

CCWG-WS2 TRANSPARENCY SUBGROUP MEETING

Wednesday, October 4, 2017 - 19:00 to 20:00

>> This meeting is now being recorded.

>> Great! So, we have oh, a little bit low volume. Well, hopefully I can be heard by most of you. Please, express yourself in the chat if there's any issue hearing me. So, I had hoped to go through the report with all the changes previously with all the changes as uploaded but as some or hopefully all of you saw we just heard back from ICANN legal who gotten back to us regarding the 3 proposed sort of "controversial" or difficult recommendations that we had. So I was hoping we could discuss those first to chart a common path forward and maybe based on that we can get agreement on a good Avenue for transparency. And I'm going to suggest that we start at the last one, we go in reverse order if that's all right. Because, Yep, right down to the bottom. Because, I think that in my mind at least the changes to the bottom two are simpler and the changes to the top one, the attorney client privilege is the only one that's a little tricky from my perspective. So why don't we start on the one on the duty to document. Can we just shift the screen up slightly? Okay. Well, that's good then. So we'll discuss all 3 of them anyway. So maybe to get the duty to document one, if you have the document in front of you about the changes that are made, oh, now I have slide control. Lovely. So, if you look at the changes that were made in terms of the documentation thing, they re worded it in a certain way. I don't have any problems with these changes. To me that helps to clarify it. One of the things that they mentioned is in terms of the first sentence they say they should include documentation whereby if significant elements of a decision making process take place orally. Then they say if it's board decision making to which my response is no because we have a separate section for recommendations on transparency for the board. This is just general decision making processes.

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And they've asked if that can be refined a little bit. I'm not sure if anybody has any thoughts on that. I don't really, you know, in my mind I was thinking it would be good to keep it open ended because it's about ICANN's decision making processes, not any single one. But why don't I open it up and see if do people have thoughts on how this could be refined or any suggestions? I think it's okay as it is. But, does anybody have thoughts or feelings about refining this further or that sentence decision making processes? I see typing. I would be in favor of just keeping it as is. Yeah. Unless there's objections there I would be in favor of just keeping it as is with the re drafting that's been done. Okay. Great! Okay. So that's good. So why don't we just then move on to the second one. Now, on that one there's been a little bit of wordsmithing there. Yeah. Why don't we yeah. Why don't we just keep it as it then. I would suggest. So, regarding open contracting there's a couple a little bit of wordsmithing that was done by ICANN legal which I don't have a problem with but they also mentioned as discussed the general availability of contractual issues, not a legal issue that presents tradeoffs which did come up in the conversation and which I was trying to be sensitive sensitive of in terms of allowing for reasons for withholding the NDA. I generally don't have a problem with the way it's being re worded as is but I think David expressed he wanted to weigh in on this one or just up it up, I see David's hand is up. Do you want to go ahead?

>> Yes, thank you Michael it's David for the record. This language I made the language I'm looking now at the ICANN legal suggestion. It's the one you have on the screen. And it is based on language that was in the document before, I believe. And in the last meeting I mentioned a concern with that language and you actually made a change that I thought was acceptable and I'll mention what that is in a minute. But let me tell you what the concern is. I'm reading the second sentence. The DIDP should allow ICANN to withhold information it

holds subject to non disclosure agreements. However, such agreements should only be entered into where the contracting party presents a legitimate commercial reason for requesting the NDA, or et cetera, et cetera, et cetera. My concern is the contracting party presenting a legitimate commercial reason. And the concern is this, if there's a dispute over the IDP that ends up RIP the contracting party could get roped into it because the question will arise was there a legitimate commercial reason. And that could be subject to the dispute. The language and I believe I mentioned that before. And the language then that you came up with I'll read from your document. The DIDP

>> Sorry, go on. I agree, yeah.

>> Okay. The language that you came up with took that phrase that I'm concerned with and said however, such agreements should only be entered into where the contracting party satisfies ICANN, that is has a legitimate commercial reason for requesting the NDA. The difference, of course is now the standard is that the contracting party simply satisfied ICANN that is had a reason. And there's a difference there. And so, if ICANN is satisfied then the contracting party is out of the dispute. It's not germane. And that's what I was requesting and that's what I think makes sense. And so that's what I'm suggesting. Thank you.

>> Yeah, thanks very much for catching that. I think I might have sent them well I definitely sent them multiple versions of this so I think there might have been crossed wires. You're absolutely right to note that the working group agreed to some changes on the last call and those changes are not consistent with the version does not have those changes in it. So apologies for that. If you look in the chat I have posted in the revised language as I have it and as I believe you just read out. So, maybe we can take a moment to review that fan we're

okay with that, I think that based on the way that ICANN legal rephrased it, I think it probably they wouldn't object to the change sorry, David your hand is up?

>> There was only a comma after you finished. I find acceptable what you wrote and put in the chat and can support that and suggest we send that to ICANN and ask them what they think of it. Thanks.

>> Okay. I would suggest that we don't need to go back to ICANN again with that. Because, I'm not sure that their objections are substantive. If you feel strongly about going to ICANN we can but I guess I'm looking to try to keep the process going on this. Can you clarify not really? Can you expand on not really?

>> Yes. Actually I've changed my mind in the split second since I wrote it. I don't know that we should go back to ICANN for comment but I think it would be good to flag it to them because it is a change. It's a change in the standard as I just described. So it could be of interest to them. I don't know. So, if we don't ask for comment I think we should at least note it to them saying you were working off an older copy, you know, the more recently one has a little bit recent standard.

>> That's no problem. I'll go back to them after this meeting and basically say, by the way there was a couple of changes made. Let us know if this changes your opinion. And I'll sort of leave it on them incumbent on them if they have an issue with it: Okay. Great. So that takes us to the one which I think is a bit problematic from my perspective which is attorney client privilege. Sorry? Oh, I see my sorry Bernard. My apologies.

>> Thank you, Michael. Can you hear me? Hello? Can you hear me? Okay. A couple of points. I understand the feeling on the previous one of not wanting to go too far with ICANN on that one. But, the point I will bring up is the following. A, let's remember we have a deadline of submitting by October 11 if we want to get in the cue for the 18th. The second one is if we do get some sort of sign off from ICANN on our changes here, we might feel comfortable not having to go for a second public consultation. And that could be very useful. So I'll leave that with you. Thank you.

>> That's interesting to consider and I guess the other thing to think about is why don't we address this top recommendation first. Because, I think that's probably going to impact how we proceed as well. So why don't we shelf the Avenue forward for now and go back to this first recommendation on attorney client privilege. So, the original version of this which was sent to ICANN, I'm going to post that into the chat in case it was adapted at all. I don't think it significantly was but just in case. The original version this is to say where sorry, Bernard is that an old hand? Ahh, okay. So the original version of this said where materials subject to a DIDP request could potentially be withheld under a attorney client privilege the ICANN should review the material to determine... And revoke if F disclosure is harmful to an ongoing lawsuit (Reading) reveal material provided in confidence by a third party or would otherwise be subject to exceptions contained in the DIDP. So the purpose is to provide some guidelines or limitations on when attorney client privilege should be exercised. And, it was originally phrased in I think a stronger way the first time around, where originally it was phrased as ICANN should only apply attorney client privilege in these limited circumstances and shouldn't have it otherwise. ICANN legal objected and said they didn't like the idea of it being kind of a presumed waiver of attorney client privilege. That they were unhappy with

that. Oh, my apologies. That they were unhappy with that. And so based on that, based on that conversation it was revised a little bit to say to be the version that's in the chat right now. It was revised a little bit so that rather than creating this hard and fast rule around limits to attorney client privilege, we clarified in the recommendation that the decision was really up to ICANN, we gave them a lot more flexibility that they would have control over how that it would be exercised. But, tried to build into the process kind of guidelines that basically said, it should only be exercised in these circumstances. So what we've gotten back from ICANN now, I think waters this down considerably. So, ICANN legal responded with the proposed language saying where material subject to a DIDP request could potentially be withheld under attorney client privilege, ICANN should review the material to determine whether any parts of the information are appropriate for release including the scope of the potential waiver of the attorney client privilege. And the comment to that they say the text are fine a waiver limited by litigation process otherwise it restated the areas not appropriate for non disclosure under the DIDP even as revised. Looking at their revised language, I think that it essentially makes this recommendation meaningless. To me, when I look at the revised language all it seems to say is sometimes ICANN legal shouldn't apply attorney client privilege but without any guidelines or suggestions on when and how that should happen and it's essentially it's been watered down to the point it's meaningless in this incarnation. I don't see not only do I see this as not having any practical impact, potential as a practical impact but without at the very least some kind of guidelines on this. You know, I don't even think this is is a proper statement pushing it in the right direction. So with that being said, I mean, you know, I would like to I think I was hoping to open this up and see what people's

thoughts are about this revised language. I think it's problematic but it would be good to have a discussion about that, obviously.

So why don't we pass it over to David?

>> Thanks, Michael. David again for the record. And I have some sympathy for ICANN's position here. And I guess I'm in the second career here at Veri sign happily so. My main career was a software company general counsel and I understand the importance of the privilege both in litigation and in contract litigations as well as elsewhere. But and even before that I was a U.S. Navy jag officer in Manila negotiating things around East Asia and even there the privilege was quite important and it had real world consequences that were important. And I can understand ICANN being worried that without sort of a general protection of the privilege they might find themselves in a very bad position. So, about this particular clause what I would say is I would disagree with them deleting the word legal. Because I think it's important that the legal actually do this review because they have certain professional code of conduct obligations that would require them to give this a fair review and not simply pass it off, dismiss it as something inconsequential. But, I also will say about their change that it's not complete. Because, they will have met their obligation if they review material to see if it's disclosable and that's it. We should go on. If we agree to their language we should go on and say in which case if it's disclosable they will disclose it. So, I understand your concern and I understand theirs and at this point I'm somewhat sympathetic to their concern. Thank you.

>> Okay. Thanks for that. Why don't we is there anyone else that wants to weigh in? You know, I don't want this just to be a back and forth. If there's other people that have thoughts on this it really would be welcome. Avri, please.

[silence]

>> I see that Bernard's hand is up and Avri is asking why did they remove legal. I actually hadn't noticed that aspect of it because I was focused on the second half. But why don't we go to Bernard first.

>> Thank you. Just trying to put this in context of process and approvals. You know, obviously this is one where ICANN legal recommendations to the board when considering our recommendations will obviously weigh heavy. Okay. Secondly, I think we've done incredibly well getting through the 30 odd recommendations we have in our report. Now, obviously it's up to this group to decide. But, I think that in my mind, I think it would be interesting to run David's proposal by legal and see if we can find some common ground there and if there is, I'm bringing back my previous point that if we can resolve these two points, then we can submit this to the plenary with considerably different optics. The plenary might feel that it's absolutely necessary we go back for another round of public consultations and see how that goes and we obviously know that if we have issues with ICANN legal the results of that public consultation from that part of the public will be known. So, I am really trying to say we're getting near the end of the line here on timing. If we can get to a point where we get these parties to think we've got some solid common ground to stand on we might do better right across the board. Thank you.

>> Okay, so just in response to going back and forth like that, I think that David's proposal is giving ICANN more than they're asking for, ICANN more than more power and control over the process than they're actually asking for at the moment. And that doesn't that's not invalidating it. You know, he brought up his points but my only point with that is I don't think that the question of whether if we say if we go back to them and say ICANN legal should be making this determination, not ICANN, that's not something that there's going to be I would be stunned if there's push back to that because I think that the way that I'm reading this is that they changed ICANN legal to just ICANN as a sort of concession to take the process a little bit away from them as a mitigation of the fact that they're taking out all these guidelines. So, for us to go back and say I mean if that's what the group wants to do, then that's fine. But I think that we could just as easily I mean that's not going to be I think a challenging thing to go back and forth on.

I really think that changing it in this way kind of ruins any potential for having any positive impact at all or any increase in transparency at all based on this recommendation. That's my opinion. I guess I've been very clear on that. But let me ask now and just see if I'm well, I see your hand okay, well let me see is it just me that feels the change is problematic or it's not? I see Robin agrees with me. So that's something thanks, Robin. Why don't we bring it back to David because I see your hand is up.

>> Thanks Michael. I think that essentially what you're saying is that ICANN should not be able to exercise attorney client privilege the way corporations apply attorney client privilege. And, I guess I'm just not there. I'm not to that point yet. It seems to me that attorney client privilege is an important privilege and before it's watered down we should know why and then secondly we should be careful with the wording so that it's only done cautiously. But as

someone who by his practice for a lot of my life, you know, sort of got to know and understand and appreciate the privilege, I'm not there yet. So anyway that's the explanation. Your mention about the word legal, I think maybe you're right. I think that this review should be done by ICANN legal because of their professional obligations under their various codes of conduct. But, I also understand that if this is ICANN generally, ICANN generally cannot review something insofar as it includes the scope of attorney client privilege without getting legal involved. But, my preference would be to say ICANN legal and not agree to their striking that board. Anyway, that's probably a minor point. Thank you.

>> So, let me Robin in the chat says ordinary companies doesn't have public governance... I agree with that. Let me say where I 100 percent agree with you, David. Which is that attorney client privilege is important and needs to be protected. And I think that we did, you know, there's been a lot of movement between where the recommendation originally was and where it was submitted to ICANN legal. I think in recognition of that. But let me also say just in terms of ICANN doing it versus ICANN legal sorry about that. So, just in terms of the who is making the determination? It's been a while since I was in Law School but if I were correctly attorney client privilege is waived at the discretion of the client. So if the client being ICANN determines that the material shouldn't be subject to privilege, doesn't that trump ICANN legal's perspective? It's not there to protect lawyers, it's there to protect the client. So fundamentally I would say it is ICANN's determination. Sorry, David did you want to respond?

>> To that point, I would agree with you that I'm sorry this is David for the record. I would agree it's the client's to waive but I think it's ICANN legal to inform the client whether the privilege exists that might be material to ICANN's consideration whether it wants to let this

information go. And I asked a question in chat, I thought that you and John Jefferies had discussed this and I just don't recall what was the result of those discussions. It's been too many weeks I guess. I can't remember and I was wondering if you could just wasn't this discussed and resolved or at least furthered? Thanks.

>> We definitely did discuss it. I thought we were I thought in the conversation that we were close to resolution. Which is why I was actually a little bit surprised to get the changes back as substantive as they were on this one. When I was speaking with JJ, what he was saying was we at ICANN legal want to release material as much as possible. We want to limit the amount of time that this is applied and we are okay with that just so long as it's not a presumptive waiver. The big problem he raised when I was talking to him was to mention that he didn't like this idea that it would automatically be waived and that my understanding of his objections was he didn't like the fact that we were going to put this hard and fast rule in place that would take the decision making out of take the decision making out of ICANN's hands. It would basically say here is the rule and there's no flexibility to it. So, the way that it was re drafted, I think that the idea behind that was to say rather than here's a rule that firmly limits what ICANN legal can and can't do, we're going to say that ICANN legal is making this decision but they're going to make it according to these kind of guidelines. And, what we seemed to have gotten back in my opinion is the removal of the guidelines as well and essentially making this a completely discretionary determination with no rules but also no even guiding principles for how it should be done. Not even value statements about that. So, you know, I'm sympathetic to I agree with what Bernie said about how there's 30 recommendations and we're so close but I also for me at least I feel like this is a bit of a bridge too far because it just completely guts it. So, if David is suggesting that we reengage with

ICANN legal, do you think it might be possible to schedule another call on this or maybe a discussion at like a 15 or 20 minute phone call to try to hash this out? Because, my perspective on this would be I think it's problematic to not have any guidelines in this at all. If the group thinks differently or if the group just wants to push this ahead then I'm, you know 30 minutes minimum. Well, yeah. David, you have your hand up.

>> Yes. And I think you had some success, Michael in arranging a call so if you could do it with Sam and/or JJ and you all reach agreement I'm pretty sure I could agree to that. But, I was just keeping an eye on what Bernie had told us before about trying to get things wrapped up. And I think that makes sense. So anyway... With your thoughts on your side and theirs on theirs if you could maybe tee it up and ask them to listen to this recording or something and I think you can probably come up with something. Anyway, that's a suggestion. Thanks a lot.

>> I would be and I am mindful we need to push this forward but I expect that we would be able to find something. Bernie, do you have any thoughts on this in terms of whether that could be set up?

>> I was just going to say, I really think that's a good suggestion. I have no idea what the availability is. Let's be clear H is a couple weeks before an ICANN meeting and that's always very hard on high end staff back at the office. But, if we decide that today, I can tell you I will make that one of my priorities and try as hard as I can to make sure we get that meeting done as soon as possible.

>> Okay. That sounds good to me. So then why don't we I think we have so we have agreements on the language on this I think and within the group at least have agreement on the NDA's and open contracting. Though, we did agree to send that back to them to

sustained back to get their approval and make sure they're on the same page with the revised language. (Send it back) and regarding recommendation 15 we'll go back and try to schedule a phone call just to hopefully hash this out. And on that phone call I will try to get to a point where we actually agree on language which I guess was not language that unfortunately wasn't done in the last one. Bernie, your hand is up again?

>> Yes. As a suggestion which might make things work a lot faster. Given on the two other recommendations, we have something that we can write very easily. I think you can clarify those in a few minutes of writing. On the third one which is the first one, recommendation 15, if you can in a few lines outline your key issues with what they've done with the text then I can grab that and send that to ICANN legal so they understand what we're going to be talking about and that might make it a lot simpler for them to get something scheduled. I would think. Thank you.

>> Okay. So I think that's a great idea. So why don't we discuss maybe just sort of try to get on the same page in terms of our thoughts on this. The problem so the revised language as we sent over to ICANN keeps the decision making it makes sure that this is not a hard and fast rule and it makes this into a contextual decision rather than a firm rule. Which was, the movement that happened as a result of our discussions. And I'm fine with that. And I think that's good. But, what I would like to see is the inclusion of guidelines about when attorney client privilege guidelines that will impact that decision making process as opposed to just a broad consideration.

Are there any other thoughts that's the main problem that I have. Are there thoughts that take the issue in a different direction or are there other values that people wanted to present

with regard to that? So, without seeing any hands at the moment guidelines with should. Yeah, I mean the previous language was to say it should only invoke this privilege if the disclosure would be harmful to yadda, yadda, yadda. We really were in the previous draft trying to keep them as guidelines and keep them flexible which yeah, that's why I was a little surprised to get it back with the revisions that we got. So, I guess we'll maybe go back and I'll come up with a paragraph to write around just sort of reflect that our interest in keeping some guidelines in the process. And if anybody else has any inputs or thoughts that they want to share that would be very welcome. But, barring anything else we can just sorry K you clarify that, meaning they should apply the guidelines versus they should only invoke them?

>> No I asked the text is struck out here on the page. It says and should only invoke the privilege. And what I was trying to get to is maybe a possible I have no idea but a possible solution that we've reached in other groups is should only apply those guidelines as opposed to should only invoke the privilege. Subtle difference but I don't know if it makes sense.

>> That might work. David did you want to comment?

>> My only comment would be if when you have a call with them is are the basis of information dealing with the lawsuit or negotiation, by calling those out are we eliminating other things where privilege might apply such as legal advice on whether money can be spent in a certain way, things like that? Anyway... That's when I mentioned earlier, you know, ICANN's position is stated more generally which is something I thought made sense, I think one of the concerns they may have with your language is you're giving specific things and by

doing that you're eliminating other things. So I would just keep that in mind as you talk with them. Thanks.

>> Yeah. It kind of is doing that. And that's I think core to it. So, to give a specific example you mentioned whether money should be spent. Right? In the conversation

>> No whether money my example was whether money could be spent. Could. Whether it was legal to spend money in a certain way. You know that would be legal advice in a budget discussion.

>> Would that be sensitive legal advice?

>> I would think so. But I don't know. That's the problem with calling out specifics is we're trying to guess what might be the specific context in which they see the privilege applying.

>> Yeah, I mean the differentiation that I think the previous language is driving at was between kind of general policy making advice and more sensitive types of stuff. And, what I heard back from ICANN legal was they said, listen, we are very happy to disclose the nonsensitive stuff. We're very happy to disclose the stuff that's not connected to I mean they didn't obviously endorse that particular language but they said yeah, we're happy to disclose stuff that isn't sensitive in that way. But, I guess they're not happy with that categorization. Which is also, you know, potentially another Avenue where we can go down. That if they're not happy with the guidelines as they're currently phrased and if they want to provide for additional categorization, then that's, you know, that's I think another area of discussion. I'm just for me the discomfort is around the discomfort is around basically turning it into I don't want to say blank check because obviously we agree that it is a

legitimate privilege. But, to turn it into an entirely into something else. With that in mind why don't we go back with those types of ideas. I think going on what Bernie said earlier, if the problematic language is should only invoke, if that's what's drawing the red flag tan could be changed to something like in consideration of this process (and it), you know, guidelines should be X and Y or something like that. If it were possible to soften it in that way that would also be okay. In my mind. But, I think that in any case we're hopefully in agreement where I'll draft up maybe a couple of paragraphs just sort of outlining that objection to what was said and we'll try to arrange a conversation with ICANN legal hopefully not too far in the future to try to hash something out based on that language. Does that sound good to people? Great. So with that being said, I guess we're not going to get through a first reading today because we are going to need one more conversation with ICANN. Hopefully just one more conversation with ICANN legal. But, you know, I think that we're nonetheless very close to The Finish Line on this and hopefully we can get to a point where we get that buy in from ICANN legal and we can take that forward. So, unless there's any other business that anyone wants to bring up I think that we're good for today and I will email around some language that will be the basis and proposed language for the basis of another conversation with ICANN legal ASAP. Does anyone else have anything they wanted to raise? Bernard?

>> Thank you, Michael. Just a note. Really, we have to try to get this wrapped up at the meeting next week if we're going to fall into the deadline. And, I understand that's a lot of pressure and they'll be a lot of pressure on ICANN legal but that's really what we're facing down here. Thank you.

>> Well, again, I'm night or day I'll do it. So if it can be arranged then I'm very happy to. Somebody tells me I will regret that phrasing when they schedule it for 3:00 in the morning my time. But anyway... .

>> All right so let's get your text out ASAP and I'll start from there. Thank you.

>> Yep, I'll send that around. Okay, thanks very much for joining us everybody. Great turn out and I look forward to taking this forward again next week.