
SEBASTIEN BACHOLLET: Thank you very much to start the recording. We have today one single topic call. I just wanted to let you know that we will return to our normal work at the next call. I will try between now and next week to send you a first draft of a document for our group, but I wanted to include what will be discussed today.

Really today, it's to have a presentation by the Ombudsman of ICANN [and] the previous one and to ask them questions and not to discuss a topic. If there are questions you want to raise to the group, can you take them? You can put them in the chat, but keep them for next week and we will come back on that. I hope that each will allow people who are not participating today on the call to listen to the recording and to participate in the discussion next week.

Thank you very much, Herb and Chris. I give you the floor, Herb. You take the lead for the call. Thank you very much.

HERB WAYE: Thank you, Sebastien. Merci. Good morning, afternoon, and evening, everybody. Thanks for dropping in. I've put together a brief [presentation] that we'll run through here. I'm hoping that it presents more questions to the group than actually me offering answers because I'm hoping to stir up a little bit of thinking and creativity as we go along.

The first [slide] is basically just a recap of the main slide from last week discussing independence, neutrality/impartiality, confidentiality, informality, and other standards. Now I added the IOA, which is the

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International Ombudsman Association, because [inaudible] their framework and code of behavior and so on, the standards that they have covering these four topics also expand and discuss other variations and other avenues of these four main topics. There may be other standards available elsewhere from other organizations, but generally standards that we have for our office are the ones that are used globally.

To dig down a little bit into each one of them, some of the issues and questions that we ask ourselves when we [discuss] independence is whether perception of independence is an issue or actual independence is the issue. Because as far as Chris and I are concerned, independence is something that we have and something that we cherish [working] for the office of the Ombudsman.

But whether there's a perceived breach in that independence due to our relationships with the Board or members of the community or leaders or the chairs of some of the groups, that might be an issue that we can address with a clearer understanding of how those relationships work. As much as we are independent of the Board, we do report to the Board. How does the community perceive that and how do they react to it? That is something that could potentially be addressed in the future.

One issue that we do discuss and has been discussed in the past is the term of the office, which is a two-year renewable by the Board term with a possibility of canceling the contract with a majority decision by the Board. Generally speaking, the terms of office for Ombuds have been a little bit longer than that, in the three- to five-year range. The independence can be potentially undermined by a short term.

Any other issue as far as independence, the person I have looked to this and thought of whether it should be a Board appointment for a new Ombudsman or whether possibly there's a role for the NomCom to be involved in that.

Neutrality/impartiality, of course, fairness is the cornerstone, the foundation for our activities. I added "unbiased" there because it's something that I like to point out. We have what we refer to as "frequent flyer," people that sometimes obsessively contact the office for issues that have been dealt with in the past or are completely non-jurisdictional. Every time a contact is made to the office, we have to look at it because we never know when there may be an element of truth or an element of unfairness to a complaint. So regardless of how frequently people come to us or how frivolous or vexatious or irrelevant something may be, we always have to look at it in an unbiased manner as if that was the very first time that individual had maybe contacted the office. That's just a little point of interest.

One of the things that I look at and I'm thinking of for the future is the role of Ombudsman as an advocate to assist in equality amongst groups. In some of the stakeholder groups where you may have a very powerful component that has taken control of an issue or taken control of policy writing or taken control of the direction of a group and the smaller group, whether it's size-wise smaller or whether it's perceived as a less important group, there may be a role for the office in giving voice to those smaller groups. Again, that would have to be looked at to determine whether that could impact the neutrality and the impartiality if the role of the Ombudsman moves more toward an advocacy type of role.

Confidentiality, a couple of issues actually could be looked at. One of them is, how do you maintain confidentiality when there is a string of e-mails or constant electronic communication going on whether it's through social media, Twitter, Facebook, whatever? When the e-mail is sent to receive and it heads off into cyberspace, then there's an element of control that is lost. In the past, we have seen entire e-mail strings between the Ombuds and the complainant or one of the parties involved going public with that, so that's an issue. It does impact how we deal with issues because we have to continually think of that in the back of our minds about how public our confidentiality could potentially be.

Confidentiality also, as far as the Ombuds office goes, doesn't mean we can't talk to people. It's very important that we have open lines of communication with the relevant department in the organization. If we have a compliance issue that comes across the desk or an issue involving one of the meetings or policy or whatever, it's very important that we have that clear, open communication with the member of staff or the department. Inasmuch as we're confidential, we also have the element [of] communication that's critical for the running of the office.

I'm just reading here. I'm sorry. I'm trying to do the presentation, and I'm just glancing down. There have been a few comments. Sebastien, did you want me to deal with the questions right now, or do you want me to take those offline after the presentation is completed?

SEBASTIEN BACHOLLET: Herb, it's really up to you. It's how it's easier for you to deal. If you prefer to go through your whole presentation and then come back to questions, it's okay. If you want to stop and answer the questions, it's okay too. It's really up to you how you feel.

HERB WAYE: Okay, just to briefly answer the question, yes, the Ombudsman is under contract. It's a contractual role with the organization. The contract is necessary to hire the Ombudsman. I'll leave the second question, I believe, to the group because that is actually one of the questions – whether examining the independence is also pertinent to examining the position of the Ombudsman – that's something that the organization could discuss.

The next slide, I'm not sure how that became red, but I did not highlight that privacy issue as red so I apologize for that. Okay, as far as informality goes, just to show the two extremes where the Ombuds for Coca-Cola has zero records in his role as an Ombuds versus our office with the case management system, online complaint form, we use e-mails. It's an online environment, so we have adapted the office to accommodate that type of a world, but it does add an element of formality.

Again, I'm not sure why the privacy issue was brought up, but that is brought up in red but it shouldn't be.

As far as informality, we have in our case management system the storage of complaints in the archives back to the beginning. If that's an issue that the group wishes to bring up whether there should be an

element as far as the standards [or the end of standards] that should be respected for maintaining records is something that can be looked at by the group.

As far as informality goes, a huge element of that is based on trust. Not only must the organization trust the Ombuds to offer the qualities and the qualifications and the quality of service that goes with the office, but the community also through that trust must be able to maintain an open, trusting relationship with the person.

It's very important to understand that the role of the Ombuds is not that of an appeal office. Informality, it's to look at the elements of a case, an informal reasonable person – I added that in the last comment – point of view, so the average citizen looking at an issue should relatively speaking come to the same decision as the Ombuds. It's looking at the process and saying, "Was it fair or not fair?" and not looking at the decision and saying, "Was the decision fair or unfair?" Those are two completely different things. If the process is looked at and is deemed to be fair, as any [inaudible] come to that conclusion, then that's the informality of the office in a nutshell.

[Generally], the office would be a first stop when somebody has an issue, but it doesn't mean it can't be a last stop. Again, looking up at the individual review and the reconsideration accountability mechanisms, the Ombudsman can step in at any point around those issues if there's an element of fairness. But again, not as an appeal mechanism for decisions that are come to by either of those unless the decision, of course, [has been] arrived at through an unfairness in the process.

Some of the challenges that the office deals with on a regular basis are complaints coming in that can be potentially extremely technical versus complaints of inappropriate behavior or interpersonal relations and issues that come up that really can be dealt with more on a level of common sense. It's a challenge to be able to do those and do them both fairly and consistently and not have one take up more time than the other.

The smaller issues that might be involved with interpersonal relationships or something along that line can be just as important to the organization as some of the major technical that quite often involve litigation and the independent review and the reconsideration accountability mechanisms. They can be very elaborate in the information that [inaudible].

Again, it's balancing that formality of the office with the case management system, using e-mails, versus the [formality] of face-to-face, having discussions with people and doing mediation or some form of shuttle diplomacy to resolve issues. Where in one situation we may be just trying to settle a difference of opinion between two people, at another level of our role we're dealing with multimillion-dollar issues between big players.

Another challenge, Item 4 there of reaching out to the community, is a big challenge for the office because people are all over the world. There are community members in all the various different time zones. We're limited more or less to reaching out to those communities at the meetings. That can be a challenge in itself because of the time constraints. Everybody is so busy when the people get together at the

meetings that it can be a big challenge getting a message across from the office.

Just give me a moment there. I'm trying to catch up in the discussion thread. Okay, I see a lot of those questions now, particularly Jose's that possibly are better topics of discussion for the group.

One of the possibilities of raising the profile of the Ombudsman is to have – and we have had in the past – orientations to newcomers, staff of the NextGen. But they're one-off orientations that have to be planned in advance. So possibly there's room for a more structured orientation for the newcomers to the organization. We have an online presentation that is available, but again if we can't get that information and that communication out to the people in an appropriate manner, then they don't get on to see the information in the presentation.

A challenge we've seen particularly in the new gTLD process was what's come to our attention a couple of times is comments that people are using the office to game the system, as an element to delay contractual completion of the new gTLD system or for whatever reason, but using the office as a delay mechanism. So that's something that the group can think about as we move forward whether there should be a more robust policy or practical standard of how to deal with situations like that when it's evidently a delay tactic.

But it all boils down to [this]: I don't think the office of the Ombuds should have a need to hire a team of lawyers or a huge support staff. As we move more toward the formal side of operating the office, it gets

more and more complicated and it gets more and more legal. I hope that we can keep it much more informal than that way.

Making forward, we've already seen one set of Bylaw changes as far as the reconsideration accountability mechanism. It is important to note that that additional step of the Ombuds moving in at the reconsideration stage issue hasn't been looked at by the Ombuds in the past. So if there has already been a ruling by the office regarding that issue, then it goes straight to reconsideration. But if it hasn't, if it's a new issue that hasn't been addressed by the office in the past, then the new Bylaw asks the Ombuds to take a look at it, again for process and to determine that there was fairness in the process and that there is no reason for the Ombuds to come up with a formal ruling on the case.

Again, formal versus informal, how far is the office toward one extreme or the other? There's a decision to be made at some point whether this becomes a very formal office of review or whether it should be maintained more as a community service for the people. That's a debate that's ongoing in the Ombuds community as it is here.

Again, how far should the Ombuds stretch out into the community as a resources? I think personally that's the place for the Ombuds, but again that's taking away the important role of accountability at the higher level.

Is there possibly a position [or a place for] the Ombuds in the development of policy? If there is, I think it's more in line with the idea that I mentioned before of ensuring that all of the parties are [inaudible] and that one party is not overpowered by either financial

resources or legal resources or sheer numbers and are not given voice to a situation. I think there is a role there that could possibly be formalized. Again, should policy issues maybe come past the Ombuds' office as part of [inaudible]? Again, potentially.

I do see the Ombuds as having a role for ethics and code of conduct. But I mean as much as anybody from the community can come to the office to complain about harassment, bullying, or inappropriate behavior, I also see the role of the Ombuds as being a champion or an advocate for appropriate behavior and appropriate ethical decision making. Potentially, that could be formalized a little bit better in the future.

Just to give you a little bit of an idea of the direction I will be taking in my role as the Ombuds, I want to do what I'm calling "inreach" to the community because "outreach" has more of an overtone of going outside of the organization and I want to spend as much time as possible reaching out to the groups internal to the [inaudible] community.

But inasmuch as I want to get out and open that avenue of communication with some of the smaller groups and the stakeholder groups, I also want to ensure that clear and respectful relationships maintain with the Board and the community leaders. Especially in some of the stakeholder groups and the constituency groups, the leadership is critical to the proper functioning of the organization as a whole. I believe that there is potential there for the Ombuds office to be a resource not just for the Board but also the community leadership in helping everything run smoothly.

Again, potentially I mentioned Board and community leaders having some sort of an Ombuds [orientation]. If not a formal orientation, at least an immediate contact so that when new leaders come into the organization that there's an immediate opening of communication with the office so that [inaudible] develop relationships and open that line of communication.

I'm going to try to be an advocate for open – I won't say open speech – but for making sure that everybody gets their views heard regardless of the size or potentially perceived unimportance of a group. I know that some groups out there are not seen to be as important, and I think that's an unfair perception by some of the members of this organization and some of the members of the various groups. So I want to be there for those people.

Finally, [ethical] behavior is a cornerstone for any good organization to run on, so I'm going to do my best to promote the code of conduct [inaudible] through my communications with the organization and hopefully raise awareness of what's appropriate, what's inappropriate, and take it from there.

This slide is from last week, but [it does] pose a very interesting question in a global sense. Again it's, how is this office going to interact with [all the other] mechanisms that the organization has? We don't want duplication, but we do want effectiveness and efficiency. So we have to keep in mind that there is no overlap. If there is a role for the Ombudsman moving forward, that it be an appropriate one and one that is positive for the organization and the people.

You will notice that all of these comments have big question marks. I think in a nutshell these are the things that this group can be focusing on as we move forward: the role of the Ombudsman in the accountability [inaudible], to what extent informality is to be balanced with formality, the supporting and the structuring of communication between the office and the various members in the organization, the building of relationships. Trust is a critical factor, so we always have to ensure that there is a building of trust.

We all have to, I guess, look into our little crystal balls and decide what's ICANN going to look like after the transition and hopefully come up with an Ombuds framework and a role that will appropriately for instance into that post-transition world.

People have been furiously typing, so I'm hoping somebody has been following along. Chris, I notice that you're there. Is there anything that requires immediate attention in the chat forum?

SEBASTIEN BACHOLLET:

Chris, do you want to add something to give us your feedback as the previous Ombudsman of the organization? Do you want to take this opportunity to give us a few words in addition to the very good presentation of Herb?

CHRIS LAHATTE: Yeah, thanks, Sebastien. Can everyone hear me okay?

SEBASTIEN BACHOLLET: I guess if you speak a little bit closer to your mic, it will be better.

CHRIS LAHATTE: Right, okay. One of the things that has been going on in the chatroom is that I'm not sure people really quite understand the concept of the Ombudsman who has a mediator type role and not a decision making role. It's very important to emphasize that an Ombudsman is not a judge or a decision maker. Talking about having a bench of Ombudsman or similar approaches misses the point about what we do.

Herb has emphasized the informality of what we do, and one of the reasons that we are informal is that our primary tool is mediation, which means we try and work between the parties. It's not necessarily even a formal structure. We just work between them and try and achieve some consensus between them. In that sense, it's consistent with the other sorts of roles in ICANN where we try to build on consensus decision making. The Ombudsman is an integral part of that because when people do disagree, we will try and facilitate agreement between them.

Now it's not always the appropriate too because sometimes if we find unfairness, then we're going to have to go into an investigation and make recommendations. But again there, we can recommend until we're blue in the face. Nobody is obliged to do as we say. I can't – I couldn't, I hate to talk in the past tense – ever tell the Board or a

member of a group that they must do something. All I could ever do was politely suggest.

That's really the role of an Ombuds, to have this informal approach where you can get in, deal with problems without being bogged down in process and formality. That's something that Herb has emphasized very much. That informality is a real strength of the office because we don't have to sit down and deal with formal pleadings as you would if you were an appeal process. You just get down and deal with the issues in sort of a quick and dirty way rather than have somebody who sits up on a bench and looks down their nose at the parties. We're down there in the community directly dealing with issues.

I think that's about all I want to say.

SEBASTIEN BACHOLLET:

Thank you, Chris. Any questions from the participants of this conference call to the Ombuds? If not, can I ask you, Herb, to make some conclusion words and we will end the call and take into account your input to our work certainly and take advantage of your participation to the group? Once again, thank you very much for giving this presentation. Herb, it's yours.

HERB WAYE:

Thank you, Sebastien, and thank you to everybody that has participated. I'm [inaudible] some of the comments and I hope that in the next few days some of the items that I've put on some of the slides may spur a

moment of reflection and assist the group in developing a direction toward the office.

Of course, Chris and I are completely open to any comments you may have or questions or suggestions. I can only say that as the group moves forward that we both hope we will be able to assist in any way possible with the outcome of this working group.

Sebastien, merci pour l'opportunité. Thank you for the opportunity to present this. Again, please do not hesitate to reach out to Chris or me for any questions or comments at all.

SEBASTIEN BACHOLLET:

Okay, thank you very much, Herb. Thank you to all the participants. We will finish the call now, and have a good – I don't know – evening, night, day, whatever where you are and talk to you next week with the whole group and with some input hopefully using that very nice presentation. Thank you very much and bye-bye.

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