17 November 2022

GNSO Council decision on Whois Disclosure System Design Paper

To: ICANN Board

Dear Tripti,

On behalf of the GNSO Council, I would hereby like to transmit the outcome of the Council's consideration of the EPDP Phase 2 small team recommendations related to the Whois Disclosure System Design Paper.

The Council unanimously accepted the addendum prepared by the small team and as a result is supportive of the request that the ICANN Board proceeds with the implementation of the Whois Disclosure System, provided that the updates identified under #1 in the addendum are made. Through its engagement with ICANN org, the small team indicated that it is possible to add these updates, recognizing that some additional time for development and additional resources may be needed.

Furthermore, the Council confirms to the ICANN Board that pending the implementation and subsequent running of the Whois Disclosure System for a period of up to two (2) years, the SSAD recommendations should remain paused for consideration by the ICANN Board, unless the data resulting from the implementation of the Whois Disclosure System would allow / warrant a decision at an earlier stage.

The Council does expect that before the launch of the system, the name of the system will be modified as it has been pointed out by a number of people that "Whois disclosure system" is not accurate and potentially misleading. In addition, the addendum provides a number of other topics for further discussion that, while not considered gating issues, could be implemented to create a more usable system. It was also emphasized that ICANN org should take a light touch on the system's terms and conditions to promote participation rather than discouraging requestors and registrars from signing up.

As also outlined in the addendum, the GNSO Council, GNSO Stakeholder Groups, Constituencies as well as others with an interest in the Whois Disclosure System, including ICANN org and the ICANN Board, all have a responsibility in ensuring participation in the Whois Disclosure System through development of a robust system, communication, promotion and information sharing. The Council is committed to continue its support for and engagement in this effort, with the assistance of the EPDP Phase 2 small team.

Although this letter highlights only a couple of the elements of the addendum, the Council does expect the ICANN Board, as well as ICANN org, to take the whole addendum into account as you consider how to proceed.

We look forward to continuing our engagement with the ICANN Board as well as ICANN org on this topic and hope to receive your feedback on expected next steps and timing soon.

Kindly,

Sebastien Ducos
GNSO Chair

EPDP Phase 2 Small Team – Addendum to Preliminary Report
Final version - 7 November 2022

Background

In April 2022, the EPDP Phase 2 small team delivered its [Preliminary Report](#) to the GNSO Council. Upon the recommendation of the small team, the GNSO Council [requested](#) on 27 April 2022 that the ICANN Board "direct ICANN org to proceed with further developing the SSAD Light Design". As also outlined by the Council, it is the expectation that data and experience resulting from implementing SSAD Light will help inform how to proceed with the SSAD recommendations. This could result in: 1) adoption of the SSAD recommendations, or part thereof by the ICANN Board, 2) modification of the SSAD recommendations by the GNSO Council, or; 3) a determination that adoption of the SSAD recommendations is not in the best interest of the ICANN community by the ICANN Board.

Following the Board's [direction](#) to ICANN org to proceed with the development of the WHOIS Disclosure System design paper (previously referred to as SSAD Light), the ICANN org team provided a status update to the small team on two different occasions, namely [8 August](#) and [6 September](#). This was followed by the publication of the [Whois Disclosure System design paper](#) on 13 September.

The ICANN org team [presented](#) the design paper to the small team followed by Q & A during the EPDP Phase 2 small team [session](#) at ICANN75. Following that, the EPDP Phase 2 continued its deliberations to assess the design paper in the context of the recommendations in the preliminary report in order to provide the Council with its feedback on how to proceed.

Review and analysis of the Whois Disclosure System (WDS) Design

Through its review and analysis, as well as continued consultations with the ICANN org team, the EPDP Phase 2 small team has developed the following responses to key questions, namely:

1. *Does the Whois Disclosure System Design align with the expectations as set out in the small team's preliminary report? If not, why not and what would need to be modified for these expectations to be met?*

The EPDP Phase 2 small team confirms that the proposed design aligns with the expectations as set out in the small team's preliminary report, provided that the following updates are made:

- Requests for data related to domain name registrations that are under the management of non-participating registrars must be logged. The small team understands that this logging would be limited to the name of the non-participating registrar for which data was intended to be requested. However, the small team also

requests that the date of the request and the domain name[1] be logged. Note, ICANN org confirmed that "the WHOIS Disclosure System could log requests that are made for data pertaining to domain name registrations that are under the management of non-participating registrars. A report could be created on the number of requests for domains from non-participating registrars and which registrars those domains are registered with, as part of the overall reports issued on the use of the WHOIS Disclosure System". In addition, ICANN org confirmed that "the WHOIS Disclosure System could collect and retain responses to "pick list" questions submitted by requestors for domains managed by non-participating registrars. The system could also collect free-text responses to the "domain name subject to the request" and "other applicable law (non-GDPR) legal basis" questions. The system should not collect any other free-text answers or attachments"[2].

● Non-participating registrars who did not affirmatively opt-out of the Whois Disclosure System should be notified of disclosure requests that are made for domain name registrations under their management with instructions for how to opt-in for the Whois Disclosure System to be able to access such requests in the future. The small team understands that for reasons of security and privacy such notifications cannot include any further information in relation to the disclosure request. Furthermore, the number of notifications to non-participating registrars should also be limited, with an ability to opt-out of these notifications if the non-participating registrar is not interested in receiving these.

● Requestors must be offered the option to fill out the data request form and download it for the purpose of sending to non-participating registrars. The small team understands that sending this data request form to non-participating registrars would happen outside of the system and any information pertaining to further steps would not be logged or tracked by this system.

● Requestors must be able to indicate if they consent to forwarding the information provided in the data request form to participating registrars who in turn should also be able to indicate whether they are willing to receive this information via email. ICANN org confirmed that "Request data could be transmitted to participating registrars via encrypted email, provided an adequate encryption key management process is designed. Adding this feature to the WHOIS Disclosure System is estimated to add an additional 2 months of development time and associated staff costs"[3]. Furthermore, ICANN org confirmed that it "does not anticipate a need to require additional indemnification and liability terms specifically related to sending request data to registrars via encrypted email"[4].

Note that in response to questions from the small team in relation to these updates, ICANN org confirmed what it considers feasible (see https://mm.icann.org/pipermail/gnso-epdpp2-smallteam/2022-October/000223.html as well as https://mm.icann.org/pipermail/gnso-epdpp2-smallteam/2022-October/000223.html). It was also confirmed that it is possible for

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[1] If there are privacy concerns in relation to logging the domain name, a hashed domain name may also be sufficient to identify if multiple disclosure requests are received for the same domain name registration.
[2] See https://mm.icann.org/pipermail/gnso-epdpp2-smallteam/attachments/20221030/224840c0/Assessment_RequestedEnhancementstoProposedWHOISDisclosureSystem-0001.pdf
[3] Idem
[4] See https://mm.icann.org/pipermail/gnso-epdpp2-smallteam/2022-November/000255.html

registrars to opt-out of the service after opting-in, but it would result in less data being collected.

The EPDP Phase 2 small team also considered a number of other topics that the small team does not consider gating factors but for which it would be interested to have further discussions with ICANN org during the implementation phase to consider if/how some of these aspects could be considered to be added in the current implementation of WDS or a future version such as:

- Application Programming Interface (API)
- Confidentiality options for Law Enforcement requests
- Billing mechanism
- Review of WDS terms and conditions for requestors as well as participating registrars
- Confirmation that requests submitted to a registrar via WDS fall under the Temporary Specification requirement for a registrar to provide "reasonable access" and/or confirmation of the interplay with the gTLD Registration Data Consensus Policy (depending on which of the two will be in force at the time the Whois Disclosure System will become operational)
- Ability for a requestor to indicate if they do not agree with the information logged by the registrar in relation to whether a response was provided and/or the timeframe in which it was provided (note, there is no expectation that there would be any kind of arbitration, but this is about providing the ability for the requestor to indicate if they do not agree with the information logged by the registrar so it can be included in the general reporting on WDS)
- Naming of the system – It has been pointed out by a number of people that "Whois disclosure system" is not accurate and potentially misleading. A number of alternative suggestions have been put forward to better reflect what the system is about such as DNS Data Request System, Whois Data Request System, Registration Data Request System.

The small team does understand that some of these aspects may go beyond the purpose of the Whois Disclosure System at this point and would likely add additional cost and complexity. The small team does want to emphasize that the unavailability of certain features in the Whois Disclosure System will NOT be a determining factor for what may or may not be available in a future system or modified version, but this determination will be informed by the experience with WDS. The small team would like to encourage an expedient and agile decision / design / implementation approach should there be agreement to move forward with some of these additional features.

The small team also noted that during the implementation as well as the actual running of WDS, further work could already be undertaken by the GNSO Council / small team to further evaluate SSAD recommendations or parts thereof, that have not been included in WDS to determine their necessity in any future evolution of WDS and/or SSAD.

2. ***Will implementation of Whois Disclosure System deliver the information to help inform Council – Board consultations on cost-benefit of SSAD recommendations?***
If yes, which information will be essential to determine how to proceed with the SSAD recommendations?

If no, what information is missing and how could this information be obtained?

The EPDP Phase 2 small team is of the view that the Whois Disclosure System will only be able to deliver the information necessary to help inform the Council – Board consultations on the cost-benefit of the SSAD recommendations if there is a sufficient level of participation, both from requestors as well as registrars. As such, efforts need to be made to inform both requestors and registrars of the objective and benefits of WDS to encourage participation. ICANN org is requested to make available promotional materials that can be used by the GNSO community as well as others to encourage participation. The small team would in particular like to request the Contracted Party House as well as the groups representing likely requestors (e.g. BC, IPC, GAC, SSAC) to encourage their members to participate in the WDS.

Alternatively, the Council could also explore whether there would be support for requiring the participation of registrars in WDS, which could be mandated as a result of a policy recommendation to this end. This could be further explored in parallel to the development and implementation of WDS.

The small team would expect that the following information would be publicly reported on a monthly basis:

- Number of registrars participating (total):
- Number of new participating registrars (current reporting period):
- Number of requestors (total):
- Number of new requestors (current reporting period):
- Number of disclosure requests (total and current reporting period):
- Number of times the data request form for non-participating registrars has been used:
- Number of disclosure requests by priority (total and current reporting period):
- Number of disclosure requests by requestor type (LEA, IP, Cybersecurity, etc) (total and current reporting period):
- Number of disclosure requests broken out by participating and non-participating registrars (total and current reporting period):
- Number of open disclosure requests (total):
- Number of closed disclosure requests (total and current reporting period):
- Number of closed disclosure requests by type (approved, partial approval, rejected, etc), (total and current reporting period):
- Average disclosure request response time (total and current reporting period, broken out by approved, partial approved and denied responses)
- Response time distribution (mean, median, histogram by timeframe), including time from the request until the request is addressed, differentiating between approved and denied responses.

To facilitate the evaluation of the WHOIS Disclosure System, the small team will continue to work with ICANN Org to ensure that the necessary data is available to ensure the proper

evaluation of the Whois Disclosure System, taking into account legal limitations that may exist to share certain information.

3. Based on the responses to 1 & 2, does the small team recommend to the GNSO Council that it requests the Board to proceed with the implementation of the Whois Disclosure System?
If yes:
What are the small team's expectations with regards to the timing of implementation?
What role, if any, is the Council / small team expected to play during implementation?
How and by whom should review of the data obtained be conducted? Should this be done jointly with the ICANN Board?
Does the original timing of check-points still apply?
How can the GNSO Council/small team contribute to the success of the Whois Disclosure System?
If no:
What is the rationale for not proceeding?
What should the Council recommend to the Board in relation to the next step on the consideration of the SSAD recommendations?

With the exception of one member of the small team[5], all other small team members recommend to the GNSO Council that it requests the Board proceeds with the implementation of the Whois Disclosure System, provided that the updates identified under #1 are made. Through its engagement with ICANN org, the small team understands that it is possible to add these updates, recognizing that some additional time for development and additional resources may be needed. The small team considers these updates necessary to ensure sufficient participation by requestors as well as registrars in order for the Whois Disclosure System to provide meaningful data.

The small team appreciates the window of opportunity that currently exists to proceed with the implementation of the Whois Disclosure System and encourages the Council, Board and ICANN org to proceed as quickly as possible with their decision-making process so that the impact on other projects, especially SubPro, can be minimized.

The small team would like to continue its regular engagement with the ICANN org team during the implementation phase so it can serve as a sound board, as necessary, as well as to continue the conversation on some of the additional aspects that were identified under #1 as benefitting from further conversation (but which were not considered gating factors).

The small team recommends to the Council that the small team is involved in the review of the data that is expected to be provided on a monthly basis (see #2), together with ICANN org and/or ICANN Board representatives. Any conclusions and/or recommendations stemming from this review, would be provided to the GNSO Council for a decision on further steps. Although the reports are expected to be provided on a monthly basis, in line with the preliminary report, the small team anticipates that any conclusions and/or recommendations in relation to the SSAD recommendations would only be developed after

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[5] Steve Crocker (SSAC representative) is of the view that the project is flawed from the outset and should not proceed.

6-month intervals, up to a maximum of two years, at which point a decision has to be taken on how to proceed (if a decision has not been made before that time). To be clear, although further enhancements may be considered by ICANN org based on the actual experience with the Whois Disclosure System once it is operational, it is not the intent or objective of the 6-month intervals to focus on technical enhancements for the Whois Disclosure System.

The small team would like to remind the GNSO Council, GNSO Stakeholder Groups, Constituencies as well as others with an interest in the Whois Disclosure System that all involved, including ICANN org and the ICANN Board, will have a responsibility in ensuring participation in the Whois Disclosure System through communication, promotion and information sharing. During the implementation phase, work should continue on how to promote the Whois Disclosure System to ensure participation from both requestors as well as registrars because without their participation, the system will not provide the data that is necessary to make a determination about how to proceed with the SSAD recommendations.

The small team recommends that the Council confirms to the ICANN Board that pending the implementation and subsequent running of the Whois Disclosure System for a period of up to 2 years, the SSAD recommendations remain paused for consideration by the ICANN Board, unless the data resulting from the implementation of the Whois Disclosure System would allow / warrant a decision at an earlier stage.

As noted in the small team's preliminary report,

> "As part of the checkpoint review, it would also be discussed what happens with the SSAD proof of concept once the 2-year period ends[6]. The small team noted that it would not be prudent to decide this at the outset as it will depend on the take up and use of the SSAD proof of concept. However, while decisions are taken and/or until a replacement solution is agreed, the small team can envision maintaining the proof of concept tool online, in existing or modified format, if it is proven useful enough, noting that there will be cost implications associated with such a decision. The small team does expect that before the 2-year period ends clarity is provided on the expected next steps in relation to the EPDP Phase 2 SSAD Recommendations which could include:
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> 1) Approval of EPDP Phase 2 SSAD recommendations (in current or modified format) which would replace the SSAD proof of concept;
> 2) Determination that adoption of EPDP Phase 2 SSAD recommendations is not in the best interest of the ICANN community or ICANN and termination of SSAD proof of concept;
> 3) Modification of EPDP Phase 2 SSAD recommendations by GNSO Council informed by SSAD proof of concept findings;
> 4) A variation and/or combination of the above scenarios."

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[6] This period may be reduced, should the proof of concept meet its goals early.