

ICANN Board input on WS2 recommendations

During ICANN61, members of the Board met with the CCWG-Accountability Work Stream 2 Chairs and Rapporteurs to discuss potential areas within the WS2 recommendations where Board comments had not been addressed, but where the initial sense of the Board is that there may be concerns that need to be addressed. This includes concerns that the recommendations may be against the public interest. The three key areas of conversation were recommendations relating to:

1. The Ombudsman Advisory Council (from the Ombuds Subgroup)
2. Open Contracting (from the Transparency Subgroup)
3. Government Engagement recommendations (from the Transparency Subgroup)

There is a fourth area that has not yet been raised, which also arises from the Transparency Subgroup, on the Transparency of Board Deliberations.

During the meeting, the participants from the ICANN Board and org agreed to send a note to the Co-Chairs regarding these three areas of contention, in order to see whether these concerns could be adequately addressed through implementation notes attached to a final WS2 Report. In the event that these issues cannot be resolved and the Board considers that it cannot approve parts of the consensus-based WS2 recommendations, the Board would have to invoke the special CCWG-Accountability rejection process at the appropriate time.

Ombudsman Advisory Council

Recommendation 8 of the Ombuds portion of the Report states:

ICANN should establish an Ombuds Advisory Panel:

- Made up of 5 members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least 2 members with ombudsman experience and the remainder with extensive ICANN experience
- The Panel should be responsible for:
 - Contribute to the selection process for new Ombuds which would meet the various requirements of the Board and community including diversity.
 - Recommending candidates for the position of Ombuds to the Board.
 - Recommending terms of probation to the Board for new Ombuds.
 - Recommend to the Board firing an Ombuds for cause.
 - Contribute to an external evaluation of the IOO every 5 years.
 - Making recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11.

- The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.
- Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.¹

This recommendation is unchanged from the version that was posted for public comments. In response to the initial recommendation, the ICANN Board provided feedback on the Advisory Panel notion, and included a list of nine questions that do not appear to have been considered or addressed in the final report. These questions centered around ambiguity of the role of the Advisory Panel vis-à-vis the Board; conflict of interest considerations for the Advisory Panel; how the Advisory Panel responsibilities might conflict with the Bylaws as written; and expertise of the Advisory Council to do the work contemplated. The Board comments are available at <https://mm.icann.org/pipermail/comments-iao-recs-10nov17/attachments/20180116/8837990b/ICANNBoardComments-WS2Ombuds-0001.pdf>.

The recommendation as maintained in the Ombuds portion of the report poses concerns for the Board that could trigger the Board's obligations under the Bylaws to reject this item.

The WS2 recommendations must uphold all of the same criteria that were applied against the WS1 recommendations, including that they must "support and enhance the multistakeholder model". Bylaws, Section 27.1(c)(1)(A). The Advisory Council as contemplated, with three members with "extensive ICANN experience," risks the Ombuds office remaining a mechanism available to support the multistakeholder model as a whole. Just as the Ombuds subgroup was concerned about the contractual power of the Board over the Ombuds, the Board is concerned that giving a group of people – a majority of whom are defined to have "extensive ICANN experience" – the power to recommend candidates and recommend termination, results in unchecked (and possibly undisclosed conflicts in) influence over the Ombuds office. The members of the Advisory Committee are not anticipated to have any of the fiduciary responsibilities of the Board, and are not bound to act in support of any broader goals than their own interest or the interest of a group with which they are (or have been) affiliated.

During the conversation at ICANN61, representatives from the CCWG-Acct suggested that the Board's push for clarity on the independence of the oversight functions for the Ombuds Office is inappropriate, and that the Board should not raise objections to this tool of bringing the Ombuds closer to the community. To the

¹ The Board acknowledges that this recommendation stems from the recommendations of the external evaluators. If this recommendation would have been provided directly to the Board by the evaluators, the Board would have raised the same concerns in consideration of that report.

contrary, however, considering how to maintain the Bylaws-mandated independence of the Ombuds is exactly the type of consideration the Board should raise. One of the Board's primary concerns is how one would ensure independence if a majority of those on an Advisory Committee have "extensive ICANN experience".

Independence, as set out at Section 5.2 of the Bylaws, does not just mean independence from ICANN org, or the ICANN Board. It means independent of all parts of ICANN, so that all involved in an Ombuds' independent internal evaluation have faith in the legitimacy of that independence. An Ombuds who acts out of concern of how and when an Advisory Council (comprised of a majority of ICANN insiders, and without any broader fiduciary duties) will recommend her termination does not support independence, does not support the multistakeholder model, and raises issues of whether this recommendation is in the global public interest.²

The Board encourages the CCWG-Acct to review the questions raised in its November 2017 feedback to the Ombuds subgroup, in line with the more explicit issues raised here, to see if any implementation notes can be suggested that would address these concerns and bring this recommendation more in line with the global public interest and the criteria against which WS2 recommendations are to be measured.

Open Contracting

The Transparency subgroup, at Recommendation 16 of its recommendations on Improving ICANN's Documentary Information Disclosure Policy (DIDP), states: "Wherever possible, ICANN's contracts should either be proactively disclosed or available for request under the DIDP." This is an iteration of the Recommendation 16 that was posted for public comment in February 2017, stating "ICANN should consider adopting open contracting, 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."

ICANN organization, on 21 February 2017, submitted inputs on this Recommendation 16, stating: "Recommendation 16, suggesting open contracting (or the automatic disclosure of all contracts over US\$5,000 or \$10,000, and modification of non-disclosure agreements away from industry standards)³ represents a shift of ICANN's contracting process, and could have significant impact on ICANN's ability to serve its mission within appropriate budgetary controls and in ways that might be impractical."

² How an Advisory Panel recommendation for termination would interplay with the obligations of Bylaws Section 5.1(c) and the $\frac{3}{4}$ vote of the Board for termination is an example of a separate question that remains unanswered. While this could be solved during implementation, further guidance towards implementation would be helpful.

³ The concerns previously raised regarding non-disclosure agreements appear to have been resolved.

The concerns raised over a year ago on the open contracting provision persist with the current version. This recommendation is still based on a presumption that governmental open contracting standards as “found in most progressive democracies” are appropriate to bring into ICANN, which is a private corporation that does not enjoy any privileges or immunities that apply to governments. ICANN has asked, multiple times for information, examples or studies on the use of open contracting in private (non-state) companies. No such examples have been provided. Instead, in order to provide further support for imposing open contracting standards onto ICANN, the drafters of this portion of the report, added citations to an article discussing the benefits of open contracting practices to combat corruption within the Ukrainian government, as well as one on a Paraguayan system built to counter “long-standing problems faced by the government, like graft, overpricing, nepotism and influence-peddling.” No information or studies have been provided to support the application of open contracting standards to private companies.⁴

The narrative provided in the report gives additional information on how the drafters see Recommendation 16 being implemented.⁵ The narrative discusses that ICANN should use a threshold (of \$5,000-10,000) for proactive publication, as well as releasing details about bids received during procurement processes (which is broader than the recommendation). The narrative references the positive impacts found in the two “case studies” (the articles provided on Ukraine and Paraguay) as reasons to support ICANN’s adoption of governmental open contracting standards. Those are both based on situations where there were allegations or documentation of governmental corruption and graft, and the impacts of implementing open contracting programs in reducing corruption and graft and in giving equal access to procurement information to bidders. Because corruption was reduced and bidding

⁴ During the ICANN61 discussion, the suggestion was raised that because an open contracting recommendation was made without study or background on how to make it appropriate to ICANN, the only proper way for ICANN to document that open contracting could pose concerns for ICANN would be to provide documentation and studies. Further, within that discussion there were also suggestions that those making recommendations for accountability and transparency improvements within ICANN had no obligation to consider how those recommendations might impact the global public interest, as that is solely the job of the Board. We do not agree with either of these assertions, as they suggest that those making recommendations have no accountability for either demonstrating the value of those recommendations to the ICANN ecosystem, or considering the impacts that might result. That noted, we do not think that this open contracting recommendation was offered with any improper intent, and believe that dialogue around this issue can remain productive, as we believe that those participating in the WS2 process intend to be accountable, as do we, for our respective efforts and roles in this work.

⁵ As noted in footnote 1 of the ICANN Org comments on the Transparency Report, the introductory narrative to the report contains more detail, and at times different, information on the recommendations. It would be helpful to gain clarity over whether some of the additional detail is intended to augment the recommendations.

opportunities were more available, there was discussion that the governments enjoyed lower costs in obtaining goods and services, and opportunities were open to more bidders.

ICANN org already has many of the protections already in place that the Transparency report suggests that open contracting would provide. For example, ICANN has publicly available procurement guidelines (<https://www.icann.org/en/about/financials/procurement-guidelines-21feb10-en.pdf>) and a Contracting and Disbursement Policy governing ICANN's contracting practices, including requiring the approval of two officers for obligations over US\$50,000, and the Board of Directors approval for obligations over US\$500,000. See <https://www.icann.org/resources/pages/contracting-disbursement-policy-2015-08-25-en>. While ICANN is subject to, through its IRS Form 990 annual filings, disclosure of the 10 vendors to which it provides the highest payments, ICANN org has, as a practice, expanded that obligation to the disclosure of vendors to which it provides annual payments of over US\$1,000,000. ICANN org has an annual independent audit performed of its financial statements, and publicly posts its Audited Financial Statements, where the auditors consider if the financial statements are free from material misstatement, fraud or error. The Audited Financial Statements and Form 990s are available at <https://www.icann.org/resources/pages/governance/current-en>. ICANN's annual budgeting and operating plan processes involve significant community inputs, with documentation posted and discussed. Within those processes, there remain opportunities to challenge budget assumptions, as well as for the community to consider how ICANN performed against those budgets. ICANN's documented commitment to considering conflict of interests in contracting (see <https://www.icann.org/en/system/files/files/enforcement-compliance-coi-05jan16-en.pdf>) continues. If those participating in the procurement process believe that there was inappropriate conduct in procurement, the range of appropriate ICANN accountability mechanisms are already available. Also, as explained previously to the WS2 rapporteur for the Transparency subgroup, ICANN has already started taking a far narrower stance on when the organization will enter into non-disclosure clauses with vendors, making information that is appropriate for public disclosure (and not subject to other DIDP conditions for non-disclosure) more likely to be available.

The Transparency subgroup has not provided any problem statement of corruption within ICANN,⁶ or lack of bidding competitiveness, or other concerns with ICANN's procurement practices. The Transparency subgroup has instead suggested a broad fix of problems that have not been identified within ICANN. With the policies and protections identified above already in place, the ICANN Board reiterates the

⁶ The new ICANN Bylaws also allow for independent investigation of credible allegations of fraud or gross mismanagement of ICANN resources. Bylaws Section 22.8. Neither the ICANN Board or ICANN org are aware of any attempts to initiate this new community power.

concern raised by ICANN organization that turning to a position where all of ICANN's contracts should automatically be subject to disclosure could negatively impact ICANN's ability to serve its mission within appropriate budgetary controls and have impractical outcomes. ICANN needs the ability to retain incentive for vendors to work with ICANN in serving its mission, at favorable prices, and without making it more challenging than some already perceive working with ICANN to be. This is key to ICANN serving the global public interest.

The Board does not suggest that that there cannot be innovations in and further transparency around contracts at ICANN. However, automatic disclosure of all contracts does not seem to be a balanced measure, particularly without a view of the problems that disclosure is proposed to remedy. For example, innovations could be things such as documenting ICANN's disclosure practices for high-value contracts, or reviewing if the high-value contract level is set at the correct amount.

Governmental Engagement

The Transparency subgroup includes a recommendation on ICANN's transparency around its governmental engagement that is substantially unchanged from the version that was produced in the February 2017 version posted for public comment. The recommendation states:

In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders⁷ and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over \$20,000 per year devoted to "political activities",⁸ both in the U.S. and abroad:⁹

- All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.
- All identities of those engaging in such activities, both internal and external, on behalf of ICANN.
- The type(s) of engagement used for such activities.¹⁰

⁷ Such disclosure is not meant to encompass government-ICANN interactions directly related to ICANN administrative and policy matters (such as a PDP WG) and otherwise disclosed statutory "lobbying" activities.

⁸ "Political activities" is to be defined as any activity that is intended to influence or inform a government directly or indirectly on a matter of public policy.

⁹ For greater clarity, this is not intended to apply to engagement within ICANN's internal processes, such as conversations between board members and the GAC.

¹⁰ E.g., newspaper op-eds, letters, advertisements, speeches, emails, phone calls, in-person meetings, etc...

- To whom the engagement and supporting materials are targeted.
- The topic(s) discussed (with relative specificity).

The ICANN organization comments on this section offered the following discussion:

As the Subgroup identified, ICANN complies with its disclosure requirements on lobbying efforts.¹⁰ In addition, ICANN regularly reports on government engagement, with information posted at

<https://gacweb.icann.org/pages/viewpage.action?pageId=38502831>.

Thanks to positive dialogue emerging out of the Subgroup, some of this information is now included in the Board Reports generated by the CEO's office in advance of every Board workshop, which provide details on ICANN's governmental engagement efforts. The most recent report is at

https://www.icann.org/static_documents/executive-team-reports-march-2017-public.pdf, and the historical reports are collected at

<https://www.icann.org/presidents-corner>. While these reports do not contain the full detail of information that the subgroup recommends be made public, the reports identify, on a regional basis, meetings and bilaterals attended by date and region. Further guidance on how ICANN interacts with governments is also set out on that page. The subgroup has identified that for "greater clarity with regard to how ICANN engages government stakeholders" and providing awareness of "interactions with governments", that ICANN should produce a detailed register including costs for engagement, engagement activities and topics of discussion for interactions beyond those lobbying activities. This is another area that might impose extra costs or have unintended effects on ICANN. Some questions or issues that could be part of future Subgroup deliberations on this issue could include:

1. The definition of "political activity" provided by the Subgroup includes an intention to influence or inform, directly or indirectly; the methods of engagement anticipated include "newspaper op-eds, letters, advertisements, speeches, emails, phone calls, in-person meetings, etc...". These do not align with the definitions of "lobbying" or engagement in political campaigning that are applicable to ICANN by virtue of U.S. laws/tax regulations.
2. How would this apply to if an ICANN representative, or supported community member, delivers a speech in a room where governments might attend amongst others? Would intention be shown if the speaker knew government representatives are in attendance, even if there is a broad audience?
3. What if a pamphlet is designed for broad dissemination, and is handed out to a government representative?

4. What is the definition of a government – is it anyone who is employed by a governmental entity?
5. Who decides what is a matter of public policy?
6. Governments come to ICANN in multiple capacities, including as ccTLD operators, or as individual contributors to policy processes. Would each of these touchpoints be a required area of reporting?
7. Would this recommendation include ICANN funded community stakeholders and their engagement, and if not, why not?

The only changes that subgroup offered were an expansion to a \$20,000 threshold for reporting, and a clarification that the recommendations are “not intended to apply to engagement within ICANN’s internal processes, such as conversations between board members and the GAC.” However, no discussion was provided to identify how ICANN’s current practices might already meet the recommendations in whole or in part, nor was there clarification issued to address the seven questions raised by the organization, including applicability of this recommendation to community-funded stakeholders.¹¹

If the CCWG-Acct is willing, the Board looks forward to viewing a gap analysis to identify what is intended for implementation of this recommendation and to consider if adoption is appropriate.

Transparency of Board Deliberations

Similar to the treatment of the ICANN organization’s comments on Governmental Engagement, the ICANN Board notes that no modifications were made to the Transparency of Board Deliberations section of the Transparency subgroup report (narrative or recommendations) to address any of the clarifications provided by the ICANN organization. As the exercise proceeds to determine if there are any implementation notes that can be included in the Final Report as presented to the Board, the ICANN Board encourages consideration of the inputs on this section as well. These subgroup considerations could include a gap analysis/clarity on Recommendation 1, and addressing the legal feasibility concerns raised in regard to Recommendation 2.

The Transparency of Board Deliberations recommendations state:

- 1) 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.

¹¹ If the “internal process” limitation is intended to address ICANN org’s question 6, further clarity is still needed as to what is meant by the “internal process” language.

2) 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. Decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.

3) 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, once the potential for harm has dissipated.

ICANN organization's comments stated:

Of the three recommendations presented in this section, ICANN org has some key areas where it agrees with the Subgroup. First, documents/information already provided to a third party (without obligation to keep as confidential) should not be withheld simply because of a deliberative process exception. (Recommendation 1). The idea that redactions should only exist for as long as necessary is also important to transparency. (Recommendation 3). For example, negotiation limits for rental of office space need to be kept confidential during negotiations, and likely for a period of time after negotiations are complete. However, at a future point that limit can probably be released. On the other hand, resolutions about specific employment matters are normally never appropriate for publication. Introducing information on when and how decisions on removing redactions are made could be a helpful improvement.

Recommendation 2, on the types of information appropriate to redact from minutes, will need to be revisited upon the completion of the review of the DIDP, and must be considered in light of the ICANN Bylaws requirements on the process and grounds for basis of removal from minutes. ICANN needs to retain an appropriate scope of redaction to meet its legal obligations. Withholding items from resolutions is not a frequent practice. Notably, if ICANN violates the Bylaws in how items are withheld from posting, the IRP is already available.

As it relates to Recommendation 1, these are the transparency practices that are already in place for ICANN Board deliberations:

- In accordance with the ICANN Bylaws, ICANN posts resolutions within a short time frame of approval, and since 2010, ICANN has been producing rationales to help support and explain the Board's actions.
- ICANN produces detailed minutes of minutes of meetings, and also since 2010, the Board makes available the documentation that supported its deliberations, the Board Briefing Materials.
- At the time of posting each set of Board minutes, ICANN posts the corresponding briefing materials for that meeting. A discussion of how those materials are prepared for posting is at <https://www.icann.org/resources/board-material/briefing->

[materialsguidelines-2011-03-21-en](#). These documents are posted notwithstanding the defined condition for nondisclosure under the DIDP regarding deliberative process materials.

- A general discussion of ICANN's redaction practices is available at <https://www.icann.org/resources/pages/publication-practices-2016-06-30-en>.
- In addition to the regular posting of resolutions, summaries of resolutions, and information about the outstanding action items from resolutions, is provided in the Board Report generated by the CEO's office.
- The Board Report also provides information about Board workshop sessions, including identification of issues discussed and follow-up steps.

It would be helpful to understand if ICANN's existing publication practice aligns with Recommendation 1 on the types of information that should be made available about the Board's deliberations, or if Recommendation 1 is addressing other documents.

Next Steps

The Board looks forward to considering any further inputs or clarification that the CCWG-Acct might have on these items. We appreciate the willingness of the CCWG-Acct to look into providing implementation notes to address the items noted above, and bringing WS2 to a successful close.