

Annex 8.2 – Recommendations to Improve ICANN’s Transparency – Minority Statement by Robin Gross – CCWG- Accountability WS2 – March 2018



We generally welcome the recommendations contained in the Final Report submitted to the Cross-Community Working Group plenary by the Work Stream 2 Transparency subgroup. We view this as a key priority area for ICANN going forward, and we hope that the organization will work speedily to implement the recommendations in full, and to provide adequate resources to boost ICANN's transparency systems. ICANN's very legitimacy as a steward over critical global Internet functions depends on its accountability to its constituents and to the public at large, which in turn depends on robust transparency.

We submit this minority statement not to disagree with the final recommendations, but to express dismay that the working group was not able to achieve consensus support for any clear principles to guide ICANN's decisions as to when to waive attorney-client privilege, and better align them with the overarching Bylaws obligation to "operate to the maximum extent feasible in an open and transparent manner."¹

We do support recommendation 15, which states "ICANN should consider future processes to expand transparency at ICANN legal, including through clarification of how attorney-client privilege is invoked." We would go further: we recommend that ICANN should, as a matter of urgency, take steps to identify and apply principles according to which attorney-client privilege shall be waived in the interests of transparency, and/or the availability of attorney-client privilege disregarded when contemplating making a voluntary disclosure. This process should involve further public consultation.

We also note that the Independent Review Process (IRP) is an ICANN mechanism, which assists ICANN by helping the organisation to recognise and correct its own errors. As such, ICANN does not have an unqualified interest in prevailing in cases before the IRP; it has overarching duties to support the purposes of the IRP, including through disclosure, even where such disclosure may make ICANN less likely to prevail in a particular case.

As a first step, and as a necessary action in order to obtain the best available advice in developing such principles, we further recommend that ICANN immediately adopts, and directs its advisors, agents and attorneys, as follows:

1. Recalling the commitment to transparency in Article 3 Section 3.1 of the Bylaws, the mere fact that attorney-client privilege is available to ICANN in respect of a particular contemplated disclosure shall not be considered, of itself, reason to assert that privilege or otherwise withhold disclosure.
2. The mere fact that disclosure might assist a claimant or potential claimant in a case pursuant to the Independent Review Process shall not, of itself, be considered sufficient reason to assert attorney-client privilege where that privilege is available.
3. When considering whether to make disclosure in connection the IRP, ICANN shall have regard to the "Purposes of the IRP," as set out in Section 4.3 of the Bylaws, and shall consider those purposes as amongst ICANN's objectives.

¹ Bylaws Article 3 ("Transparency") Section 3.1 ("Open and Transparent") begins "ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate **to the maximum extent feasible in an open and transparent manner** and consistent with procedures designed to ensure fairness[...]" (emphasis added).

