
MONTREAL – GNSO - EPDP Phase 2 Meeting (second part of 3 out of 4)

Monday, November 4, 2019 – 17:00 to 18:30 EDT

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UNIDENTIFIED MALE: It is Monday, November 4th, 2019, at ICANN 66 in Montreal, at 5:00 P.M. This the GNSO EPDP Phase Two Meeting, second part of three out of four, in Hall 511C.

BECKY BURR: If we are all here, can we call to order? Do we record these? Yes. Okay, thank you. Volker, why don't we start with you, with roll call.

VOLKER GREIMANN: Yes, Volker Greimann, RrSG, present.

MATTHEW CROSSMAN: Matthew Crossman, RySG, present.

BRIAN KING: Brian King, IPC, present.

THOMAS RICKERT: Thomas Rickert, ISPCP.

MARGIE MILAM: Margie Milam, BC.

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BERRY COBB: Berry Cobb, GNSO Policy staff.

CAITLIN TUBERGEN: Caitlin Tubergen, ICANN Org.

BECKY BURR: Becky Burr, ICANN Board Liaison.

AMY BIVINS: Amy Bivins, ICANN Org.

DAN HALLORAN: Dan Halloran, ICANN Org.

TATIANA TROPINA: Tatiana Tropina, NCSG, present, and might be replaced by Stephanie Perrin later. Thank you.

CHRIS DISSPAIN: Chris Disspain, ICANN Board Liaison.

LAUREEN KAPIN: Laureen Kapin, GAC.

BECKY BURR: Wonderful. We have a continued substantive review of a couple of legal questions submitted to date. We were going to have an update from ,Brian, Margie, Thomas, and Volker’s updated proposal. Do you guys have something to report?

MARGIE MILAM: Yeah, I just emailed to Caitlin what we were working on, but it hasn’t been updated, so I think you should talk about the concepts we were addressing, that we could build into the question.

BECKY BURR: Laureen, could you turn your mic off?

THOMAS RICKERT: So, shall we maybe just present the ideas, and you can confirm whether or not I got things right? We have been discussing how to ask a question to outside counsel, with respect to reverse lookups, and what the potential safeguards need to be. I think we took a pretty fresh start to all this. I think we’ve identified different scenarios where reverse lookups might be warranted.

The easiest thinkable case is where the data subjects themselves want to know which domain names their name or their identity is associated with. They should be able to go to the SSAD and ask, “What domain names, if any, are associated with my name?” There shouldn’t be any further safeguards for that, other than just identifying themselves. That’s one case.

For the other two cases, we need to be slightly more nuanced. We have, I think, agreement that URS and UDRP providers need to have the capability of doing reverse lookups, because being associated with abusive registrations or use of multiple domain names can be a ground for a decision against the registered name holder. So, URS and UDRP providers need to be able to get access to reverse search capabilities via RDAP, just based on their role. But there wouldn't be any limitations, other than that they can only use these search tools in performing or preparing for their decisions.

If any other requestor wants to use reverse lookup capabilities, we're proposing to take a staggered approach. So, number one, you can't just go there and say, "I want to have reverse lookup for a given data element," but you need to be able to substantiate that you have reason to believe that certain data elements are associated with multiple domain name registrations.

Just to illustrate that, if you have fraudulent websites, or a website selling pirated goods, typically the WHOIS data might be different, but they might have an email address in common. You might find in [fora] where users exchanged their experience with fraudulent websites—that they publicized that.

So, if you find a website suggesting that one email address, let's say, is used in connection with multiple domain name registrations, you can take that evidence and say, "I have reason to believe that a domain name is used in a pattern of abusive behavior, and therefore, please

check whether there are other domain names associated with domain registrations.”

If you can evidence that, then you would only get back three figures—the total number of domain registrations that have that data element in them. You would get a figure, how many TLDs are affected, and how many registrars are affected. You can then use that as intelligence to base your further investigations on. You might say, “That’s okay for me, and I need to take a different route.” Or you can then say, “Okay, I now need to know what domain names are involved with that.”

So, we wouldn’t jump to revealing registration data for all those domain names, but a decision needs to be made whether or not the requestor should be given the list of domain names that have this common data element in them.

We suggest that manual intervention is required at that stage, because we need to find out, let’s say, whether it’s actually a request in the context of trademark abuse, or selling fake goods, in which case the decision would likely be affirmative, that you can get the list of domain names, and then go to individual requests, versus politically-motivated research, in which case ... Even though registration data is not revealed, the list of domain names may give sufficient evidence to law enforcement in certain jurisdictions to find people that have political speech that the local government might not like. And then, you might be denied the list of domain names.

Basically, it’s a staggered approach. After that, if you get the list of domain names, then we don’t do any further reverse lookups, but then

you can make your choices as to which of the domain registrations you want to further pursue, and then go to individual request mode.

That's the overall approach that we took to reverse lookup. Again, we've done this this afternoon, so we didn't have a chance to put it in writing, but we would really like to get this group's feedback, whether you think that we're on the right track. Margie, Brian, is there anything that I forgot?

BECKY BURR: Any comments, anybody? Go ahead, Brian.

BRIAN KING: Thanks. I joined the conversation toward the later end of developing that. It seems to make sense to me. I think it's probably a pretty conservative approach to how reverse lookups might be done. I think if it were up to me, I don't think I'd have any problem standing in front of a DPA and saying, "I found this really bad stuff on this website infringing my brand, and therefore I can justify finding out every other domain name that that bad guy has, if they have one domain name." I think this is a calculated, conservative entry into the conversation around how reverse lookups could work, and so I'm happy to start there.

BECKY BURR: Can I just ask what would be the criteria for ... Are you proposing to put some suggested criteria around what you would need to get to the list of names, for example?

THOMAS RICKERT: We're suggesting manual intervention at that stage, because the revealing of the domain name list already requires a balancing test. So, the individual or the panel reviewing the request would then make a determination based on the nature of the requestor—Is it law enforcement? Is it a trademark attorney? Is it a company—and then the reason why they want to get the data. Then, you can say, “Okay, the lives of dissidents expressing their speech online is at risk, and therefore we deny, or it’s a civil claim that’s being pursued, and therefore we can approve.

BECKY BURR: So, it would go back to the purposes, right?

THOMAS RICKERT: Exactly. But typically, we associate the balancing test with revealing registration data, but we would build in an extra safeguard, even before a list of domain names has been disclosed.

BECKY BURR: And then from there, it would be a manual request for the underlying information?

THOMAS RICKERT: After you’ve given access to the list of domain names, we’re leaving the territory of reverse lookups, and it would go to individual requests.

BECKY BURR: Okay. Any other comments?

MARGIE MILAM: We know, because with the 6(1)(f) balancing test, it's going to be a greater burden, if you will, to get that information. That's why we're talking about this manual step. We don't envision this as being something that would be automatic, that would come right away. It needs some sort of intervention before even the list gets submitted.

BECKY BURR: Okay. Brian, and then Volker.

BRIAN KING: I'm glad you said that Margie, because I can foresee situations where it perhaps could be, if what we're pivoting on is the org field data, and it's certainly a legal person. If we get to a point where we can make that distinction, or if the data subject is certainly not within the EU, if we choose to make those kinds of distinctions, I could see cases where it could be automated and not manual. But I think, as a baseline, we should assume manual for now.

VOLKER GREIMANN: Yes. I had to leave earlier, because I had a pre-existing meeting. This sounds very much like what we discussed in the earlier part of the meeting. Most of this is also based on existing practices that we have

already for individual requests, without the SSAD at the moment. So, we have law enforcement coming to us and saying, “We have this email address. What domain names are associated with that, because we’re investigating a botnet,” or something. We’ll just look that up and give it to them.

Or we have requests where abusive websites are being registered by parties claiming to be someone else for fraudulent services—pursuance or provision. And then, we’ll give them the list of domain names that are registered in their name, so they can request to take down or take action against the perpetrators and shut that down. That’s nothing that’s not currently already being done, and if that can be integrated into the SSAD in some form or shape, that would probably be helpful. There is, of course, the jurisdictional issues and all kinds of other legal issues that have to be considered, but I think it’s worthwhile asking those questions.

BECKY BURR:

So, what are we looking at here? Is this the formulated question? Okay, so homework. You guys are going to update it and bring it back to us. Okay, great. If we can go back to the agenda. Yes. I’m sorry, Dan.

DAN HALLORAN:

Thanks. Just an implementation question. I’m a little confused, starting with just technically how. Maybe we’re just focusing on the legal, assuming it could work, but I’m not aware of any current functionality

that would work across ... Are you talking about across all gTLDs, or within a particular registry or particular registrar? Thanks.

THOMAS RICKERT: Ideally, it would work across TLDs. We've asked Alex. Since we're not—at least, I can't claim to be a sufficiently tech-savvy person—we wanted to check whether that's feasible with RDAP. But maybe, it's a feature that would need to be developed.

MARGIE MILAM: Alex mentioned to us that there's already work in the IETF, to allow for reverse lookups through RDAP. So, obviously, you'd have to wait until that happened before this functionality could work, but they're already building it for dot IT.

THOMAS RICKERT: Yeah. I have no clue how to technically implement it at this stage. It's just the question of whether it's even possible on a legal basis, because we should need to discuss anything that we can't implement from a legal perspective, and we look at the technical and other questions later. But reverse lookups are really a part of the current WHOIS system, or were with certain TLDs that have agreed in their registry agreement to do that. If we can build that on a multi-TLD basis ... I have no clue if that's even possible, but it's something that we could look at at a later stage if the answer is positive.

BECKY BARR: Great, thank you. So, we then have some next steps. You guys are going to come back to us with some revised language on it. We're going to move now to ... Margie raised a question about whether the right to be forgotten case had implications for us that we should be looking at. So, Margie, do you want to report back on that?

MARGIE MILAM: Yeah. I think, Becky, you had mentioned another case that you thought might also ...

BECKY BARR: There was a Facebook case, but it was actually a very different kind of case. I looked at it, and it seems unrelated.

MARGIE MILAM: Okay, good, because I looked at it as well, and it wasn't a GDPR case. It had to do with copyright issues, if I'm not mistaken, in the e-Commerce Directive.

BECKY BARR: It was interesting. It was a right to be forgotten case, but it came out in a completely different context. It was issued by the European Court of Justice in a matter of days, so that's why I had sort of, "Is that something we need to look at, too?"

MARGIE MILAM: Okay, good, because I looked at that case, and didn't think it was relevant to what we did. I haven't made any changes to this question. Do you have the latest version of ... Yeah, I can send it right now.

BECKY BURR: Okay, so the question is, in light of the recent right to be forgotten case, regarding the reach of GDPR, we have a quote from the European Court of Justice to the effect that. Numerous third non-EU countries don't recognize the right, and that it has to be ... It's not an absolute right. It has to be balanced against other fundamental rights, etc. Does this change the advice that you gave us in Phase One regarding the territorial scope, or the advice given in question one and two with respect to liability?

And then, in light of this ECJ decision, using the same assumptions identified in Q one and two, would there be less risk under GDPR to Contracted Parties if the SSAD allowed automated disclosures—I'll let you guys read this stuff—and/or ICANN served as the sole entity making disclosure decisions for the SSAD, and directly provided access to the redacted data from a processing center outside of the EU, such as from its LA headquarters. Caitlin?

CAITLIN TUBERGEN: Thank you, Becky. If I recall correctly, I think one of the action items with respect to this question was for Margie to specify what text within the Territorial Scope Memo might be implicated, based on this decision,

and similarly what advice in the liability question might be implicated by this decision.

MARGIE MILAM:

Yeah, I went and looked, and it was hard to really scope it out in a way that made sense. So, if it's too broad, I think what we're really trying to get at are answers to a and a below, and I assume Bird & Bird would touch upon the other issues if they think they need to.

BECKY BURR:

Comments or questions about this text? Are we all comfortable with this text as a question? Am I going to take silence as agreement? Volker, yes.

VOLKER GREIMANN:

I'm not very comfortable with the language of this text, or with the question or the premise behind it. I don't really agree with the assumption that the question is based on. However, I understand why this is being asked. I don't believe the question will provide an answer that is looked for by this question. Therefore, basically, we're wasting our money, because it's leading nowhere. But if it gives peace of mind, then I will just withdraw my objection.

BECKY BURR:

Any other thought? Yes.

MATTHEW CROSSMAN: I think for question a, isn't the real issue there that we don't necessarily have a dispute over the legal risk between disclosing data of EU and non-EU registrants. I thought where things landed after Phase One is that it is a technical differentiation issue for registries and registrars. And so, where we landed was registries and registrars may make that differentiation, but are not required to. So long as that is the state of the policy, I'm not sure that getting a legal answer to this question changes that determination.

And then, on b, my sense is that's already answered by question one that we've gotten from Bird & Bird, about the relationship between Contracted Parties and ICANN as the controller of SSAD. But I'm happy to be persuaded how it's different—just my two cents on those two questions.

MARGIE MILAM: I think the difference between the Phase One recommendations and this is that the Phase One recommendation's related to redaction, and what was redacted and what wasn't. This relates to can we have an automated process for disclosing redacted information, based on certain categories, and in particular in this case, geographic distinction?

So, the way I look at it is along the line of what Ashley would say in our meetings. Automate where you can, and standardize where you can't. I think we might get to a place, if we get a positive answer here, that says that if the individual's outside of the EU that there can be an automatic

disclosure of the request, assuming that there's a legal basis for the request to begin with.

BECKY BARR: I'm sorry, if which individual? The registrant or the requestor?

MARGIE MILAM: I'm sorry. The registrant.

BECKY BARR: Tatiana?

TATIANA TROPINA: Thank you. I'm actually with Volker here, honestly. I think that this question would be a bit of a waste of money and time. Unless the team is comfortable with sending it, I would say that I do not really see why and how these very general court case, and very general ruling, will affect some specificities outlined in a and b. So, it's not really clear for me, the sense of this question. I understand Margie's arguments, but I still can't make sense out of them. Thank you.

VOLKER GREIMANN: Maybe just one addition of why I think it's not leading anywhere. The right to be forgotten is a very, very European thing. It's something that has arisen out of court decision of that very same court that has now made the new ruling, and has been then changed into law that is more

generally-applicable now in the GDPR. But it's something that has no equivalent outside the EU, as far as I know of.

The right to privacy of individuals—the privacy of the data, and that that data is not to be shared willy-nilly is more of a general concept that is accepted around the world. So, some of the assumptions in the question already do not apply because of the premise that the court put to the right to be forgotten being a different one than the right in individual privacy.

The formulation of question part one is also ... It's very broad, and can be answered in many different ways, which going into would probably take too long. Just saying that of course, automated disclosure would be possible for data of registrants that are outside the EU, and not EU citizens, and no processing occurs inside the EU because the GDPR wouldn't apply in that case.

As our commenter from the European Commission also stated, in quite a succinct way, in the earlier public forum we had on the EPDP earlier today, I think much of the question asked has already been answered in the statement from the Honorable Member of the European Commission. Maybe we should just look, if we can ... Cut this down to the bare essentials in some form. Margie, what do you think?

BRIAN KING:

Volker called on Margie, but I think from reading her mind, I think we could both take out point b there. I think we can ask the question okay. I do support following up on this question. I need refamiliarize myself

with the territorial scope. I think Bird & Bird spent a lot of time talking about ICANN's Brussels establishment, and whether that alone as dispositive. So, I'd like to go back and check on this.

I'd like to also consider the Q one and Q two with respect to liability, and how that interplays into this, but I'm still catching up on how this is going to press on that. So, I do want to not throw this out. I want to really strongly consider asking it. Let me just read a little more, if we could.

BECKY BURR:

Okay, I just want to ask one question. Am I right that this case came up in the right to be forgotten that existed under the directive, not the GDPR, because it's a newspaper case isn't it? Did they apply GDPR in this case?

MARGIE MILAM:

Yeah, they applied GDPR in the case. That's why I disagree with what Volker was saying. It's Google listings, and the decision actually talks about GDPR

BECKY BURR:

Okay, Tatiana and then Volker.

TATIANA TROPINA:

Sorry. Maybe this is the difference between European lawyers and non-European lawyers. I can only second right to be forgotten and right to

individual privacy are strictly separated concepts. Although right to be forgotten made it to GDPR, as far as in Article 17, the right to be forgotten was established by the very same court. The fact that it made it to GDPR doesn't mean that it conflates with the right to privacy. They are different rights in the GDPR.

In a way, right to privacy and territorial scope would be very different from right to be forgotten, which was based in Europe, on the court ruling, and is different from the right to privacy. I understand why some team members think there is a need to ask this question. I understand, because it is a bit confusing, but I agree with Volker here that it leads us nowhere, just because for Europeans, it is clear that privacy and right to be forgotten are absolutely different. Territorial scope would be different, and they are different under the GDPR. But fine, thank you.

I think that if we somehow shorten this, and remove some of the assumptions as was suggested, maybe we will be more comfortable and find a common ground here. Thank you.

BECKY BARR:

Volker, I think you were next, and then Brian.

VOLKER GREIMANN:

Yes. Just maybe as an illustrative example, to take a different legal area that would probably be comparable in some way, I think the right to be forgotten can be compared in this context to geographic originators, and the right individual privacy can be compared to trademark rights. Trademark rights are universally recognized, and can be enforced

globally. The European concept of geographical originators has no acceptance in the US, and cannot be enforced there.

I think on those lines, the court made a decision that because the right to be forgotten is such a uniquely-European concept, there are certain limitations that come into play. In this case, they decided that in Europe, Google has to redact certain information, but in the rest of the world, that information does not have to be redacted, specifically because Google is not bound to redact it in the rest of the world for a right that only exists within Europe. It's an interesting decision, and I agree that it can lead to certain assumptions. However, I think it's very strictly limited to this particular right that is referenced. Thank you.

BRIAN KING:

I'm clearer now, after those last two comments, on what the objection is to asking the question, but when I read that case, I didn't read it as distinguishing the right to be forgotten from other rights under GDPR. Maybe it did and I missed it, but if it did and if it's clear, then maybe I think we rethink this. But I read that case as GDPR doesn't apply extra-territorially. If that was too broad a reading on my part, I'd be happy to go back and reread it. But I would like to reread it before we consider throwing it out.

BECKY BURR:

Go ahead, Volker.

VOLKER GREIMANN: If you just scroll down a bit, it's in the introduction part of the question, that it's particular to the right to be forgotten, which is particular to Europe—just the first sentence after “However.”

BECKY BURR: It goes on to say the right to the protection of personal data is not absolute, and must be considered. So, I think it's a little hard to conclude from that. What I'm hearing is at least we should table this. You're going to go back and read it, and we will consider whether, in fact ... If the territorial scoping is really narrowly-applied to the right to be forgotten, it's probably not worth pursuing, but if it has more general implications for the territorial scope of the privacy protections, it's worth pursuing. Okay, yes.

BRIAN KING: Thanks, Becky. I'd just like to add a general comment that we have redacted all domain name registration data—whether GDPR applies or not, whether territorially, whether it's a legal person or a natural person. We did that out of expediency. I want to be clear before we finish the EPDP about why we're redacting data that doesn't need to be redacted. If the answer is there's a legal gray area, then we need to know that. Or if there's not a legal gray area, and we decide that it's impractical to ask Contracted Parties to do it, although the law may not require it ...

We need to document what the answer is. That, I think, will inform our decisions later. So, if we can get clarity on whether GDPR applies to

registrants, registrars, and ICANN, all of which may be outside of the EU, then we'll need to make that decision based on that legal context.

BECKY BARR:

Okay, so I think that question was clearly answered by Bird & Bird, and the question here is does that change your analysis at any level. That's really what you guys are looking for. I think Bird & Bird was pretty clear that it does apply, under certain circumstances, to ICANN and registrars and registries who are outside of the EU.

MARGIE MILAM:

Yeah, and that's why this case was interesting, because it was actually an EU resident that couldn't even have the right to be forgotten applied outside of the EU. If Volker and Tatiana is correct, and it's clear in the case—I didn't read the case that way, but I'm not a European lawyer—I think it's worth asking Bird & Bird.

Maybe the answer's exactly what they say. It could be yes, that that was a unique case because right to be forgotten is something special. But I'd rather hear that from Bird & Bird, because it might factor into ... We've already made the choice that some of the data's going to be redacted, but it might ease the disclosure process, so that some of this could be automated. That's the reason it's important to ask.

BECKY BURR: I think that what we're going to do is we're going to go and read the case, and then come back and talk about it some more. Volker, is your hand up?

VOLKER GREIMANN: Yes, just one minor issue. Ultimately, Margie has one point, in that the GDPR does not apply if you have a registrar that's sitting in China, that's just processing Chinese data, yet the Temp Spec that is in place still allows them to redact that data. That was, I believe back in the day—maybe you can provide some more light on that, Becky—probably done for expedience. The Temp Spec was supposed to be something that was quickly implementable and executable all over the earth's entire infrastructure or environment.

However, we are not just dealing with GDPR. We're dealing with GDPR. There's a California law that's coming into effect very soon. There's a Brazilian law that's coming into effect very soon. We have Russian privacy laws. We have Chinese privacy laws. We have privacy laws in India—popping up all around the world. We have to be cognizant that these laws will also have some extra-territorial scope that protects their citizen. Therefore, just looking at the GDPR is looking at the problem in too short a scope. The perspective is lacking. I think we need to have a system in place that works all around the world.

Therefore, the question is what should that system look like? I think the decision that was ultimately taken to protect all data the same is not just one that makes our lives easier because we only have to implement one way of doing things, but also protects us against having to check all

individual privacy laws around the world, and make sure that everything always matches to the dot. If we apply the GDPR, which is arguably one of the most strict privacy laws out there, we should be covered for most others. If there's that we found out that it doesn't work too, then we might have to adapt that further. That's at least my position.

BECKY BURR:

Just to be clear, I don't think it would be fair to say that the Board adopted that provision of the Temp Spec just for expediency, and that if it had been really easy to make those distinctions, the Board would have abandoned the wider application. There is concern that I think we have to be aware of. What does it do to incentives to which registrar you use, and where you register a name, if you're treating registrants differently based on where they are located, or where their registrant, or where the registry.

I don't think the Board came down in any final place on that, but my recollection is it was those considerations that had us coming out where we were. And I don't think it was universally the Board's view, but on balance, in the situation that we were in, and the need to move promptly, that's where the Board came out. I'm not suggesting that the Board could never change that, but it wasn't just because it was easy.

Okay, so I think we all have homework in the sense that to the extent we are interested in this question, we should all go back and read the case, and come back together to discuss whether there is an argument

that it has an import outside of the right to be forgotten context, on the jurisdiction issues.

Next agenda item. The next item is whether we're prepared to sign off the on legal memo summaries. Those have been linked in the agenda. I think ICANN Legal did some reformatting and standardization, but otherwise, I don't think substantively different from the last time reviewed. Is that correct? Okay.

Yeah, why don't you just go ahead and take the camera off me though, please. It's been a long day. It's been a really long day. This is for questions one and two. Do you want to explain what you've done to these?

AMY BIVINS:

Sure. It's been a couple weeks since I've looked at these, but basically what we did was just ... For all of the memos, there was a brief summary, and we just put it in a standardized format on each of the three memos. So, you'll see we have an executive summary, and then in this ... There were various stages of summaries in each of the memos that you guys had worked on, and some of them were more detailed than others, but we just reformatted it and put it at the top of the memo, basically.

BECKY BURR:

So, do we need to review these substantively at this point, or is this really a, we've agreed to these before, and it's just final checkoff time?

MATTHEW CROSSMAN: Thank you, staff, for taking that action item to go through and try to consolidate and clean these up a bit. Really appreciate that. I think our best approach here might be to accept everything that's in here currently and create a clean draft. I think it's going to be hard for folks to review them as is, because things have been deleted and moved.

So, if maybe we could create clean drafts and set a deadline of our next call for folks to put comments in here, and then use our next call to discuss the comments, and agree up a final draft, I think that might be the best way, rather than us trying to review here on the fly and make comments. I think that's going to be a lot for us to do here. That's my suggestion, but welcome any other thoughts.

BECKY BARR: That's a good suggestion, and I would definitely welcome the clean drafts. Brian?

BRIAN KING: I'd support that, too. I'd support that pending when is our next legal team call? Let me be clear about that, because that was a pretty material fact there.

CAITLIN TUBERGEN: The next call is scheduled for Tuesday, November 19th.

BRIAN KING: Okay.

BECKY BURR: Okay, Dan?

DAN HALLORAN: Thanks to Caitlin, and Amy Bivins, I know worked on these. I think they were a little bit torn, because they didn't want to do a lot editorial rewriting on the substance of the summaries that the team members had helpfully prepared, but I have a general concern that the summaries are almost as long as the original answers from Bird & Bird in some ways. It might just be too much volume and density. They're good legal summaries, but the intended audience is the EPDP team, and if there may be a way to go back, and maybe we can do another round.

Can we boil it down for the non-legal audience in page? What were the main points that Bird & Bird said, that the EPDP team needs to know about—like an executive, executive summary. They can dig down through these summaries, or go back to the actual answers if they want to know the details of the rationale, and the cases cited, and all that. But just what are the bottom-line points that Bird & Bird made for the non-legal audience to digest. Thanks.

MATTHEW CROSSMAN: Thanks, Dan. I'd agree with that. I think we're close with the executive summaries that are at the very top. I think the rest of the document

does get into more detail, and I agree. I think that may be too much of a deep dive for some of our team members. So, I think when folks are reviewing, if there are suggestions to fine-tune and make this very top section more concise, I think those would certainly be welcome. That may be something we'd want to keep in mind as we review.

BECKY BURR:

Okay, great. That's the homework for next time. The 19th is not that far off, so if you could just flag those when they're clean documents, and we'll get on them. Next agenda item. Begin review of priority two legal questions—so, the substantive review of the priority two legal questions. Can we get those up?

CAITLIN TUBERGEN:

What the team sees on the screen right now is an inventory of all of the legal questions that have been populated into the various worksheets that we have. What I did with this document is the first questions ... I'm sorry. This is not the right document.

The beginning is the questions that were proposed in reference to SSAD. You'll note the chart shows the draft question in its original form, who proposed it, and the action item associated with that. This team hasn't begun discussing any of the Phase Two legal questions, but I thought if here was extra time, we could look and see if there were any questions that could be discussed in parallel, if the team would be willing to do that. So, in terms of the priority two items, I just put them

in alphabetical order, but if there's any suggestions as to which topics you'd like to tackle first ...

BECKY BARR: These are the very colorful and ... Oh, here we go. We get to priority two questions. How many questions in priority two are there?

CAITLIN TUBERGEN: There are a lot.

BECKY BARR: Okay, but let's just quickly go through these—just read them and see if anything jumps to mind about easy to discuss. Specific guidance about examples of serious consequences, relevant parties referenced in paragraph 21 ... These seem very specific.

CAITLIN TUBERGEN: Thanks, Becky. For some of these questions, we had asked the legal committee to go back and read the memos from Phase One, as some of these issues were related to Phase One, and see if there was any further clarification needed. I believe some of these questions might be referencing very specific content from the Phase One memos, and if we need to go back with further questions.

BECKY BARR: Keep going down. For me, it's going to be very difficult to do this without the memo next to it. I have no idea how to even think about

these questions without that analysis. I don't think we want to create a document that does that, but I think we all do need to go through this with the two documents in hand. Does anybody have any ideas for doing it in a different way? I just think you have to ... We could drop in the paragraph—the analysis on third parties in paragraph 19, but you're probably going to need more context than that anyway. How many questions are there altogether?

CAITLIN TUBERGEN:

That's a good question. I didn't count them, but I would say between all of the topics, probably over 100 questions. Not all of the questions relate specifically to Phase One memos or texts with those memos. But the questions as you see them currently are exactly how whichever group was proposing to ask put them into the document.

BECKY BARR:

Have you considered whether there's ways of grouping them together, consolidating them? I don't even know if we're comfortable with doing that, and I understand that you wouldn't have done that without ... But I'm looking at Dan and everybody to see. Is there a way of making this a more manageable task that we're comfortable with?

CAITLIN TUBERGEN:

I was originally hesitant to touch language that other people had drafted, but I can certainly attempt to try to group things that are in common together, or try to put specific references in, so that we're not

having to toggle between 14 documents to try to understand what's being asked.

BRIAN KING:

Can I ask where ... They seem like, I think, they probably came from the priority two worksheets. Caitlin, is that where they came from? Okay, so they're sprinkled across all the priority two worksheets. So, maybe in that case, then, it makes sense to just look at one of those worksheets—to look at one priority two item, and then think about what the questions are for that. Then, maybe we can look at the next priority two item. That may be a good way to do it.

BECKY BURR:

That makes sense to me. So, if you can group them by those items ...

CAITLIN TUBERGEN:

Just as an FYI, that's how they already are grouped. Sorry, scrolling too fast. The first page is all of the questions pulled directly from the Accuracy and WHOIS ARS worksheet. I just put them all together into one giant doc for my own convenience, but they're pulled directly from that sheet.

BECKY BURR:

Okay, so how many worksheets are there?

CAITLIN TUBERGEN:

I think there are seven or eight.

BECKY BURR:

And how many questions are there on accuracy? I don't know exactly how the cadence ... Obviously, I know we would like to move as quickly as possible. One way of doing it is to say for next time, everybody should read the accuracy, and we'll take it one issue at a time, but that takes us out quite a long ways. City field redaction is probably fairly simple, so could we maybe take two of them? Take the first two. It looks like you've already grouped them, so that's a reasonable amount of time. If we can all commit to be prepared to discuss the first two work papers—the questions associated with that.

If you could provide us ... This would be very helpful to me. I'm sorry I'm still getting up to speed. If you could point us to specific places in the papers for those two, sooner rather than later, then we should just commit to get through these at the next call if possible. Now, I imagine the city field redaction is a smaller undertaking than the accuracy one would be. Go ahead.

VOLKER GREIMANN:

Just one thought. If we are the reviewing the questions anyway, I think it might be helpful if the proponents of the questions consider whether the current deliberations that we had since the questions were first posed, where further reading of the documents maybe made those questions superfluous. If certain questions could maybe be retracted, which would probably also make that redrafting and revision easier. That could be undertaken prior the to the next legal call.

BECKY BARR:

Actually, that would be very useful to say. The first order of business is the proposers of the questions go through the entire list, and identify anything that's been overtaken by events and can be taken out. Then, we see what's left over, and commit to doing one, two, or three issues, depending on how many questions are leftover. So, if we could phase this homework so that we have the answers to what questions still remain of interest and relevant ... The 19th is probably two weeks out, so if we could do that in the next week, so that we all have a week to go through the first couple of issue papers and the questions associated with that.

So, if you guys go through and look at your questions that you've authored, or the groups you represent author, get that back to us within this ... I guess we're all traveling, so a week from tomorrow—something like that. It makes sense. I know that's probably aggressive, but otherwise we're going to be here for the rest of our natural lives. Mine is shorter than the rest of you guys but still, I'm hoping, long.

Then, we can regroup and talk, and just have an email check about what's a reasonable amount to be prepared to do on the 19th when we get together. I apologize. I am still getting up to speed, but we'll try to do these organizational things in advance and via email, so we're not doing so much of it in our together time. That's the plan. Yes, Berry.

CAITLIN TUBERGEN: In terms of the questions related to SSAD, the only questions that the group has agreed to were the questions submitted to legal counsel. The other questions were either dismissed as a group. Q 11 is being reworked. The right to be forgotten question is being reworked, and there were two questions put on hold because the group hadn't gotten to that topic yet. For example, one of the questions was about the purposes identified, to see if it's compatible with the model. Since the group hasn't agreed to that building block, it put that question on hold. So, in this particular document—the ugly document with all of the questions—the status is noted, and some of them are on hold.

BECKY BARR: Is there a way of moving some of them forward?

CAITLIN TUBERGEN: I'll scroll up and show you the questions that are on hold. I think there's two of them. And we can see if that might be something the group can talk about. Questions that are in green have either been completed, or the group agreed that we're no longer moving forward. The questions in blue are the questions being reworked, and then the yellow questions are on hold.

BECKY BARR: You're saying we don't have any that are ready to go?

CAITLIN TUBERGEN: Correct.

BECKY BARR: And the greens are complete?

CAITLIN TUBERGEN: The greens were either submitted in batch one, or the group agreed we're not going to move forward with them.

BECKY BARR: So, we don't actually have any on the table that in process? Okay, so we should try to move this forward.

BRIAN KING: I don't know if now's the right time to talk about it or not, but I would like to put a new one together, based on the exchange that Alan Woods and I had on automation. I think we have proximate cause question on that, that really I'm not sure what the answer is. I'd like for it to be my interpretation, but I could be dead wrong. What's the process to get a new one spun up? Do I just draft it?

BECKY BARR: I know we have another one that's come in from the SSAC, so I know there's a process for doing it.

CAITLIN TUBERGEN: Generally, anybody in the EPDP Team can submit a question, and then once a question's been submitted for legal review, the Legal Committee

agrees as a whole whether it's going to move forward, or it shouldn't be considered, or it needs to be rewritten.

BECKY BARR:

Is it possible? I think it would be very useful for all of us to have a very crisp sense of what's on our plate, how many questions we've got right now, how many we've got in process, how many can go away, what's on hold, why are they on hold? I think we need to have a more proactive work plan than just rolling along as we get to it. I understand that that may be entirely aspirational, but I feel like we're going to be way behind the EPDP, and they're going to need answers to stuff that we're not able to give them because this process is not moving ... I know they're not moving at the speed of light, but we're definitely not moving at the speed of light.

CAITLIN TUBERGEN:

My question is ... That's what this table intended to do. Maybe it would be better if I just grouped the questions by category, instead of in order of how they were numbered in the worksheet. According to this list, we have three questions on hold, one question that's being reworked, and that's Q 11 that has been in the pipeline for about three months now. And then, we haven't spoken about any of the priority two questions yet, because the team had agreed collectively that SSAD questions took priority. We wanted to get agreement on those before moving to priority two.

BECKY BURR: The ones that are on hold still appear to be on hold. Is it still the case that they should be on hold? Is it premature or whatever? Yes, Brian. Sorry, Stephanie.

STEPHANIE PERRIN: It's okay. This is kind of out of order, but going back to your discussion of a crisp summary of the legal advice we've got, I think if we're talking about presenting this material to the EPDP as a whole, it might be really useful, in addition to the question, to explain the rationale for why. What are the impacts of the answers to the question? In other words, why are we asking this question? I don't think that sort of policy issue is necessarily evident to everybody. It's probably evident to all you lawyers, but it may not be evident to everybody on the team. That would be a nice little box in there on your graph. Sorry. I realize this is a non-sequitur.

CAITLIN TUBERGEN: Thank you, Stephanie. We discussed maybe when you weren't in the room, but correct me if I'm wrong. For the questions where we did receive answers, the team has draft summaries, with executive summaries that are supposed to be in non-legalese for the whole team to understand. The current action item is for me to clean up those documents, accept everybody's suggestions, and then everyone's going to review those by our next meeting and make additional suggestions before we send them to the team. And then, I can definitely populate the summary into the document.

MATTHEW CROSSMAN: Am I wrong, Stephanie? It seemed to me you were maybe saying something a little bit different—that where we have proposed questions that have not yet gone to outside counsel, that aside from just having the questions, folks should be able to demonstrate the rationale for why this impacts our policy work. Was I hearing that right?

STEPHANIE PERRIN: That, indeed, is what I was aiming at, but I appreciate the summary of what you're going to do with the answers. Obviously, you need that as well, but I figured that would be in that summary. But yeah, why are we asking this question? I think that's kind of—because we're going to be presenting that to the team before we send it to Bird & Bird right?

CAITLIN TUBERGEN: Again, thank you for clarifying that, Matt. I'm not comfortable writing someone else's reason for submitting a question. I think the ownership for that should be whatever group has proposed the question, and that's been identified in both the worksheets and in the master summary of the questions.

BECKY BURR: Okay, so we do have a homework assignment that the representatives of the groups who are the authors of these questions are going to go through. They're going to mark which ones have been overtaken by events, no longer need to be there, and maybe we can have a one-

sentence addition of why are we asking this question? Two sentences are okay, too. Yes?

BRIAN KING:

That’s probably a good keep-you-honest exercise? You should justify why you’re asking the question, what policy principle do you think it’s going to influence—keep everybody honest.

BECKY BURR:

I have to tell you, it’s very confusing, because all of you except for Margie are sitting behind—well, even Margie—are sitting behind signs that do not have your names on them. I’m not going to call you Alex Deacon, but I’m sort of perturbed. And I promise not to call you Steve DelBianco, either.

I think that’s a good suggestion, Stephanie. We will implement that. We have some timing on this that we’ll try to do it. I know it’s a lot of work, but I just think it’ll help us move forward. Yes, Volker. I know what your name is, too.

VOLKER GREIMANN:

I have a question, a bit as an aside question, because that’s something that we’ve discussed earlier today in a different meeting. There is a certain amount of frustration that we are not seeing the entire picture of the advice that Bird & Bird has given ICANN, because ICANN Org has also asked questions of Bird & Bird that have been not released to us because they were deemed privileged information.

Correct me if I'm wrong, but my legal background tells me that it's only privileged information until the date that the beneficiary of that privilege releases that information. So, you can waive that privilege, basically. It would be helpful to see the other part of the advice that Bird & Bird has given ICANN Org, even if it's just for us to see the questions that ICANN has asked and have the answers inform our deliberations as well.

I'm not sure how useful that will be, but it was mentioned earlier today, and maybe the party within ICANN Org who makes the decision of whether to waive that privilege to our benefit could reconsider that position, and give us that information as well.

BECKY BURR:

I have no particular insight into this. Can we take this offline, and we'll come back to you and talk about it? Yes?

UNIDENTIFIED FEMALE:

My question is related to what was Volker saying. What if we submit questions and those are, in a way or another, have already been answered through Bird & Bird, through the questions submitted by ICANN Org ... At least if we don't get to have the answers to these questions, someone should look at the questions that we are putting out, and see if actually there were answers submitted before that could respond to that.

BECKY BURR: Yes, we definitely do not want to ask them to answer the same question twice. That would not make sense. I suspect if there is stuff that's not being shared, it goes to ICANN's liability in particular.

DAN HALLORAN: I think if something were to happen like that, we would want to get ... It would be a question from the Legal Committee, and we would get a version of the answer. I don't know off the top of my head if such a thing happened. We would get a version of the answer ... It would be very quick and easy, because they would be like, "Oh, we already answered this. Here's the answer," and then we give it to you guys.

So, you've gotten full questions and answers to every question you've asked. I think the idea came from you guys that we would save money, save expertise, and have coordinated answers by making sure that we were checking ... If ICANN Org had questions, and you guys had questions, it would go to that same source. I don't remember any question.

We'll take it back and confer, but to go back and rethink that, and now make public stuff that we had asked with the idea that it was privileged and confidential might be problematic. Generally, anything we're asking outside counsel that privileged and confidential. We have an exception here, where we've retained them to answer the questions that you guys are raising in this committee. Volker?

VOLKER GREIMANN: Yeah, and I fully understand that ICANN does not want to release anything that might give rise to any circumstances that would increase their liability. It's just that ICANN might have asked questions that we just simply did not think of, and where the answers could in some form or shape inform our thinking as well. I'm just throwing it out there as it might be beneficial if ICANN sees any questions in the responses for Bird & Bird that do not match questions that we've asked, and they can release without increasing liability, then that might be something that would be helpful to us as well. Might not be, but ...

DAN HALLORAN: Thanks. That's an understandable and good way to put it, and we'll take that offline and see what we can come back with.

BECKY BURR: Alright, do we have anything else on the agenda?

CAITLIN TUBERGEN: Did you want to quickly go over the questions on hold, and see if they should still be on hold?

BECKY BURR: Sure. We have a few minutes left. So, number one, "There's a need to confirm that disclosure for legitimate purposes is not incompatible with the purposes for which such data has been collected." It's on hold because Phase Two has noted that this question is premature at this time, and will be revised once the EPDP team has identified the

purposes for disclosure. Are we still in that condition? Yes. I take Beth says this should still be on hold.

Okay, “Legal guidance should be sought on the possibility of an accreditation-based disclosure system as such.” The question will be revisited once the EPDP team has agreed on an accreditation framework. I know we’re still working on that. We have some of that guidance being sought being the Strawberry Paper, but I don’t know if we think we have the accreditation model done yet in EPDP.

Okay, next. “The Business Constituency proposes split purpose two into two separate purposes, enabling ICANN to maintain the security, stability, and resiliency of the domain name system, in accordance with ICANN’s mission and bylaws, through the controlling and processing of gTLD registration data, enabling third parties to address consumer protection, cybersecurity, intellectual property, cybercrime, and DNS abuse.” Mark is on hold until the question is revisited by the GNSO Council on purpose two.

I don’t think we have completed the formal consultations between the Board and the GNSO on this, but I think the Board and the GNSO are all in agreement that purpose two needs to be reviewed as part of EPDP Phase Two, so that suggests to me this is still on hold.

BRIAN KING:

That actually suggests to me that we should ask this question and get more input for Council and the Board, if that’s a consultation—if it will be helpful in those deliberations. That, to me, says let’s get the legal

advice now, because we haven't worked it out for ourselves without it, and we've tried.

BECKY BARR:

The problem is we don't even ... Maybe, but there are a million different ways you could rephrase purpose two, so why are we picking two? It just feels a little ... I think every single one of us could sit here and come up with our version of purpose two. I know I can. Yes?

VOLKER GREIMANN:

I also think that the question below is rather broad. I also think that the question below is rather broad. What does "possible under the GDPR" even mean? Anything is possible under the GDPR as a purpose. It's just not possible to disclose data under that purpose. I think we should be very succinct, and very clear about what we mean by "is possible under the GDPR," and asking Council to improve the language is also, I think, a bit—can be very strenuous on our resources, because improve how? With what goal? I think we should be very clear in the questions that we're asking, and the below part is so broad that it invites any answer.

BECKY BARR:

Purpose two is the ICANN purpose. What it does is it creates and ICANN purpose, plus an additional third-party purpose. That's what this is getting at. Yeah, Margie?

MARGIE MILAM: Obviously, it came from us. I think we still haven't had the discussion on the purposes. That's one of the building blocks we haven't finished. I do think we probably need to wait until we have the collective discussion about it, and then whatever we land on, send it back to ... I'd love this to be our purpose, but I know that we haven't really gone in-depth enough to understand where the rest of the team is on this.

BECKY BURR: I think it's going to be a very important question once we get there, to get right, and to get legal advice on. But I don't think we're close enough yet. Okay, and there's one more? Yes, I'm sorry. It's a long day. Go ahead.

UNIDENTIFIED FEMALE: I'm looking at this purpose, and the main issue that was addressed by the letter sent was with regard ... This doesn't look that what we had, actually. It doesn't look like a purpose. Part of it is a purpose, but the other part is more like an activity and not a purpose. I think in there, the first part of the question also falls into this category.

The first part, it says, "Enable ICANN to maintain the security, stability, and resiliency of the domain name system, in accordance with ICANN's mission and bylaws." That's a purpose, full stop. We say, "through the controlling and processing of gTLD registration data," that doesn't become a purpose. That's how I see it.

The second part of the question, "enabling third parties," that looks like a purpose. Maybe, the question Volker was saying ... What does those

few lines down there say? Can legal counsel be consulted to determine if the restated purpose two is possible under GDPR? I think what is meant here is it's not really what's possible under GDPR or not. But we are saying those are purposes. So, when you read these, do you think those look like purposes?

Maybe the word "possible under GDPR" is not the right one, but I think that's the essence that we should be thinking about. We shouldn't be throwing whatever we would like to have as a purpose as a purpose, and say, "Okay, this is our purpose." We could all have different suggestion for this purpose, and different hopes, but in the end, it has to look like a purpose. If it's a purpose, it has to look like a purpose. Thank you.

BECKY BARR:

I think we're all agreeing that we're not ready to move this question forward at this point—that there's more work needed, primarily at the EPDP level. Okay, one more? That's it? Okay. Alright, so our questions on hold are still on hold? Any final comments? We do have homework, so we'll get some assignments with some timelines, and maybe we can sit down to figure out some organizing this so we can help move things along. Perfect. Thank you very much.

[END OF TRANSCRIPTION]