

FINISHED TRANSCRIPT

ICANN TRANSPARENCY SUBGROUP MEETING

JUNE 20, 2017

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>> Hello, can you hear me?

>> We can hear you very well.

>> We heard.

>> Okay. So why don't we just get started, then. (this meeting is now being recorded).

Thanks to everyone for joining us. There is -- the main purpose of this meeting is to try and tee up discussions for the face-to-face in Johannesburg as well as to review some of the minor changes to the document that have been added over the last couple weeks in order to factor in some of the -- what I see as the noncontroversial changes from the comments that we received during the consultation.

So, before we get to that, however, I just wanted to reach out one more time to see if there was anybody who might be willing to volunteer to take up the aspects of the review process that my former co-rapporteur Chris Wilson left behind when he resigned about a month ago, a couple weeks ago. If you'll recall, he had to step away for professional reasons, and we had kind of a division of lane or where I was reviewing the sections on the DIDP and board deliberations and he was taking interactions with government and whistleblower protection.

So I put out a call to the list to see if anybody wanted to step up and haven't really heard back.

In terms of like I can take it on myself as a last sort of resort. It'll set us back a little bit, but it should be fairly manageable if I need to. But one thing that I didn't occur to me before but perhaps reaching out to Barbara Wanner who is the one who drew the initial draft of the whistle blower protection thing. So looking around, I'm not really

seeing any volunteers on that front. If anybody is willing to take on those two sections or one of those two sections, particularly the one on interactions of government, that would be greatly appreciated. But if not, then I can step up and take those on myself, as well. We're pretty close to the finish line on both of those, I think. I haven't really reviewed the whistle blower protection and detractions of government very closely, but I feel like it's fairly well developed now. So the process won't be too much of an issue to take those on myself. It's always better to have a division of labor, but if I need to do it in order to keep things moving forward, then I'm happy to take that on. So.

So I guess as our action area for this, not hearing any volunteers for that, I'll take on the interactions with government aspect myself and I'll reach directly out to Barbara to see if she'll be willing to keep working on her version of it, of the draft that she prepared on whistle blower protection and see if she can take that forward.

So, moving forward from that, then, I sent around about 30 minutes ago a revised draft of the document to recommendations.

If you'll recall from the last phone call that we had, we had basically divided the recommendations into two sort of categories.

Oh, yes, I should update you guys, as well, about what happened.

So previous to our last call, I had spoken to Samantha Eisner of ICANN Legal and we had a good conversation and she had promise today get back some information for us and I was also supposed to provide some additional information to her. I provided that shortly after our last call and sort of reminded her about getting some additional information and haven't heard back from her yet.

I wrote again late last week to remind her and still haven't heard back.

Oh, hi, I see Bernard entered.

>> Bernard: Hi, Michael. On that front, I reached out to Sam and I've not heard back from her. I believe she's currently already in South Africa. I believe the Board is meeting. And usually these pretty hectic times for her. So I've got on my to do list to try and find her while I'm in Johannesburg and see when she'll be able to deal with that. Thank you.

>> All right. Thanks very much. I appreciate that very much.

Yeah, I mean I've heard that they're really swamped at the moment. I think that it's -- I think that a very important part of these -- we're entering the later stages of the process now, the last stages of the process, and a very important part, I think, is getting some dialogue going with ICANN Legal about the proposed changes, in particular the ones about attorney/client privilege, but generally to have a bit more of back and forth. So hopefully we can get that done in order to arrive at final recommendations that everybody's happy with.

So that's just sort of the update of where things stand with them. And I will, of course, let you know as soon as we hear anything back.

In the meantime, if you'll recall, from I think it was the last conversation that we had, we sort of divided -- we separated out the issues that we're facing basically into two and we isolated I think it was three areas that were going to be a little bit controversial and going to require some robust discussions. And those were the approach to attorney/client privilege, the approach to commercial information and the approach to open contracting. Those were sort of the three that we recognized where there were very

strong opinions on different sides that needed to be, other than a more robust discussion, with sort of a duty to document also kind of on there, although after speaking to Samantha, this really seemed to be more about -- less about hammering out compromises and more about talking out the practical implications. Less of a controversial one and more where attention needed to be paid but it's not about hashing out compromises.

So since that last call, I went back to the document, and setting side those issues, I tried to resolve the smaller, little objections that people had raised which I viewed as not being particularly controversial and mostly about four words or areas that needed clarification. I'll say that I did that for the DIDP and board deliberation section, although this wasn't anything in the board deliberation section that people raised strong objections to. And I haven't done that with the interactions of government or whistle blower protection sections because I was hoping somebody would step up. I was hoping to hear back from everybody else. But I will take a look at those in the coming little bit. I'm not sure that that's necessarily going to be -- that there's anything too controversial in those, either, but I will take a look.

So I was hoping with this meeting we could go through those minor amendments and make sure that everybody -- that there's no objections to the small changes as well as kind of agree to a framework of discussions for the face-to-face in Johannesburg.

If we can get the revised report up on the screen, I sent it around to everybody. So hopefully you all can bring it up on your computers, as well, on changes are tracked. Since we're waiting to get it up ... I guess you can't really see the track changes in this version, but if you have it on your computer, hopefully you see it there.

So the first change is a very small one. If you look at the beginning of the second paragraph of the executive summary. Originally there was a reference to the right to information. And I think it was -- one of the comments, the way that it was phrased made it sound confusing in relation to the Human Rights discussion of rights. And so as part of my ongoing process to scrub any mentions of rights from this document, I deleted that and replaced it with just discussion of global transparency standards, which I assume is not controversial and is really just a stylistic little thing.

The next change is in the bottom of Page 5 -- and maybe the best way to do this is shoot a hand up if you object to any of the points, any of these points.

Just getting down to the bottom of Page 5. This deals with the recommendation for providing more -- for ICANN to provide more information for how the requesting process works. ICANN's response back to us on this was like "oh, we've already done that. And they linked to a document that I had already seen. And it was kind of a little bit skeleton in its description of how this works. So we sort of elaborated out and wanted to emphasize that, yes, we know that document is there. Hoping for a little bit more. And I linked to a very lovely flowchart that the British Office of the Information Commissioner has put out about how they handle requests to sort of give a better idea of the nice kind of user friendly and easy-to-understand thing that we're hoping might be produced in order to allow requesters to get a better sense of the system. So there's a link down at the bottom which you're free to check out. But basically it's just about elaborating and letting them know that we are hoping for a little bit more.

I'm actually thinking that once we are all on the same page, once we all have consensus agreement the about the nature of the recommendation, that will be after

Johannesburg as part of the final stages of this, one thing that might be good to do is to actually draft up the suggested DIDP itself and say, like, "to avoid any confusion about what the recommendations mean," that that should be included as part of the final package we deliver because it can be confusing otherwise if you just have recommendations, that kind of followup. I see Bernard's hand is up.

>> Bernard: Thank you, Michael. Just for information, we'll be working on a best practices guide for recommendations and avoiding possible confusion is really the key in there. It talks about clarity, implementability and measurability. Basically clarity "does everyone understand exactly the same thing when you make a recommendation"? To implementability is about being able to actually do this. Is there a reasonable way to get this done effectively? And, finally, the measurement point is about two functions. And it's ensuring that there is a way to measure that the recommendation has been completely implemented or not? And, B, once it is implemented, some sort of scheme to measure is it effective? So I think you'll be seeing that coming your way soon. Thank you.

>> Michael: Thank you very much for that, Bernard. I will definitely be looking forward to reviewing that.

I see David's hand is up.

>> Thanks, Michael, it is David here. I just want to say I think what Bernie said just makes great sense. It's consistent with what we see in Copenhagen that we would have a final consistency review and I'm very happy with that.

Secondly with respect to your suggestion of an actual DIDP, I think that would be a good idea, as well. Subject to what comes out of the best practices document that Bernie was mentioning, I thought it was a good idea.

And then, thirdly, I would just mention that with respect to these minor changes to the document, I think they look fine. But I personally hadn't read them before the meeting. I was engaged in a hallway conversation. Didn't have a chance to look at it. And my thoughts on that are it depends very much on what ICANN says. I'm very interested in the additional comment that ICANN is going to put forward and that includes with respect to the British flowchart and things like that.

So while these seem good, I just think they depend, in some measure, on what ICANN says. And so I think I'd have to say that for lack of a -- my lack of objection is really meant to say I need a little time to think about this and see how ICANN reacts, too. Thank you.

>> I appreciate that. And I also understand that. And I sent this very late around. I wasn't really intending this to be like a formal reading process. I was just sort of hoping that we could sort of discuss these minor things and sort of/kind of get everybody on the same page. There will be a formal process of resolving these later on. Because obviously there's still issues that are less resolved on the nature of this that I haven't touched on this.

Most of these changes are in response to the objections that ICANN's raised. Right, so we will, I guess, hear back.

But it was mostly about in terms of the ensuring that everybody is on the same page. And those values that Bernard had mentioned. So it's great to see there's some support for taking it forward in that way.

Just go back to the document now. Mentioning the next thing, which is we also recommended that the process be -- so it says the better practice is -- dedicate your team to be -- to the process request. ICANN responded to that by saying we already centralized the process. I think that comes down to a misunderstanding and so a clarified a bit to say that there should be a specific -- it's not just about making sure as a request gets in, somebody gets assigned it. It's about making sure that there is a particular person who's like "the" DIDP person or a small team of people who have that as part of their core responsibilities.

I also included in order to clear up any confusion a suggestion that that should be sort of published on like, hey, here's our staff person who's going to be dealing with that stuff so people know who to reach out to. So that's sort of just mentioned in the second paragraph on this page that mentions publicizing identities of the persons dealing with ICANN requests.

Moving on to -- just let me briefly make sure there's nothing other than the -- I think that the next place that we're going to is all the way down in the recommendations. Just bear with me. Right. So, again, just some minor changes in regard to recommendation 4. Designating a specific employee who has that responsibility. Oh, sorry. It's the recommendation is Page 20 to 23. My apologies.

Number 4 which is just reflecting what I just said. Recommendation 5 has been changed in order to clarify concerns that ICANN raised about resources. So I think that they read -- and we've had this discussion in the working group, as well. In terms of the requirement, the commitment to complying with requesters' reasonable request in which to receive information under request, that's recommendation No. 5.

ICANN's response was like hold on a second, will people say convert all these documents for me? And I clarified no. That means -- that comes into play if ICANN either already has that information available in the requested format or can convert it to the requested format relatively easy. So it's not about going and fishing and asking them to convert or to save multiple versions of every document and convert multiple versions. The idea is just if you have another document sitting there, if you have it in two different formats and they say hey, can I get this format or if you have it in multiple languages and they say I prefer it in this language and you already have it, just that kind of an idea of respecting preferences or facilitating preferences where it can be done easily. So that was a concern that ICANN raised and I added that little caveat at the end to make sure it wasn't misunderstood.

There's been a small change to recommendation No. 8. Again a similar kind of thing. Where I think that ICANN concern was that ICANN's response -- creating a responsibility for direct requesters to where information has already been published was going to lead to people making narrative types of requests. So, hey, guys, gather up all of this information, like these big fishing expeditions that would lead to problematic resource expenditures by ICANN. I clarified that, as well, by adding little sections by saying in other words, if the process and other DIDP requests reveals that the information has already been published.

So staff should include information about where this information may be found in the response to the requester.

ICANN actually said in their response to us that they already do this as a matter

of practice but they also said -- it was a bit confusing because on that single recommendation, they first said oh it's no problem we already do this because then it causes resource challenges. So I sort of tried to alleviate that concern by clarifying what we're talking about again. And the other revision or sort of the next revision is in on the following page with number 12. The intellectual property, the IPC, I think, in exception number 12, the number 12 deals with reaching out to third parties when their personal information or commercial information is under request to obtain their consents for disclosure.

We need to discuss approaches to commercial information. So putting that broad issue to one side, the IPC had said they had made a request. If it's the requester who's reaching out to the third parties, that's inappropriate and a privacy problem, et cetera. Which is completely true. And as that had been drafted, the idea was that ICANN would reach out. But they said that was unclear so I clarified that saying that the idea of reaching out to the third parties to try to ascertain if they have any objection to the disclosure is done by ICANN.

And to clear up what we're talking about, to provide more clarity to what we're talking about, we're talking about instances where an exception is grounded not in ICANN's interest but in a third-party interest. So third-party privacy interests. Or third-party commercial interests. If a request comes in and it touches on those interests, ICANN would reach out to the person affected and say hey, do you have an objection to the disclosure or do you have no problem with it? Because if the person who is contacted doesn't have any objection, then there is no -- then there is no problem about disclosing it. And I do realize that we have more to discuss in terms of the approach to third-party commercial information generally. But the only purpose of this little clarification here is just to note that consent mechanism.

The request is for -- David said: If the request is for permission to disclose, not objection to disclosure.

Well, the way that it's phrased is to assess whether they would consent to disclosure. The difference between permission and objection is kind of what we're talking about here. That's kind of at the core of the bigger issue that we need to discuss is how much control third parties have over that disclosure and whether it's video power or not. I know your position on this, David, and that's an issue that we're going to discuss in Johannesburg because I think that's one of the contentious ones.

So it's not visible on the screen right now, but if you have your own versions of the doc open, you'll notice that for exceptions number 11, 15 and 16, I added kind of little comments sort of framing it that that's what we need to discuss. And just to read those out, it says for number 11, "to be discussed. Is there scope for providing avenues for access to some types of information provided by third parties while still respecting the legitimate interest of these parties? How did this recommendation interact with open contracting? That's basically just sort of teeing up the conversation and saying, like, how do we feel about this?

Similarly, on the next one, or on number 15, I added a comment saying "to discuss how should this exception be structured for attorney/client privilege? And are there specific areas of information related to ICANN Legal buy we would like to see released that's the main thing that ICANN Legal is waiting for from us a little more

guidance with -- they expressed unhappiness with the phrasing as it currently stands, as two of the three responses of the consultation, as well. So they said we don't like this. Give us a little more information on what specifically you want to see released. And we also said give us a little more information about what you want to keep secret. And sort of are hoping to meet that and hash out at the face-to-face is more specifics about what do people want from ICANN Legal? What are the areas of transparency we can look for other than just stronger change which we had originally recommended.

And then, finally, in comment number 16 on open contracting, it says, "to be discussed in order to clarify the scope of the DIDP is it is important to understand how NDAs interact with the DIDP. How should this be approached? And do we want to include a specific recommendation on open contracting?"

So those are the three areas to discuss and that's the language that I used to sort of tee up that conversation.

And one other minor change that was made on the following page. So, again, 22. And this is per the recommendation of ICANN's interactions with government. I took a quick look at -- there's been a back and forth between ICANN and Chris that I kind of have to sort of take up the mantle and jump into now basically around how this is going to work. This probably will require a little more back and forth as I think about it because obviously this is something that affects them quite a bit. But for now -- previously it said all expenditures and we got a recommendation in to limit that to expenditures over \$20,000. So if you look at the first bullet point where it used to say all expenditures. Now it says all expenditures over \$20,000 on an itemized basis by ICANN both for ICANN contractors and personnel both for U.S. and abroad should be disclosed on at least a yearly but no more than a quarterly basis.

So that's just in response to one of the inputs that we got in.

I want to make sure. I think that's all of the changes that have been made. And that's basically meant to prepare us for this discussion to Johannesburg. I see Bernard's hand up?

>> Bernard: Thank you, Michael. Just to give you know notice, if you haven't looked at the schedule, we've scheduled 45 minutes for this. And so if you want to structure the discussion accordingly so that you can use up that time, I think that will be great.

On a second point, I've got -- I included some documents, including the summary of comments from the transparency public consultation in the send last night with the agenda. But would you be okay if I distributed this new version of the document and the transcript to sort of tee this up so people understand the issues we're going to be talking about?

>> Michael: Certainly. I would very much welcome the distribution of the revised document. Maybe it would be good to distribute, as well, some of those background documents that I sent around. If you want to, you can mention that these are not background documents that are endorsed by the working group if people would be uncomfortable because they are not position papers. It's just kind of to discussion that has to be dug into a little bit.

Bernard?

>> Bernard: We'll make sure to refer people to the wiki where everything has

been presented here.

>> Michael: Yeah, sure, that's fine.

Just in terms of schedule, like I had seen that. I was kind of -- I understand it's a busy day and you've got cram everything in. And I also didn't mention this in advance. I was hoping that there could be a little bit more time than 45 because I was kind of hoping to hash out these final issues. But I should have contacted you about that earlier. I also know it's a busy day. So it maybe can't be accommodated. I thought I would mention it now in case there's any rescheduling that happens or if things get shifted around a little and there is a little bit of time that is left over, it would be very much appreciated if there's anymore available. But I understand if that's not possible. Yep, Bernard?

>> Bernard: Well, usually the co-chairs try to run this so that if there's an active discussion, they'll always try to make sure that that discussion gets completed whenever possible.

>> Michael: Okay. I appreciate that. Just because my hope is that, like, this kind of face-to-face will be sort of the area -- I know we have some big issues to hash out. And my hope really is that we'll just kind of finish the conceptual debate around the document. Can finish the -- can get to a point where we're basically on the same page conceptually and have consensus on that and where that comes down to the little details. So thanks very much for that.

That's all that I wanted to -- that's sort of the end of my kind of program.

I had mention a bunch of little changes. If anybody had any objections to those, then we're obviously very receptive to that. And otherwise did anybody have anything they want to say or any additional comments either on the changes or on our work face-to-face or anything else? Going once? Going twice?

Okay.

So thanks for joining us. And for your continued engagement on this group. If there's nothing further, I look forward to catching up with all of you in Johannesburg. Thanks very much and I'll see you there.

(end of meeting)

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