

EN

CCWG-WS2 TRANSPARENCY SUBGROUP MEETING

Tuesday, October 10, 2017 - 19:00 to 20:00

[This meeting is now being recorded]

>> MICHAEL KARNICOLAS: There it is. Apologies for the delay. I see that thanks to everybody for joining us. I see that so just to give a brief introduction to what we are doing.

There's a fair number of kind of minor innocuous changes. And then there's the one main thing to talk about with this one, which is the exception on trying to find brink I have not received anything in writing from ICANN but I see Samantha is joining us now. Let's jump into that first. And just have that discussion.

Sam thanks very much for joining us. Do you want to do you have something, a response you wanted to make to the email that was sent out?

>> SAM EISNER: Hi Michael, yes this is Sam Eisner from ICANN legal. I'm sorry we didn't get anything to you guys in writing before this meeting started. But we would like the clarify a little bit where the edits came from in response to the prior version that you had circulated.

So, as Michael has reported back, he had a call with general council John Geoffrey and myself. To discuss some of the ongoing issues relating to three of the recommendations. I think we are pretty much down to just this one. So during the conversation on attorney client privilege, one of the things that he had expressed with from the ICANN legal side was the concern over language that would create a requirement for proactive waivers of attorney comply.

Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

EN

Because of the way that the exception was written.

And so certain conversation, as Michael noted we had a discussion may be there could be guidelines that could kind of give guidance around when attorney client privilege would be used to hold back word or not provide information that would be otherwise responsive to a request. But there are we weren't sure what that would look like. Michael took a good faith effort in drafting up a recommendation that had some specific examples in it. Or some specific boundary through which possibly that did the exception around attorney client privilege could be exercised. That included future it contemplated or ongoing dispute resolution. Including litigation and arbitration, etc. And then, it also referred to other of the DIDP exceptions. There's other reasons why there has been and there seems to be a collective understanding that there may be not reasons to disclose information such as security related issues or art related issues. Items that were bound confidential, etc.

So when I took back the language to the general council and we reviewed it and we were colonel at that point that guidelines might not be or at least the guidelines were being considered were not really done in a way that allowed for the appropriate amount of discretion. In how attorney client privilege could be used. Because it's so layed out an area of proactive waiver and kind of to other issues that are already okay for there's already some consensus on not releasing. As we really sat down and thought about it, agreeing to that sort of proactive waiver reaches a point that actually raises questions to whether or not ICANN's lawyers are abiding by our ethical duties and engaging on a proactive blanket waiver. We tried to present some language back to the group that didn't include guidelines but included, we were trying to express a sentiment that we understand that even when items are requested that are basically subject to attorney client privilege

EN

we need to look at them. We need to actually take a look and see if it's appropriate to claim attorney client privilege over those items and not just provide a blanket response back that says no, you don't get them.

So we were trying to demonstrate our understanding of where we are trying to go with the transparency conversation. That it's not just a check the box if the document has attorney client privilege at the top but we look at it to see if it's necessary to continue maintaining privilege over it.

That was really the spirit of our response back. I don't know Michael if you have other responses to that. You know as we were thinking about it, we tried to see if we could put any sort of guidelines, but it was really difficult for us to come up with some that we felt didn't cross that line of a proactive waiver that really started raising some concerns.

>> MICHAEL KARNICOLAS: Yeah, let me just paste the version of it that you sent back to into the chat. So we have it on people's screens.

So, first of all. I mean it's great that we are on the same payment on the other two. Just with regard to, I think that my concern with the way that it's phrased currently, and in the version that you that has been sent back, I don't think that actually provides any kind of substantive baseline or anything that's really grounded in something that is going to improve practice. It doesn't really even include a firm codification of what is being done now. When I look at the specific language in the revised version, I don't think that it would work to have that as a recommendation because it doesn't really say anything concrete.

All it really says is that ICANN will determine when material should be withheld or not. And that's sort of going to happen no matter what. That's almost inevitable thing that is going to happen. That they will determine when materials should be withheld or not.

EN

So I think that the reason why I tried to categorize it with those particular in that particular way is to provide firm kind of guidelines for how it should be applied and I think in my email follow up that I sent, I expressed that if the categories don't quite capture the proper interest or if it's unclear as to how the determination would happen, you know I think that we that could certainly be amended. But I think that if you look at the way that the accepting is phrased now, I wouldn't categorize it as a blanket waiver and I wouldn't even categorize it as an automatic proactive waiver. All the recommendation really says is it says that there will be a process to review the material as opposed to just a consideration, actual process is going to takes place and that process is going to be based around certain guidelines. So my hope is that we can arrive at some kind of recommendation that provides for a specific process and specific guideline because in the absence of that, I don't I don't really see the utility. Like if I really see any impact or any real value to a recommendation if it doesn't include something concrete like that.

So I see David's hand is up. So why don't we open it up and have a discussion about this.

>> DAVID McAULEY: Thanks Michael it's David McAuley for the record.

And I want to thank you and Sam both for trying to bridge this gap. The last time we spoke I mentioned I had some sympathy for ICANN's position because based on my previous career was where I was in a corporate legal office and general council and I can understand I understood the important of it.

It seems to me in many of the things where there's been a dispute or not dispute but a discussion about these transparency stars, ICANN has come back to this group and said oh, we do that already. And that's been sort of satisfactory. So my question here would

EN

be maybe there's a middle ground. I don't know but maybe there's a middle ground that can be seen as somewhat concrete along these lines much that is when ICANN claims attorney client privilege that is the person seeking disclosure is concerned it's just a knee where jerk reaction and it's not really considered disclosure appropriately, they could say would you revisit that? Would you take a second look? Some way to take a second look. And in any case where there was a second look, ICANN legal would look at the aversion of privilege and then before they came back they would review their decision with the CEO or the chairman of the board. Because it's client's privilege to waive if they wish.

Would that possibly be a way forward? That's just a session recognizing both you and Sam have reasonable positions. Thank you.

>> MICHAEL KARNICOLAS: Sorry, can you clarify that again? That it would create a process for ...

>> DAVID McAULEY: What I was saying Michael maybe if there was a middle ground if ICANN claims attorney client privilege in the context of a DIDP request and the person seeking the positions thinks maybe it's just a knee jerk reaction on making that assertion, they could or we could describe a second request process. Where by they come back and say, would you take a second look at that assertion of attorney client privilege? And when you do take that second look or when that process provides for a second look, it wouldn't be just ICANN legal coming back and saying yes we continue this we persist, maybe that's a good word to use here, but they would have to review their decision with the CEO of the corporation a of ICANN.

Thank you.

EN

>> MICHAEL KARNICOLAS: Yeah so in terms of having a waiver for ICANN privilege because the waiver is at the discretion of the client it's a recommend defense that's just a legal fact. And in terms of creating a an appeals process there are appeals processes to the DIDP which are already existing and we have looked into creating I think we looked into creating parallel versions of it and getting not that ended up being problematic. I wouldn't necessarily see I wouldn't necessarily see the utility of having separate appeals for that.

I think that for me, the bottom line is, I think that what we are cheering is to try to provide recommendations for good practice. And I don't think that that means that we should be either providing recommendations that rubber stamp an existing practice or providing recommendations, particularly when people have expressed there's a need for more transparency and I don't think we should be providing recommendations that are so soft and vague that it could potentially be I think essentially of not a lot of utility for the process.

So this is why I'm trying to find an avenue that will actually the nail down a specific process rather than just essentially leave it as a discretionary decision that ICANN will make, based on their based on indeterminate factors. Robin in the chat says I have not heard any argument against recommendations for good practice.

I think it would be ways of opportunity if we didn't find some avenue to codify the factors and considerations that go into this decision and how it's going to be made.

So how about can I ask Sam, do you think there's any skill for providing more specificity. To row determination on applying attorney client privilege will be made.

>> SAM EISNER: I think one of the issues for this is that there isn't necessarily a one size fits all process for it.

EN

Right?

So there's so you know there are things that you know might be relevant to somewhere where there's a potential threat of litigation or dispute resolution right?

That's the easy part of of the world many but there's so many other things that factor into it. That it is hard to say, on a proactive standpoint, what those would be. I think one of the things we were trying to say, it is aligned with some of the things I'm hearing right? We want to make sure that people we want to make sure that we are not just in a position where the language of the DIDP says go ahead and rubber stamp it right? I think we have already moved a bit from the language that is currently in the DIDP that says, just sign condition for nondisclosure anything for attorney client privilege moving to a place where you actually have to look at it ICANN you have to think about this critically.

There are certain things that we have done in the past that we have we've looked. And we have talked about this transparency issue as it relates to other things. There comes time where issues have passed to the point where it doesn't make sense to maintain privilege over an issue or doesn't make sense to maintain confidentiality over an issue and we have you know released documents that we have previously held as privilege based on the passage of time. So that's been something that has happened. But in the terms of trying to set up guidelines, of that go beyond irk can will actually do something to look at this. And not just say, oh there's an attorney on it it's privileged. That, we want to help show our willingness to take that on. We think that is part of our responsibility. You know one of the things that we saw in the earlier version of the recommendation was that there was discussion around ICANN's policy making activities or the ICANN community policy making activities and where ICANN legal advice might fit into that. And one of the things we discussed and we discussed with Michael is the fact that we, there

EN

are many places where ICANN already has those conversations right? We already come in, we already produce advice, we produce general council impacts on mission, etc. much there's already things made public around it. So I think one of the issues that might help, I think there's kind of a missing part of information here. What is the type of information that there's perceived to be a challenge about getting that is also appropriately on the attorney client privilege. If we can look at some examples of that, is there a way to develop some sort of understanding about what different types of practice or the documentation of practice can get to around that. Or would there are those things that ICANN would need to have some further explanation as to why that information still wouldn't be appropriate for public dissemination. We are talking in a lot of generalities around attorney client privilege and if we had specific examples of that, the types of information other than just saying we want to get to it ICANN's attorney client privilege information that might be more helpful in moving us forward.

>> MICHAEL KARNICOLAS: I mean so that's kind of a challenging thing because you know, we are not sitting in your office and we don't see the documentation that you have in front of you.

So, for people that are you know because obviously it's subject to privilege.

So for people that don't have access to the material, to come up with a list of the material that they want this in that office I think that's kind of an impossible act which is kind of why and it also, you're never going to in terms of list specific documentation, obviously you know that what's contained will vary day to day. But I think that's fundamentally. Look I have a legal background as well. I totally understand the importance of attorney client privilege but I think what we are really trying to do is develop recommendations that provide proper protection for it. But I think that the hope is that, you know, we can do a

EN

little bit better than leaving it with a line that basically says look at the material before you apply the exception.

I mean, it's not if that's where we are at, you know, God help us. I think that we are not talking about a proactive waiver. We are not talking about any sort of a blanket thing if you look specifically at the language it's a contextual determination that is going to be made based on the facts that are there. All we are looking for is to build some specificity into the process. So that it's not just an entirely discretionary decision. So that there's something that the community can look at and say, if I'm making a request, this is what is being considered as opposed to this kind of broad determination based on nothing that's nothing that the community can take as reliable and nothing that a review can take as reliable.

Sam I see your hand is up again.

>> SAM EISNER: Yes thanks. So I I wasn't necessarily saying we need a list of the documents that you want to get that you think that we have. I get that it it's hard to make that to make that judgment. But I think if this is something that is part of the transparency group's work, that what is the problem statement around attorney client privilege documents? Are there examples of experiences where people have complained that attorney client privilege has kept them from getting information they think they should get from ICANN? I'm talking about the experimental base is that leads to the problem statement. That's one factor.

And in terms of getting to areas where you know you think about what does attorney client privilege mean? Why do attorneys why do we have attorney client privilege? Why is it that we might be claiming it? So we there are things that we look for. And it s I noted

EN

earlier it includes potential pending disputes, things that we know about. If it could be you know highly sensitive items that might not be might not look like there's a dispute on the horizon but they are we receive advice on potential new areas of law or potential new things that we're looking into. That there are some areas of first impression that come up with ICANN that you know we might not know there's going to be a dispute around it. But we need to have something to to guide us in making our decisions. And just assessing risk elements, etc.

There are many different places attorney client privilege is related to risk profiles for the organization and many other things. And that so I'm not trying to say that the it's impossible to come up with some guidance around that. But I think that using this process to try to come up with a few guidelines may be this maybe it's premature to have the guidelines conversation. Maybe we use maybe there's a recommendation coming out of this group to encourage ATRT 3 to review practice you should the new DIDP as it evolves out of the work stream 2 based on experience with the new DIDP. Maybe there's ways that we he can allow the conversation to keep happening without coming with a recommendation now but we would look at and say, you know this actually could be harmful to the organization if we were to take it in this form.

>> MICHAEL KARNICOLAS: So, Robin just mentioned in the chat specific example, I don't have a list of the things in front of me at the moment but I did have in the early phases on if this there were people coming forward and saying this is an area of improvement that to see.

And again, it's it's in terms of categorization or list, I think when you're talking about the DIDP the way it's structured is to provide access to the information that is there. Any

EN

information that is there, apart from that that is subject to privilege to the exceptions or privileges.

So in crafting exceptions to the DIDP I think that's where we are at at the moment. That's basically the way they function they are carving out areas that are not accessible. So this is by way of finding lists of areas or guidelines or categories that are going to be off limits where we stand as opposed to finding categories that are subject to exposure because DIDP creates things to be subject to exposure other than what is there.

So with that being said, I mean personally, the way that it's been phrased at the moment in terms of the way that it was revised saying material subject to a DIDP request held under attorney client privilege ICANN should review the material whether any parts of the material is appropriate for release in scope of attorney client privilege.

I actually, I personally don't see any utility to conclude including at that all frankly I don't think that's any improvement of proper current process and I don't see that as providing any kind of concrete guideline that would be helpful going forward. Like I think we are better off with nothing than with that frankly.

So in terms of where we stand in the process, my hope was that we could have a discussion that aimed at improving the categorization providing something a little clearer and nor concrete going forward.

That's still my hope. Is there any possibility of that because if not, then people are suggesting pushing it forward. I think that in creating this report we need to express that concerns were raised about transparency with ICANN legal. I think if we are unable to find an acceptable avenue forward, I think that we are going to have difficulty in the group. I think there's obviously going to be discomfort here pushing something forward that

EN

doesn't have buy in from ICANN legal. So if we can't find an avenue to provide a clear and specific recommendation here, then my suggestion would be that we basically mention we had discussions with ICANN legal but were unable to agree on a satisfactory agreement for improving transparency there and that is something that should be taken forward in ATRT 3.

Yeah go ahead Sam.

>> SAM EISNER: Sorry coming off mute.

So one of the things that John, general council, he would definitely be open to, if you wanted to have one furthering conversation about this, he's still willing. I think we are not necessarily far apart. It's really a matter of language. And making sure that there's if we can't agree on appropriate language that's really the barrier here. So he wanted to make sure that I expressed the issue around you know some of the ethical concerns that came up and the fact that it sill looked like a proactive waiver and we really had some challenges when we looked back to see if there's more we can put in. We can thing about it a little bit more in terms of process if there's any other points we can put in. If you want the have a further conversation with John this week we can get that set up.

And that's we will leave the rest of how the group wants to go forward with the recommendation to the group.

>> MICHAEL KARNICOLAS: Yeah I think that that would be a good idea. And I'd be very happen happy to do that.

>> SAM EISNER: Okay.

Okay.

EN

>> MICHAEL KARNICOLAS: Just to break in briefly to discuss where we are in terms of the timeline.

Bernard and please do correct me if I'm wrong on any of this. But my understanding from discussing with Bernard was that today is the deadline for submitting it, if there's going to be a further consultation. But, I think that what Bernard mentions was, sorry it's tomorrow.

But I think that what he also mentioned was if we are not providing any policy things that are specifically opposed by ICANN legal, that there may not be need for a second public consultation.

So in other words, the I don't see tomorrow's deadline as being absolutely hard, because in my opinion, because I think that there's essentially two directions this can go in. Either I have a conversation with John and we come up with a formulation that is good and supported by ICANN legal and that gets included. Or, I have a conversation we are unable to come to an agreement and that leads to essentially, we will remove the recommendation.

And essentially include a statement saying we were unable to come to an agreement. And it should be taken forward to the future process.

Either way, I don't think we are pushing something forward against resistance from ICANN legal. So without I don't think that a second public commentary is necessary which gives us a little more wiggle room. If there's any opposition to that, from the group, please let me know now. Otherwise, we will proceed on that basis.

Okay. Oh Sam do you want to go ahead?

EN

>> SAM EISNER: Sorry I just had one question. Because I think that the test of whether or not there's opposition by ICANN legal probably isn't the test of how you consider whether or not a document would go for further public comment. I think even if you had recommendations in there that ICANN legal didn't agree with or we did agree with there was substantial changes from the recommendations of your first report that would gear towards public comment. And some of this goes to I think the area of you know we in ICANN legal don't necessarily feel that we're as powerful as maybe some of the community might view that we are. And so I don't think that applying that if ICANN legal agrees to future phases of your work, I surely wouldn't want whether or not we disagree with you to be the test that you use on the validity of your work. You may have some really good ideas that we don't agree with you and you don't agree with us on. And I would hate for that to be the reason that those ideas are not put out for future comment. And then our voice can be one of the voices that are considered as a community views that.

>> MICHAEL KARNICOLAS: Yeah. I mean I didn't mean to give the wrong impression there. I think the timeline really plays into the factor here. If we want it to be included in the report, we would need to submit it by tomorrow. Which essentially means we would need to get obviously ICANN legal doesn't have veto power on what we are deciding today. But in order to proceed with something that irk can legal is opposed to on this issue specifically, I think there would be opposition within the group from what I heard superseding in the face of that opposition, which is why, that combined with the timeline puts us in that kind of situation in regard to that specific recommendation.

Samantha is proceeding with the record and bracketing for recommendation for further update.

EN

I think that other than this one, I think we are good with the rest of it which is why I wanted to shoot through the remaining recommendations, the remaining minor changes in the 20 minutes we have left in order to insure there's no disagreement with them.

Those are generally these are just minor wordsmithing things to clear up confusion that was raised.

So maybe we can go back to the bigger document that I sent around.

The full kind of 20 pager. If that's all right.

Great.

And we will briefly go through the changes that have been made. And because we have only 20 minutes, I'm going to ask people to just kind of, I'll kind of go through them and people can raise their hand if something looks problematic.

So the first small change just says, the word right to information was taken out to replace it with just a discussion of global transparency standards.

The next change is a down on page 6.

Right, this is to approve the text. Other than the thing on attorney client privilege.

So the next small change is at the bottom of page 5.

Which clarifies that the DIDP should have process on request. Although ICANN developed a document on in 2013 on the process for responding to DIDP requests this information could be further clarified and released in a more user friendly manner.

EN

Yes Ricardo this was at the last meeting. There was a slight update to the two recommendations that is not reflected in this specific document because I missed that. But that's been sent around. So the document I center around just before this meeting was the language we agreed so for those two. And if there's so we can look at that again at the end of this.

So this changes just to clarify because in response to the call for more information, ICANN responded saying we put this information out there so we are clarifying that it could be improved a little bit.

But we have seen that and would like it to be improved.

In terms of the next point, best practice among other identity of this person or persons. So that's just to make sure that the person reviewing ICANN publishes the name of the person who is responsible for the DIDP request so that people know the point of contact which is just standard operating procedure and good systems.

There's a couple if on footnotes that have been changed.

The I think there's no other changes to the document as a whole.

Until we get down to the recommendations.

Here we will go through how it's been changed.

The second recommendation. That's about the documentation rule. That's been changed according not to document that's in front of you to a separate one. We will look back at that right after we are done here.

EN

Recommendation number 4 has been shifted so it says the DIDP should disclose guidelines how to process requests including delegate specific employee or employees to respond to specific DIDP requests.

Recommendation number 5 has been changed to say the DIDP should commit to replying with requesters reasonable preferences regarding the form in which they wish to receive the information on the request.

If ICANN either already has that information available in the requested format or can convert it to the requested format relatively easy that is respond to an objection they didn't want sort of ICANN to have the responsibility for scanning hundreds of pages of material or whatever. So that is the shorted of it it's not to impose unreasonable administrative burden.

In number 8, has been changed to say in cases where information subject to request to requests already publicly available, ICANN staff should direct requesters with as much specificity to be found. And again we clarified, I'm guessing Bernard is about to tell me to slow down.

In other words, it's a processing of a DIDP request reveals that the information has already been published, staff should include information about where this information may be found in their response to the requester.

So, again, that's just to clarify based on an objection about unreasonable resources that just to make sure ICANN is not in the business of consolidating vast amounts of information for the requester and the researcher should be doing that themselves.

EN

Number 12 was slightly tweaked to say that where an exception is applied to protect a third party the DIDP should include a mechanism for ICANN staff to contact this third party to assess when they would consent to the disclosure. I'm still going to have to clarify that the ICANN staff is the one reaching out and not the requester. ICANN can quest to do it through privacy and concerns.

Number 313 is attorney client privilege. We can skip over that.

Number 16. I think number 16 is related to one of the three of the list as well.

Just double check that.

Yes it is.

So we will skip over that. That's not the final word in there.

And then in terms of reporting on ICANN interactions with governments it was shifted to all expenditures over \$20,000 on itemized basis should be proactively disclosed.

Open to U.S. and abroad.

And I think that that's it in terms of those recommendations.

Maybe we can go back to the document with the three revised ones on it.

Okay. So skipping owe attorney client privilege regarding NDA's open contracting, it now says recreation 16. Wherever possible ICANN's contracts should be either proactively disclosed or available for request under DIDP. The DIDP should allow ICANN to hold everything subject to nondisclosure agreement but such agreement should be satisfies ICANN's that's a typo has a legitimate reason for requesting the, GA and other

EN

suggestions within the DIDP such as examples where the contract contains disclosure would be harmful to the security and stability of the Internet.

That is includes in language on recommendation 2. The new DIDP a should include documentation rule where by a significant element of a decision making process take place orally or otherwise without a lasting paper trail decision making process.

So I think that those, that's the revised material, that's the revised wording we agreed on in the last call.

So, those that language for recommendation 2 and recreation 16 is just going to be pasted into those two. And then, other than recommendation for 15 under attorney client privilege, that's where we stand now.

So I'm going the ask if there's any objections or any to the other recommendations or the documents as it currently stands?

Going once, going twice.

Okay. So in that case, we are good the go with the regulations other than the one on attorney client privilege.

We will schedule a follow up considering for some time this week with John the try to finalize that. Other than that, I think we are good the go with these, with this report and send back to plenary great.

So unless there's any other business thank you very much everybody for turning out again. It's been a long process but I think there's some really good recommendations and really great stuff in here.

EN

And yeah, I think that this is a really good baseline for making things better. And I think that the groups done really well and I really appreciate everybody sticking with us throughout this process.

So thank very much. And I will be sure to send out an email immediately after the conversation with John to update and provide final steps forward.

So unless there's any other business, again, going once, going twice. All right thanks very much everybody. Really appreciate.

And thanks so much for Samantha for joining us again.