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CCWG-TRANSPARENCY SUBGROUP MEETING

Wednesday, September 13, 2017 - 19:00 to 20:00

>> Hello.

>> Michael, are you on? Ahh, yes, we can hear you fine.

>> I am. Sorry about the delay. I can't seem to get Adobe by connect. It's odd. It's freezing before it connects.

>> ICANN updated its version and you have to accordingly update on your end, especially if you're on a Mac. There's all sorts of problems. We've got the Adobe room open and we've got the document with the 3 changes up. So maybe while we send you that we can start with you reading those changes on your own screen.

>> And I'll tell you if there are questions.

>> Yep that would be great. I'm just putting the update together now. So, I can just move in parallel. So, thanks to whoever has joined us.

>> This meet something now being recorded.

>> Thanks very much to everyone who has joined us. So, again, this is mostly an update to go over some of the changes to the document that we should consider as a result of the conversation I was able to have with JJ and some others in ICANN legal a couple weeks ago. Just to if you'll recall, basically at the end in the beginning of this process we discussed that there was going to be pretty much 3 major areas sort of thorny issues to resolve in order to move forward. One of them was attorney/client privilege and how that should be understood. The second was about basically commercial contracting or sorry, commercial information as well as a non disclosure agreement and how those issues all sort of bundle together. And a third was the duty to document. Those are the 3 main areas where there were kind of flags raised in terms of the previous draft. And all 3 of those areas it was

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determined that the best course of action would be to follow up with ICANN legal to get a better sense of the objections that they've raised. So, we had a very productive conversation earlier this month and what was particularly good to hear was that for a lot of the objections that were raised or a lot of the policies that we were trying to stress, ICANN said ICANN legal said, look, these in most cases match very closely with either a value that we share or a practice that we're hoping to aim for. So, regarding the duty to document for example, they said, look, this sounds like good administrative practice, that sounds great. This is a value that we completely share, documentation, paper trails, I mean that's just something we should be striving for. So, we're on the same page as that. But they said that they wanted it phrased in a way that didn't imply that a particular directive was being made to harmonize record keeping functions across different departments because those different departments sometimes had different requirements for how they would actually operate. So, they wanted to make sure those different departments had enough wiggle room to set their own sort of note taking standards instead of trying to impose them all through this policy. But they said this is a good idea. So, with that said, on each of the 3 major issues I was able to follow up with JJ and to get a stronger sense first of all of what he understood what was underlying their objection and I was able to propose new language that I think is in line with or resolves a lot of the objections that were raised on that side. So, with that being said I would like to go through the suggested re draft. The first is to address attorney/client privilege. So this if you'll recall is an area that was strongly debated here and when I brought it up to ICANN legal the response that I got back was that they have an interest in disclosing as much information as possible and they're completely on the same page as that but they don't like the idea of phrasing it as a directive or they don't like the idea of having it sort of as this they read the

previous draft of the recommendation as being a heart natural that would not allow them to apply the principles in a contextual way. Too much of a directive basically. So, kind of but they also said that they tried not to apply attorney/client privilege unless there was real harm. So, they didn't like the way it was phrased but the underlying value it was aiming for they said strongly touched a nerve they had and current policy anyway. So, the proposed re draft of that as a result, you will see on your screen where materials subjects to DIDP request could potentially be withheld under an attorney client privilege. ICANN legal should review the material to determine whether it's disclosure might be harmful and should only invoke this privilege if the disclosure would be harmful to an ongoing or contemplated lawsuit or negotiation or similar process or where its disclosure would reveal material provided in the confidence by a third party. It makes clear that that's a decision that ICANN legal is going to be making contextually and based on their assessment of the potential harm of the situation which gives them a little more flexibility in its application in which was their main concern. Why don't we just pause for a second to see if there's any comments on that while I try again to launch Adobe Connect.

>> I have one hand up from Samantha Eisner.

>> Great.

>> Thanks, this is Sam from ICANN legal. Thanks Michael for sharing the re draft text. Here in LA time I just looked at it. I haven't had a chance to discuss these with John in how they align to our conversation. I think my initial reaction to the re writing of the attorney client privilege section is, you know, I think the recounting of the conversation is really spot on about the goals that we would seek to achieve and why we pulled things as privileged and how it fits in with the general practice of when information is released, et cetera. I think we would want to

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go back and look at this language in particular to see it still seems a bit drafted in terms of a proactive waiver situation and limiting the situations where ICANN might have a legitimate need to withhold information as attorney client privilege. And I know we discussed on the call the concept of guidelines, et cetera. So maybe one of the things we can do is take a look and see if we have any reactions to this language to give some more kind of specific feedback to the language here seeing how you've rewritten it but understanding that we're working towards a common goal.

>> Yeah. That's great. Yeah, I think I definitely sent versions of this along to JJ I'm just trying to find the email. Right. So, this is on September 1. I sent an email to you and to John with the same proposed language basically. So, my hope is that and I didn't intend this as being basically my intention of this call is to try to solicit feedback from the group as well, sort of in parallel to that because I wasn't sure when I would hear back from you in terms of the language itself. So, I was hoping to kind of move along both tracks in parallel. But I would definitely be very I think everyone in the group would be very interested to hear back from you on this language. Basically, on all 3 of these re drafting areas. Would you be comfortable offering like a rough estimate of when you might be able to get back to us on that?

>> I do need to see when I can get some time with John. We are planning on I know he and I both leave next year to travel to the workshop so there is we have some realities that we only have basically two days together in the office before that happens. So, it would be within the next couple of weeks but it's not going to be in the next couple of days.

>> Okay. That's great. So, next couple weeks or so would be perfect. And thanks again for your comments at the moment. So, we'll look forward to hearing back from you on that. Are

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there any comments from other people in the group about the proposed changes? And I'll clarify in case that wasn't clear. I'm not intending this as being a first formal or formal reading of these changes. I'm basically trying to solicit feedback on it and see we're getting comments back from ICANN legal. There needs to also be consultation, discussion process with the group obviously as part of that as well. That's what I was intending this to be. But unless there's hands up on that

>> No other hands up.

>> Okay. I'll move forward to the next one which is on NDAs and open contracting. So again, it's a similar kind of thing where in the conversation we discussed the values that we're trying to get at with this extension which is to bring as much of the contract as possible while still protecting the commercial interests that are in place. And again, I heard back from ICANN legal and there's a shared interest in transparency and disclosure and I think also a shared understanding of the need to protect information that's subject to commercial subjectively or information to protect ICANN's ability to secure its commercial terms. So as a result, the recommendation on sort of commercial the recommendation there is redrafted assaying wherever possible ICANN's contract should be either proactively disposed or available under the DIDP. It should allow ICANN to withhold information subject to a non disclosure. (Reading) or where information contained therein would be subject to other exceptions within the DIDP. Such as for example, where the contract contains information whose disclosure would be harmful to the security and stability of the internet. So, are interest any thoughts from the group on that proposed re drafting?

>> Hand from David.

>> Great.

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>> Hi Michael, it's David for the record. Yes, I have one request for clarification and it deals with the phrase that reads, however, such agreements should only be entered into where the contracted party presents a legitimate commercial reason or requesting the NDA. And, my request would be that it reads something like, should only be entered into where the contracting party satisfies ICANN that it has a legit Mt. commercial reason for requesting the NDA so that this particular DIDP request ended up with an IRP, the focal point of inquiry wouldn't be whether the reason was legitimate, it would be whether or not the contracting party had satisfied ICANN. Thus, leaving the dispute between the requester and ICANN and not involving the other party. And that's my comment. Thank you.

>> Yeah. I don't have a problem with that. Are there any objections to that or any other thoughts?

>> Nothing in the chat and no hands up.

>> Great.

>> Julf says, sounds good.

>> Sorry it's cutting in and out. My apologies. I didn't catch that.

>> We have one chat comment that says sounds good.

>> Great! So, let me just preplace that in my word version. So, the DIDP where the contracting party satisfies ICANN, that it has a legit Mt. commercial reason for requesting the NDA or where information contained therein would be subject to other exceptions. Okay so that's good. Unless there are any other comments we'll move on to the next one, regarding the duty to document. I think I led with a little bit of information of how I recall the conversation as going. Again, as basically being the main objection that ICANN legal presented to that, to the phrasing as it was, was that they didn't want to enforce uniform

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standards on ICANN different arms and branches who have their own prioritization and own way of doing things for the context they operate in. However, there was an agreement in the general value of having a paper trail for decisions. And, you know, this is something that I approached as a transparency issue. But as ICANN legal quite correctly pointed out this is also an issue of and administrator efficiency and good business practice to be able to trace the stuff back and leave a paper trail. So as a result, the recommendation on the duty to document was rephrased so that it's not as much as a directive and is more a rule that if decision making is taking place without a lasting paper trail participants should create that paper trail. Including documentation whereby if significant elements of a dig's making process take place orally or otherwise without a lasting paper trail the participants should be required to document the substance of the conversation and include it alongside other documentation related to this decision making process. Any comments on that one?

>> We have one hand from David. But before we go to David, I'll just bring you up to speed on the chat, on the previous point Samantha posted just to clarify an IRP would be about ICANN's alleged violation of the Bylaws in how it handled a DIDP. Not about ICANN's alleged violation of the DIDP. However, I think that David's request language remains in the spirit of how ICANN now looks at entering NDA's. And David replied, agree on IRP standard that Sam notes. And that's all that's in the chat right now. And David has his hand up on the current point. Over to you, Michael.

>> Over to you, David.

>> Thanks Michael, David again for the record. I have a question on this and also a language comment. Let me go with the language comment first. Instead of saying without a lasting paper trail can we say without a record? And the reason I say that is there are probably many

these are community decisions that have an oral transcript. But not a paper one. Anyway, my question is with respect to the decision making process that this addresses, are these internal ICANN decision making processes or are we talking also about community processes for reaching decisions? Thanks.

>> Yeah, great question. That specifically came up. My understanding of the scope of this the scope of what we're doing here, if it's just related to ICANN and not out to the different communities, particularly because there's a separate process that's specifically looking out that's specifically discusses the communities and that includes transparency and engage. So, I've spoken to Steve who is leading the process or who is one of those in the process in terms of transparency for those and they're ramped on that front. So, I didn't want to step on any toes in terms of creating and conflicting recommendations. But, yeah, that came up in the conversation with ICANN legal. It's a very good point. I'm a little hesitant to build that into it but my understanding of this current recommendation is it's just for ICANN organization. But I'm open to hear people's thoughts about that too, certainly.

>> It's David again if I can just reply. Thank you for that information and then that makes the reference to paper trail more sensible to me. So, I really don't have a comment on the paper trail language. Thank you.

>> Okay. Great. So, so those are the major amendments then. What I'm going to suggest in terms of going forward is that we schedule another meeting for about say 3 weeks from now. Because I realize I only sent this around today and I saw all the people that can't make the call which gives me time to suggest that we schedule a meeting for let's say in 3 weeks. Hopefully by then we will have heard back from ICANN legal as well as their thoughts on this amended language then we basically try to get through the first reading of revised report at

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that meeting in say 3 weeks. I'll follow up with Bernard to schedule that. Does that sound good?

>> I can schedule that right now if you want. Just a note that if we've gone through one public consultation. Anyways, I would problem in that case October 4, 19:00 hours if that's convenient.

>> Perfect. Works for me. Any objections?

>> With a note that documents that are due for the following plenary are due one week later on the 11th for a plenary on the 18th given we're traveling or face to face on the 27th in Abu Dhabi. So, we will note that and send the usual invites.

>> So just because it really would be good if we could get a first reading for the plenary at Abu Dhabi. So, you're saying we would need to go through two readings ourselves before that, two weeks in advance?

>> Well, that is depending on how you want to do it. Yeah, if you want to do two readings technically you could have a second meeting either on the ninth or tenth or 11th and still make the time, the required time line for the plenary on the 18th. The documents are due end of business on the 11th or midnight UTC.

>> All right well let's try that then. Why don't we try one meeting for the fourth and one meeting for the tenth and if a whole bunch of stuff is raised on the fourth or doesn't look like it's possible then, you know, we can cancel that second one. But why don't we try to schedule those two and see if we can do it.

>> All right. So, the fourth, 19:00 and tenth, 19:00.

>> Perfect. Okay. And so, one of the things to mention is there was a recording made of the conversation between myself and ICANN legal and Bernard do you maybe have an update on how or where people can access that?

>> I did not manage to dig it up yet. I was sent the link. I will post it to the list for this group today.

>> Great. So, we'll look forward to receiving that. Any other business or any final thoughts from anybody? Assuming there's no hands, thanks very much for the call and look forward to checking back in in a few weeks. Hopefully on Adobe Connect this time.

>> Thank you everyone.

>> Thanks Michael, bye.