportunity to comment on the EPDP Team Phase 2 Final Report Priority 1 Recommendations and thanks the EPDP Team and ICANN Staff for their hard work and significant efforts in completing this enormous task. We welcome the occasion to provide the following comments in the hope that they are helpful to the Implementation Review Team as they proceed with their part of the process.

The work of this EPDP Phase 2 has resulted in a proposed centralized system (the SSAD) that allows requestors to submit disclosure requests in a standardized manner and that consolidates requests so that Contracted Parties can review and make disclosure decisions, taking into account the data protection regulations and other legal obligations applicable to them. Tucows is concerned that the potential for inadvertently contravening its data protection obligations is high with this model but accepts that this result is still workable.

We note that the SSAD is intended to be a centralized system to handle a function which already exists in a distributed model. We have not yet seen a full cost/benefit analysis and it is not at all clear that the significant expenditure of resources required to build, operate, and maintain the SSAD is in the best interests of the global Internet community or even of the stakeholders involved in the EPDP Phase 2 Team. This lack of confidence is exacerbated by the fact that the *primary users* of the SSAD, its stakeholder–beneficiaries, have voted against the EPDP Phase 2 Priority 1 Recommendations specifically with regard to the the SSAD and, further, have indicated that the SSAD is not fit for *their* purpose. if we build it, will they come?

Disclosure of previously-public registration data to stakeholder–beneficiary requestors is the sole purpose of the SSAD. The stakeholder–beneficiaries of the SSAD participated in the EPDP Phase 2, including drafting its Recommendations and this Final Report. Their attempt to undermine the multistakeholder process now that the Final Report has been published and sent to the Board for review is an attempt to redraft the Policy Recommendations for the SSAD. This must not be allowed.

If the Board rejects the SSAD, whether on the basis of stakeholder-beneficiaries' comments or not, no further PDP on the subject is required.

Tucows' comments below should only be taken into account in the event that the SSAD is approved, as the EPDP Phase 1 Recommendation 18 is adequate for all stakeholders.

It is appropriate that the Registrar—that is, the Data Controller (either individually or jointly with ICANN)—has decision-making power for any data processing activities it conducts, including disclosure of custodial data as laid out in Recommendation 9, which requires that automation be legally permissible as well as technically and commercially feasible. This permissibility and feasibility must be determined by the Registrar–Controller (indeed, for some Contracted Parties, it may not make good business sense to put resources into automation at all). Any future working group or team that identifies use-cases for automated disclosure must respect this

requirement and the Central Gateway Manager must only automate responses at the Registrar–Controller’s discretion.

We must, however, emphasize that, for disclosures handled in an automated manner, the Registrar–Controller must have the right and opportunity to review and there must be recourse in cases of disagreement with the Central Gateway Manager’s disclosure decision. Similarly, if the Central Gateway Manager relays a request to the Registry Operator instead of to the Registrar, it must also notify the Registrar at the same time.

Some significant elements of how the SSAD should operate were not determined by the EPDP Phase 2 Team in these Recommendations and will be addressed only by the Implementation Review Team. The essential question of to whom exactly the data are disclosed and by what means is an important one: the data should be disclosed directly from the relevant Contracted Party to the Requestor in a secure manner. The IRT will also address the various service agreements described in the report (Query Policy, Acceptable Use Policy, Privacy Policy, Terms and Conditions); these should be developed with a holistic view of the complete landscape of agreements for SSAD participants, with input from the CPH members of the EPDP Legal Committee. This work will necessarily require the completion of current work on the Data Protection Agreements being done by the Roles and Responsibilities Team, as required by the EPDP Phase 1 Final Report, including acknowledgement on ICANN’s part of their status as a Data Controller. Tucows looks forward to the finalization of these discussions or, in the alternate, ICANN’s acceptance of the Standard Contractual Clauses to legalize ICANN’s relationships to its Contracted Parties.

While the Priority 1 Policy Recommendations in this Phase 2 Final Report are the outcome of valiant effort and compromise, the fundamental necessity of having such a centralized system remains arguable. Should the stakeholder–beneficiaries accept the SSAD, Tucows will of course participate in the SSAD in good faith according to our obligations under the RAA, Consensus Policies, and relevant laws relating to the protection of the personal data with which we are entrusted.