

From: ws2-transparency-bounces@icann.org
To: ws2-transparency@icann.org; [Michael Karanicolas](mailto:Michael.Karanicolas@icann.org)
Subject: Re: [Ws2-transparency] Draft WS2 Transparency Document
Date: Friday, October 21, 2016 12:00:55 PM
Attachments: [ATT00001.txt](#)

Hello Michael,

My congratulations on one of the most thorough and impressive pieces of work I've seen produced by an ICANN working group. I regret I haven't been as active in this group as I had anticipated as a mixture of illness and meeting conflicts (including tonight: Friday evenings European time are just not doable for me) have limited my participation but I did want to share these thoughts with the group:

1. On page 8 there is a factual error. It is stated: "Currently, appeals against refusals or other non-compliance with the DIDP are handled by the Ombudsman". That is not true.

Appeals against a denial of information from ICANN under the DIDP are properly matters for a reconsideration request or IRP. Here is one such appeal which I wrote and was filed by the Noncommercial Stakeholders Group:

[https://www.icann.org/resources/pages/13-11-2014-02-13-en\[icann.org\]](https://www.icann.org/resources/pages/13-11-2014-02-13-en[icann.org]) . Appellate procedures for DIDP refusals are also mentioned on the ICANN website under 'Appeal of Denials' here: [https://www.icann.org/resources/pages/didp-2012-02-25-en\[icann.org\]](https://www.icann.org/resources/pages/didp-2012-02-25-en[icann.org]).

The Ombudsman currently has access to all documents held by ICANN. He does, however, have a limited remit based upon fairness and arguably somewhat questionable independence due to the past design of the Office. That likely is why myself and others have in the past declined his offer of assistance in matters related to the DIDP.

2. Although applauding the intention behind the emphasis on human rights in the document, I am fearful that doing so to the extent it is done will place transparency reforms in the middle of the rather contentious ongoing human rights debate at ICANN. This should be best avoided.

Document access and transparency are simply good corporate governance tools for a disperse bottom up governance structure like ICANN's. When as part of the work stream one reforms we included Inspection and Investigation rights in the ICANN Bylaws it was not because we considered these rights to be in any way a human right. Rather, it was good corporate governance designed: 1) to help the Empowered Community get the information it needed to properly discharge its duties, and 2) to prevent the ICANN Board from "pulling a FIFA" and hiding improprieties behind closed doors. Good governance.

That is not to say that human rights are not at issue here. The paper is somewhat persuasive in arguing they may be. They aren't needed though to posit that increased transparency and document access is necessary and proper for the functioning of a private corporation dedicated to a public purpose designed to be accountable to the global internet community. Transparency = good governance. Period. No other justification is needed.

3. I need to note that ICANN is not a nation-state, it is not an IGO, it is not an NGO. I mention this because although there are many references in the document to

governmental freedom of information / document access laws, references to the policies of groups like the World Bank and the Inter-American Development Bank, nowhere in this document is it mentioned what ICANN is: a California public benefits corporation established and governed by rules promulgated in the California Corporation Code (Cal Corp Code §5110 et. seq.). That is a mistake.

I would strongly suggest that this group posit a question to our independent counsel along the following lines:

– In examining the current Defined Conditions of Nondisclosure (DCND), which of the exemptions from disclosure would be necessary to keep so that ICANN remains compliant with California law? Are there any additional documentary items that are or may be in ICANN's possession that you believe should be excluded from public access and or inspection on the basis of California statutes?

As we rebuild the DIDP I'd like to think that the starting point should be from the default position that what is not required to be kept secret should be available, with reason, for inspection and access. To begin that analysis, though, we first need to know what California law requires ICANN to keep out of public view.

4. I disagree with the proposed appeals process. It is written as such:

– ICANN should establish an external Information Oversight Panel of three members to hear appeals against DIDP refusals. The Panel should operate on an on-call basis, rather than sitting permanently. Its members should be chosen based on their expertise in relevant fields, including the right to information, and they should be prohibited from accepting any staff, consultant or contractor positions from ICANN until three years have elapsed from the end of their service as a member of the Panel. The Panel should be empowered to review information under request, and to order its disclosure.

Initial DIDP requests are handled by staff. The Board deserves the opportunity to manage staff and to correct improper staff behavior before a matter escalates to an external panel. I strongly advise this group to require the initial appeal of a DIDP denial to go through our revised Reconsideration process before being escalated to outside parties.

An independent review of a DIDP denial that has been affirmed by the Board would then be appropriate. I would suggest, however, first examining whether our revised IRP process would be suitable to hear DIDP appeals rather than forcing ICANN to establish a second mechanism for appeals specifically designed for the DIDP. We certainly could enact rules and provide guidance to the standing panels specifically related to the DIDP. I question the cost and efficiency of establishing a second review mechanism specifically designed for the DIDP while simultaneously establishing IRP panels deemed good for everything else. Best avoided if we can.

Thanks once again for everyone's hard work. I'm sorry I'll be absent this evening due to a pre-existing commitment but I hope these comments prove helpful.

Kind Regards,

Ed Morris

From: "Michael Karanicolas" <michael@law-democracy.org>
Sent: Tuesday, October 18, 2016 3:34 PM
To: ws2-transparency@icann.org
Subject: [Ws2-transparency] Draft WS2 Transparency Document

Hello all,

Please find attached a first draft of our document, including Recommendations for the DIDP, proactive disclosure and whistleblower protection. Thanks so much to everyone who submitted ideas or comments, and particular thanks to Barbara Wanner and my co-rapporteur Chris Wilson, who led on drafting sections 2 and 3.

A couple of things to note. First, right now the document is a bit of a mashup between the different contributions. I still need to go through again, just to harmonize the different sections and make it a bit more coherent. Second, the proactive disclosure section right now only addresses ICANN's engagement with governments, so I also need to beef that up a bit, to add in some things about budget transparency, and potentially other areas that should be published.

We are set to have a call to discuss this at the end of the week, at 3 pm EST, so please try and look through it before then. We are keen to hear your inputs! We are also supposed to circulate more broadly to the other groups by end of the week, so if there are major substantive issues to raise, starting the conversation sooner would be preferable.

Best wishes, look forward to hearing from you,

Michael Karanicolas
Senior Legal Officer
Centre for Law and Democracy