**Policy Delayed is Policy Denied**

Four years ago, the ICANN Board passed the Temporary Specification to implement narrowly tailored policies, compliant with the GDPR, for the “maintenance of and access to accurate and up-to-date information concerning registered names” and other processing required under its Bylaws to “coordinate the stable operation of the Internet's unique identifier system.”

To underscore the importance of addressing this need, ICANN reaffirmed that providing such access is required by its bylaws and further that “the provision of RDDS for legitimate and proportionate uses is a critical and fundamental way in which ICANN addresses consumer protection, malicious abuse issues, sovereignty concerns, and rights protection – enforcing policies that enable consumers, rights holders, law enforcement and other stakeholders to access the data necessary to address and resolve uses that violate law or rights.”

In emphasizing that access to RDDS is critical to its remit, ICANN also noted that such processing must also be consistent with Article 6(1)(f) of the GDPR, which “requires ICANN to balance the legitimate interests described above with the interests, rights, and freedoms of the affected data subject.”[[1]](#footnote-1) ICANN noted in particular that “[t]he tiered/layered access framework for RDDS identified in the Interim Model, and implemented in this Temporary Specification, is specifically designed to minimize the intrusiveness of Processing while still permitting necessary Processing” and that “Processing under the tiered/layered access framework as required by this Temporary Specification minimizes the risk of unauthorized and unjustified Processing.”

To expediate the development of policies to ensure appropriate access to accurate and up-to-date registration data in compliance with data protection regulations, ICANN, via the GNSO Council, initiated a one-year Expedited Policy Development Process (EPDP) to determine if the Temporary Specification should become an ICANN Consensus Policy, as is or with modifications, while complying with the GDPR and other relevant data protection laws.

Along with the EPDP Working Group, ICANN Org also formed a Technical Study Group to develop an SSAD technical model. While the TSG’s proposed model included a centralized gateway based on a flawed assumption that it would, *ipso facto*, have an impact on liability for data disclosures, it did also include a requirement for appropriate accreditation and authentication of requestors (corresponding to the EPDP’s policy recommendations), which is a *highly* relevant to implementing an SSAD governance model that will help ensure compliance with the GDPR and other data protection regulations—fundamental to the SSAD.

The driving goal of this policy and technical development work is to develop an SSAD that achieved this balancing of interests, ensuring that the privacy rights of data subjects were protected while also ensuring that ICANN maintains access to accurate and up-to-date registration data to address consumer protection, malicious abuse issues, sovereignty concerns, and rights protection and other legitimate interests—which is critical to its remit.

While the GNSO formed the EPDP “in recognition of the need to complete the work in a relatively short timeframe,”[[2]](#footnote-2) it was extended into three distinct processes spanning over three years and has yet to be fully implemented.[[3]](#footnote-3) Thereafter, an Operational Design Process that was supposed to last three months stretched to nine months. Even the GNSO Phase 2 Small Team that was established by the GNSO Council in February of 2022 endeavored to finish its work by March, but will likely stretch until July.[[4]](#footnote-4)

Thus, at this late date, it is imperative that ICANN and the GNSO remain focused on expeditiously completing the development and implementation of an SSAD that satisfies ICANN’s critical remit to provide appropriate access to accurate registration data, and that unnecessary digressions and delays are avoided.

There is no question that developing consensus policy and an accompanying technical implementation to provide appropriate access to non-public registrant data in compliance with data protection regulations is not an easy undertaking. Over the past four years, InfoNetworks has actively participated in policy development in this area, consulting across stakeholder groups to understand their concerns and to solicit feedback as we developed a complete operational reference implementation for an SSAD to assist in accelerating this process.

It is with our extensive research and experience in this area in mind that we are submitting these comments, which we hope will be of use to the GNSO Council to avoid unnecessary additional delays that will only benefit those seeking to preserve the status quo.

**The Good**

We applaud the work of the Small Team in preparing its list of clarifying questions to ICANN Org and their comprehensive list of concerns in response to question from the ICANN Board as to “[w]hether the ODA has correctly interpreted the intent of the SSAD recommendations in the proposed implementation.” But there are three aspects of the Small Team’s report that we want to comment on in this regard.

First, we fully support a pilot to evaluate the EPDP Phase 2 policy recommendations as approved by the GNSO Council. However, some of the proposals being discussed within the Small Team would not only undermine the EPDP Phase 2 work, but may add unnecessary delay in achieving an operational SSAD that supports ICANN’s critical remit to maintain access to accurate registration data, as laid out in the Temporary Specification.

Second, we agree with the concerns raised by the Small team regarding the ODA’s flawed approach to estimating the development and operational costs of the SSAD system itself. ICANN Org’s preparation of its cost estimates without a specification or at least complete set of business requirements, combined with its conflation of its system costs with costs for accreditation (which will be borne by requestors) has produced costs estimates that are unreliably broad, and which greatly inflate what the actual development and operating costs of the system are likely to be.

With an appropriately defined specification, the build and operating costs for the SSAD system will likely be substantial lower and much more in line with the original $9 million USD costs as originally projected by ICANN Org. As we informed ICANN in our response to the SSAD RFI last summer, InfoNetworks has already built a complete, operational reference implementation for an SSAD solution based upon the EPDP Phase 2 recommendations (along with a sandbox of the domain name ecosystem). And, based on our experience in building that reference implementation, as well as our extensive research into the costs and operational requirements for identity services and accreditation, we agree with the Small Team’s assessment that the costs are likely to be more in line with ICANN’s original estimate.

Third, we share the Small Team’s concern regarding ICANN Org’s fundamental shift in its proposed technical model to now route requests through accreditation authorities under the auspices of data minimization. While data minimization is unquestionably important, it can easily be achieved through other means, such as through the use of pseudonymized, federated credentials as have been incorporated into our reference implementation (which supports the TSG Technical Model and the EPDP’s recommendations that ICANN has already adopted). In light of various other means to achieve data minimization, there is no reason for ICANN Org to now deviate from the existing technical model and Phase 2 recommendations on this.

**The Bad**

Conversely, while the Small Team properly raised concern with ICANN Org’s desire to now deviate from its adopted policy recommendations and technical model, the Small Team itself has disregarded the EPDP Phase 2 recommendation for an Accreditation Authority that would vet potential Requestors in its proposal of a proof of concept for a ticketing system. The verification of Requestors and data subject legal protection mechanisms to which credentialed Requestors would be bound (along with other governance-related requirements) is fundamental to implementing an SSAD that achieves ICANN’s critical remit to maintain access to accurate registration data in a manner that is compliant with data protection laws. It was not only a key aspect of the Phase 2 recommendations that underwent substantial deliberation and debate, it was also passed by a Super Majority of the GNSO Council after almost 18 months of deliberation.[[5]](#footnote-5)

Moreover, implementation of a central ticketing system alone is not likely to provide any meaningful data towards achieving ICANN’s critical remit for the SSAD. It appears that the ticketing system would merely provide a standardizable form and route requests to appropriate parties, who would evaluate those requests in the same manner that they are doing today. It will not evaluate any of the policy considerations for evaluating those requests and establishing the extent of a legitimate interest for providing access to registration data.

One of the considerations presented for piloting a ticketing system is ostensibly to gauge the volume and type of demand for access, to help properly scope requirements for the SSAD in line with that demand. However, the proposed ticketing system would not change the manner in which requests have been processed in the four years since the Temporary Specification was adopted, and so information regarding demand under the current regime can easily be collected without implementing a ticketing system.

Perhaps more importantly, however, is that providing appropriate access to accurate registration data is a critical remit for ICANN, irrespective of the purported level of demand (and whether such demand itself has been impact by difficulties faced by many parties in gaining access to accurate registration data, notwithstanding a legitimate interest for doing so). To be sure, it is important to properly scope the SSAD system to its need, but this be done more expeditiously by developing a proper set of requirements and specification for the system and soliciting proposals for the development and operation of that system from interested parties.

Also concerning was that this proposal by the Small Team appears to stem primarily from a single Registrar stating that they would not rely upon ICANN’s Accreditation Authorities and would be undertaking their own accreditation review. While a Registrar has the right to undertake its own accreditation review process and check that against the output of ICANN’s own Accreditation Authorities, a Registrar unilaterally stating that it would not rely upon ICANN’s Accreditation Authority and then bootstrapping that to remove one of the most important EPDP Phase 2 policy recommendations for all contracting parties is an affront to the multi-stakeholder model, especially in light of the Super Majority vote of the GNSO Council on this recommendation.

As noted above, we share the Small Team’s concerns regarding the flaws in ICANN Org’s estimates of excessive SSAD costs. However, the Small Team should have sought clarification on the specific assumptions underlying ICANN Org’s calculation of these costs rather than summarily dismissing the critical recommendation for Accreditation Authorities. Without having specific operational details and experience with an Accreditation Authority and related policy aspects of the SSAD, it is difficult, if not impossible for ICANN Org to properly prepare a specification and requirements for the technical system.

**The Ugly**

On 6-April-2022, the Small Team chair posted to the list a document entitled *SSAD Light Design Concept*, [[6]](#footnote-6) which had been prepared by ICANN Org. This draft document appears to have removed the central or governmental accreditation authorities, which, as noted previously, was a fundamental policy recommendation for the SSAD, previously adopted by the ICANN Board based on the EPDP Phase 2 work.

Article 3.1 of the ICANN bylaws clearly states that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations.

Article 3.6(a) of the ICANN bylaws further states that:

With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

(i) provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;

(ii) provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and

(iii) in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.

If the GNSO Council approves the proposed Small Team recommendation to effectively abandon a critical recommendation from a policy development process that lasted approximately 18 months, involved over a hundred calls and thousands of people hours and was adopted with a Super Majority vote of the GNSO Council—and without even holding a public comment period—it would appear to be a clear violation of ICANN’s bylaws that would only add further unnecessary delay in implementing the SSAD in a way that ICANN itself has noted is required by those bylaws.

**Recommendation**

InfoNetworks respectfully submits that the most expeditiously and prudent course of action would be for the GNSO Council to vote on the Small Team engaging in a continued dialog with ICANN Org regarding a pilot that would explore the key requirements and costs for implementing an SSAD based on the recommendations adopted by a Super Majority vote of the GNSO Council and that achieves ICANN’s remit in this area. This vote could be communicated to the ICANN Board, thus absolving them from taking additional action until further information is made available from this pilot and/or proof of concept.

We recommend that the Small Team be restrained from micromanaging the technical and/or operational implementation details of any such pilot, as that is outside the policy remit of the GNSO, and thus the Small Team. Instead, ICANN Org should conduct a formal RFP to solicit pilot proposals from interested parties. This would allow ICANN Org, the Small Team, the GNSO Council, and most importantly the ICANN Board the ability to make “fact-based policy development” decisions based on facts that are relevant to its remit for the SSAD, as outlined in the Temporary Specification, and as required by the ICANN bylaws.

As noted above, the driving goal for the SSAD is to balance interests—to ensure that the privacy rights of data subjects were protected while also ensuring that ICANN maintains access to accurate registration data for addressing consumer protection, malicious abuse issues, sovereignty concerns, and rights protection and other legitimate interests. Critical to this are the policies governing the accreditation of requestors and the data subject protections to which they are bound, clarity and consistency in the determination the extent of legitimate interests, and minimizing the prospective liability of data controllers for disclosing data under the SSAD.

But in order to obtain actionable guidance from data protection authorities, the necessary details for these governance requirements need to be laid out, along with the specifications for the technical solutions with which they will be implemented.

For these reasons, we recommend that a pilot be conducted using a reference implementation for a complete SSAD that supports all of the EPDP’s key recommendations, which can be used for evaluating specific governance requirements for accreditation, legitimate interest rules, etc., along with assessing technical requirements and costs. The pilot can be staged in manageable chunks, focusing on certain use cases for different types of requestors, legitimate interest requests, and data requested. In the event that ICANN still wants to collect requests through a ticketing system for analysis, it can easily be included in this pilot.

The context-specific governance recommendations from the pilot can then, along with the reference implementation (or any modifications thereof), be used to prepare data privacy impact assessments that data protection authorities can more reasonably evaluate for actional guidance to help provide the clarity that the ICANN community needs.

If ICANN Org is unable to make a recommendation to the Small Team and/or GNSO Council after conducting this RFP, then ICANN Org may wish to reconvene a second Expert Working Group on gTLD Directory Services (EWG-2).

We also recommend that if ICANN Board moves forward with a pilot RFP, it do so NOT as a formal policy recommendation, but on a voluntarily basis. Any formal policy recommendation that will require contractual changes will likely take many additional years to complete. For examples illustrating this, see the ICANN Org’s negotiation with the CPH for a mutually agreeable Data Processing Agreement and ICANN Org’s ability to amend the Registry Agreements to permit DAAR to process additional data to combat DNS Abuse. Time is (and has been) of the essence, and ICANN Org should instead rely upon interested parties who wish to solve the problem voluntarily participating in an SSAD pilot that addresses the actual goal for the SSAD development process and demonstrates its viability.

As discussed above, InfoNetworks was a respondent the ICANN SSAD RFI, and developed a complete operating reference implementation for an SSAD and sandbox of the domain name ecosystem to be used for preparing data privacy impact assessments for seeking action guidance from data protection authorities, like we have done with DotMusic.

During ICANN72, InfoNetworks, DigiCert and Microsoft announced that we are soliciting participants for a pilot using this sandbox, expanding upon the initial work that InfoNetworks has done for DotMusic. Since that time, we have continued demonstrating our SSAD implementation and sandbox to interested ICANN stakeholder groups. If ICANN Org were to open an RFP, InfoNetworks would respond and would likely partner with the other willing organizations.

1. https://www.icann.org/resources/pages/gtld-registration-data-specs-en/#temp-spec; [↑](#footnote-ref-1)
2. <https://www.icann.org/en/public-comment/proceeding/gnso-expedited-policy-development-process-epdp-on-the-temporary-specification-for-gtld-registration-data-policy-recommendations-for-icann-board-consideration-04-03-2019> [↑](#footnote-ref-2)
3. <https://gnso.icann.org/en/group-activities/active/gtld-registration-data-epdp> (Phase 1) ; <https://gnso.icann.org/en/group-activities/active/gtld-registration-data-epdp-phase-2> (Phase 2); and <https://gnso.icann.org/en/group-activities/active/gtld-registration-data-epdp-phase-2a> (Phase 2A) [↑](#footnote-ref-3)
4. [https://community.icann.org/display/EOTSFGRD/EPDP+Phase+2+Small+Team+to+review+the+SSAD+ODA+-+started+Feb+2022](https://community.icann.org/display/EOTSFGRD/EPDP%2BPhase%2B2%2BSmall%2BTeam%2Bto%2Breview%2Bthe%2BSSAD%2BODA%2B-%2Bstarted%2BFeb%2B2022) [↑](#footnote-ref-4)
5. EPDP Phase 2 work commenced on 1 April 2019 ([https://community.icann.org/display/EOTSFGRD/Phase+2+-+started+-+01+April+2019](https://community.icann.org/display/EOTSFGRD/Phase%2B2%2B-%2Bstarted%2B-%2B01%2BApril%2B2019)) and the GNSO Council approved it by a Super Majority vote on 24-September-2020 (<https://gnso.icann.org/sites/default/files/file/field-file-attach/draft-epdp-phase-2-report-08oct20-en.pdf>) [↑](#footnote-ref-5)
6. <https://mm.icann.org/pipermail/gnso-epdpp2-smallteam/2022-April/000124.html> [↑](#footnote-ref-6)