

The EPDP Team was tasked by the GNSO Council to address the following two questions:

- i. Whether any updates are required to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”);
- ii. What guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.

In addressing these questions, the EPDP Team started with a review of all relevant information, including (1) [the study](#) undertaken by ICANN org,¹ (2) the [legal guidance](#) provided by Bird & Bird, and (3) the substantive input provided on this topic during [the public comment forum on the addendum](#). Following the review of this information, the EPDP Team identified a number of clarifying questions, that, following review by the EPDP Team’s legal committee, were submitted to the Bird & Bird (see <https://community.icann.org/x/xQhACQ>).

As part of its approach in dealing with these two questions, the EPDP Team agreed to commence with identifying possible guidance to Registrars and/or Registries who decide to differentiate between registrations of legal and natural persons.

Background Information and EPDP Team Observations

In developing the guidance below, the EPDP Team would like to remind the Council and broader community of the following:

- A. GDPR and other data protection legislation set out requirements for protecting personal data, not non-personal data.
- B. Per EPDP Phase 1 Recommendation #6, “as soon as commercially reasonable, Registrar must provide the opportunity for the Registered Name Holder to provide its Consent to publish redacted contact information, as well as the email address, in the RDS for the sponsoring registrar”.
- C. Per the EPDP Phase 1 recommendation #17 “Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”.
- D. Distinguishing between legal and natural person data alone **may not be sufficient as the data provided by legal persons may include personal data that is protected under data protection law, such as GDPR.**

¹ As part of its Phase 1 Policy Recommendation #17, the EPDP Team recommended, “as soon as possible ICANN Org undertakes a study, for which the terms of reference are developed in consultation with the community, that considers:

- The feasibility and costs including both implementation and potential liability costs of differentiating between legal and natural persons;
- Examples of industries or other organizations that have successfully differentiated between legal and natural persons;
- Privacy risks to registered name holders of differentiating between legal and natural persons; and
- Other potential risks (if any) to registrars and registries of not differentiating.

ICANN org delivered the [study](#) to the EPDP Team in July 2020.

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E. Registrars operate different business models (Retail, Reseller, Brand Protection, Others), and one-size-fits-all or overly prescriptive guidance does not properly consider the range of registrar business models and the various process flows the different business models may require. Instead, Registrars require flexibility to implement differentiation in a manner that best suits their business model and reduces the risks associated with differentiation to an acceptable level for that particular Registrar.

F. Per Phase 2 Final Report Recommendation #9.4.4: “the EPDP Team recommends that the following types of disclosure requests, for which legal permissibility has been indicated under GDPR for full automation (in-take as well as processing of disclosure decision) MUST be automated from the time of the launch of the SSAD (...) No personal data on registration record that has been previously disclosed by the Contracted Party.”

G. Per Phase 2 Final Report Recommendation #8.7.1, if the Contracted Party receives a request from the SSAD Central Gateway Manager and the Contracted Party has determined this to be a valid request, “if, following the evaluation of the underlying data, the Contracted Party reasonably determines that disclosing the requested data elements would not result in the disclosure of personal data, the Contracted Party MUST disclose the data, unless the disclosure is prohibited under applicable law”.

Proposed Guidance

The EPDP Team would like to put forward the following guidance to assist Registrars who want to differentiate between registrations of natural and legal persons, or those of legal persons containing personal and non-personal data.

1. Differentiation between the data sets of natural and legal persons could occur at the time of registration. However, some EPDP Team members have indicated that this may not be possible or practical in all circumstances, including for certain registrar business model.
2. As part of the implementation, Registrars should consider using a type of flag in the RDDS, or their own data sets, that would identify the type of data it concerns (personal or non-personal data) as this could facilitate review of disclosure requests as well as indicating changes to the type of data in the registration data field(s).

Example scenarios

The EPDP Team has identified three different high-level scenarios for how differentiation could occur based on who is responsible and the timing of such differentiation. It should be noted that other approaches and/or a combination of these may be possible.

1. Data subject self-identification at time of data collection / registration
 - a. The Registrar requests the Registrant (data subject) at the moment of Registration data collection to include an indication of legal or natural person type. The Registrant is also requested by the Registrar to confirm that only non-personal data is provided for legal person type.

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- b. If the Registrant (data subject) has selected legal person and has provided a confirmation that the registration data does not include any personal data, the Registrar sets the registration data set to automated disclosure in response to both SSAD and public RDAP queries.
- c. If the Registrant (data subject) has selected natural person or has confirmed that personal data is confirmed present, the Registrar does not set the registration data to automated disclosure unless consent for publication has been provided by the data subject².
- d. Any substantive change to the registration data should reset the confirmation above to default (data is redacted in public RDDS).

2. Data subject self-identification after initial collection

- a. The Registrar collects Registration Data and provisionally redacts the data.
- b. Registrant (data subject) indicates legal or natural person type and whether or not the registration contains personal information after registration is completed, for example, at the time of receipt of the WDRP email for existing registrations or through a separate notice requesting self-identification³.
- c. If the data subject identifies as a legal person and confirms that the registration data does not include personal data, data is then flagged for automated disclosure in response to both SSAD and public RDAP queries.

3. Registrar determines type based on data provided

- a. The Registrar collects Registration Data and provisionally redacts the data.
- b. The Registrar uses collected data to infer legal or natural person type⁴.
- c. If legal person is inferred by the Registrar and subsequently the Registrant (data subject) confirms that no personal data is present, the Registrar sets the registration data set to automated disclosure in response to both SSAD and public RDAP queries.
- d. If the Registrar has inferred natural person or has detected personal data, registration data is not disclosed unless consent for publication has been provided by the data subject or a legitimate request is made.

In all of the above scenarios, clear communication and guidance should be provided to the registrant (data subject) concerning the possible consequences of both identifying a data set as being of a natural or a legal person, and confirming the presence of personal data or non-personal data.

Registrars may also choose to use a third party to verify that a registrant has correctly identified its data.

² Note that the data subject may not be the party executing the process but may have requested a third party to do so. In such circumstance consent may not be possible.

³ Note, the implementation of EPDP Phase 1, recommendation #12 (Organization Field) may facilitate the process of self-identification.

⁴ Some have noted that there may be risks for the Registrar to infer a differentiation without involvement of the Registrant (data subject).

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The EPDP Team recognizes that in all of the above scenarios, there is the possibility of misidentification, which may result in the inadvertent disclosure of personal data. However, the EPDP Team recommends that Contracted Parties who choose to differentiate based on person type SHOULD follow the guidance above and clearly document all data processing steps. It is not the role or responsibility of the EPDP Team to assess the legal risks, as that responsibility ultimately belongs to the data controller.

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Page 2: [3] Commented [6] Owen Smigelski 3/26/21 10:05:00 PM

This mischaracterizes Recommendation 8.7.1 and the RrSG does not support its inclusion.

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Staff support team: Updated with exact language of the recommendation

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the provided guidance focuses on differentiation only for the purpose of disclosure. The GDPR differentiates between legal persons and natural persons and thus making this distinction makes sense regardless of the disclosure or publishing of the data which will depend on whether the data includes personal information or not. For that we need two flags one for the registrant type (natural/legal/unidentified) and another for the data type (includes PI/does not include PI)

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Hadia, could you perhaps provide some context as to why you believe the differentiation 'makes sense' outside of disclosure. Specifically, why would such a differentiation, in the context of the temp spec, be considered necessary in a manner other than in the context of disclosure?

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There is no risk in non-disclosure of non-personal information.

19. **Page 2: [19] Commented [13R12]** Brian K 3/25/21 2:06:00 PM
Disagree. There is certainly risk involved in concealing data without a basis for doing so. There is also a detriment to parties who need to process the data, including to protect the registrant.

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I don't think we'd agree with this sentence. Why couldn't the registrant self-identify at the time of registration?

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Need a better word than "disclosure" for the act of returning unredacted data in response to a query

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	Note that data subject may not be the party executing the process on their behalf - consent by third party impossible.		
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This option is not acceptable to NCSG. We want the RNH to be in control of how they are designated. I cannot see any justification for allowing a second party to make that determination for them, given it's consequences for data publication.

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This option is not acceptable to NCSG. We want the RNH to be in control of how they are designated. I cannot see any justification for allowing a second party to make that determination for them, given it's consequences for data publication.

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zz. Page 3: [61] Commented [33] Alan Woods 3/25/21 2:04:00 PM

Just want to re-flag the issue of obtaining third party consent as per Bird & Bird Memo on consent. d) does not take this properly into account.

Page 3: [62] Commented [MOU34] Microsoft Office User 3/27/21 8:28:00 AM

Staff support team: Removed reference to SSAD as a legitimate request directed to a registrar could also result in disclosure.

Page 3: [63] Commented [35] Owen Smigelski 3/26/21 10:08:00 PM

Suggest deletion: unrealistic, except for maybe corporate registrars

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Page 3: [66] Commented [36] Milton Mueller 3/23/21 11:47:00 PM

How can you communicate "guidance" to a registrant if the registrar is the one determining the person type by looking at records on its own without any involvement of the RNH?

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