

**Internet Commerce Association
1155 F Street, NW
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April 10, 2017

By E-Mail to comments-ccwg-acct-draft-recs-21feb17-en@icann.org

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536

Re: Recommendations to Improve ICANN's Transparency

Dear ICANN:

I am writing on behalf of the members of the Internet Commerce Association (ICA). ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers. ICA is a longstanding member of the GNSO's Business Constituency.

This letter addresses the "CCWG-Accountability Work Stream 2 - Draft Recommendations to improve ICANN's Transparency" [published](#) for public comment on February 21, 2017.

Executive Summary

The ICA has long supported greater transparency of ICANN operations and

decision-making. The multiple recommendations contained in the draft report of the work stream 2 accountability subgroup focused on ICANN transparency will, if adopted and properly implemented, result in much needed and long overdue improvements in such transparency.

We commend the chairs and volunteer members of the subgroup for the delivery of such a comprehensive and well-considered document within an expedited timeframe. Once this comment period is concluded we urge the subgroup to resume its activities, fully consider all comments, and deliver a final set of recommendations as quickly as possible so that the transparency recommendations can be adopted and implemented at the earliest feasible time.

Improving ICANN's Documentary Information Disclosure Policy (DIDP)

Accountability requires transparency. No organization can be held accountable if it is permitted to impose excessive constraints on the release of internal documents and the vital information they contain to affected stakeholders. Our experience in attempting to use the current DIDP is that it fails to provide an adequate response to reasonable information requests in a timely manner. That is because the broad exceptions contained in it, combined with the excessive interpretative discretion allocated to ICANN staff, facilitates the withholding of important information to requesting parties simply because its disclosure might embarrass ICANN or raise further questions about its decisions and actions.

We therefore enthusiastically support the great majority of the recommendations made with the aim of converting the DIDP into a far more robust and useful procedure.

From our viewpoint, some of the most important of these are:

- Deletion of the caveat that the DIDP applies only to ICANN's "operational activities".
- Expansion of the DIDP to include clearly defined procedures for lodging information requests.
- Clear guidelines on how ICANN should process DIDP requests.
- A specification that requests should receive a response "as soon as reasonably possible" and that timeline extensions should be capped at no more than an additional 30 days.
- The exception for information "that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone" should be amended so that it only applies to information whose disclosure would cause actual harm to the security and stability of the Internet.

- The exception for “drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication” should be amended to clarify that this information should be disclosed unless it would be harmful to an ongoing deliberative or decision-making process.
- The exception for information requests which are “not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual” should be amended so that either the Ombudsman or the Complaints Officer automatically reviews any decision to use this highly subjective and easily abused exception.
- The permanent deletion of this enormous and unacceptably loophole-creating sentence contained in the present DIDP: “Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.”
- The recommendation that ICANN should consider adopting open contracting practices, whereby all contracts above \$5,000 are automatically disclosed, and non-disclosure clauses are limited in their application to the legitimate exceptions found in the DIDP. We would strengthen this recommendation by requiring that in all instances involving contracts with parties other than registries and registrars, where a contract has been tendered on a sole source basis without competitive bidding, ICANN should be required to provide an explanation of why competitive bidding was not utilized at the time it discloses the contract terms.
- The inclusion of a severability clause, whereby in cases where information under request includes material subject to an exception to disclosure, the remaining information should still be disclosed with only the sensitive aspects severed or redacted.
- The requirement that where an information request is refused, or the information is provided in a redacted or severed form, the DIDP should require that ICANN’s response include the rationale underlying its decision, by reference to the specific exception(s) invoked, as well as provide information about the appeal processes that are available to the refused requester.

The one area in which we believe other stakeholders have raised legitimate concerns relates to Recommendation 11, which states, “The exceptions for “trade secrets and commercial and financial information not publicly disclosed by ICANN” and for “confidential business information and/or internal policies and procedures” should be replaced with an exception for “material whose disclosure would materially harm ICANN’s financial or business interests or the commercial interests of its stake-holders who have those interests”.

We have noted the [Registries Stakeholder Group \(RySG\) Statement](#) in which they state their opposition to “any disclosure policy that would require ICANN to

disclose any information in any form that it holds under a contractual duty of non-disclosure unless, and to the extent, that such information must clearly be disclosed under applicable law and unless, and to the extent, expressly permitted by the party(ies) to whom ICANN owes such a duty of nondisclosure”.

The RySG goes on to recommend the addition of text to guarantee that any *existing contract* must be honored in accordance with its terms irrespective of the new DIDP to cover information disclosed to ICANN under protection of a non-disclosure agreement; and that any new contract containing a nondisclosure agreement should have prominent ICANN boilerplate text informing the contracting party that information disclosed to ICANN may be subject to public-interest disclosure through the DIDP. These seem to be reasonable requests to assure that the non-disclosure provisions of existing contracts are honored, and that contracting parties have conspicuous notice of potential disclosure of the provisions of future contracts.

Likewise, the comment [filed](#) by the Business Constituency (BC), of which we are a proud member, also questions whether the WG has made the proper case for removing the clauses referenced in Recommendation 11. The BC notes that when businesses are required to share trade secrets or other confidential commercial information in a contractual context, they should have certainty that that information will be protected from arbitrary release.

Therefore, notwithstanding our overall support for ICANN’s adoption of open contracting for all future agreements exceeding \$5,000 in value, we support continued adherence to the nondisclosure provisions of existing contracts that ICANN has entered into in order to satisfy the reasonable expectations of their counterparties.

Documenting and Reporting on ICANN’s Interactions with Governments

A key goal of the IANA Transition was to foster the continuation of ICANN’s multistakeholder model in which governments play only an advisory and not a controlling role. Now that the U.S. government has terminated its last unique relationship with ICANN it is even more important that there be clear transparency requirements regarding ICANN’s interactions with all governments.

We therefore enthusiastically endorse the recommendations that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly basis:

- All expenditures on an itemized basis by ICANN for both outside contractors and internal personnel devoted to “political activities” intended to influence or inform a government directly or indirectly on a matter of public policy, both in the U.S. and abroad.

- All identities of those engaging in such activities, both internal and external, on behalf of ICANN.
- The type(s) of engagement (e.g., newspaper op-eds, letters, advertisements, speeches, emails, phone calls, in-person meetings, etc.) used in support of such activities.
- To whom the engagement and supporting materials are targeted.
- The topic(s) discussed, with relative specificity.

Transparency of Board Deliberations

We cannot help but recall that the original steps engaged in by ICANN senior staff to facilitate the IANA Transition were undertaken pursuant to a Board Resolution adopted in secret and only revealed to the community months later. While the Board has more recently undertaken actions to substantially increase the transparency of its meetings and decision-making process, permanent safeguards should nonetheless be adopted to ensure the future transparency of Board activities and the possibility of intentionally secret decision-making.

We therefore enthusiastically endorse the recommendations that:

- The DIDP exception for deliberative processes should not apply to any factual information, technical reports or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.
- The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception; and that decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.
- Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time.

Improving ICANN's Anonymous Hotline (Whistleblower Protection)

An organization's employees are often best positioned to know of behavior that may violate local laws and conflict with organizational standards. But even the most ethical employees will only come forward with such information if they are assured of strong whistleblower protections against potential reprisals by superiors.

We therefore enthusiastically support the proposed strengthening improvements of ICANN's Hotline Policy and Procedures. In particular, we applaud the proposed broadening of incidents meriting reports beyond "serious issues", to encourage the report of all issues and concerns in potential violation of applicable law or organization standards.

We also agree that ICANN needs to more effectively address potential fear of retaliation against the reporter by stating unequivocally that alleged retaliation will be investigated with the same level of rigor as alleged wrongdoing. ICANN should also guarantee a meaningful remedy for reporters who experience retaliation, as well as clarify that the good faith reporting of suspected wrong-doing will be broadly protected from liability.

Conclusion

We appreciate the opportunity to provide these comments on the CCWG-Accountability Work Stream 2 draft recommendations to improve ICANN's transparency. We hope they are helpful to the further consideration of this matter by ICANN and its community, and to the Working Group as it prepares its Final Recommendations.

Sincerely,

Philip S. Corwin

Counsel, Internet Commerce Association