

Annex 9 – Implementation Guidance – CCWG- Accountability WS2 – June 2018



Executive Summary

The Implementation Guidance provides further clarification on the recommendations that were noted as problematic by the ICANN Board in its letter to the CCWG-Accountability on 14 May 2018. The recommendations which were noted are:

- The Ombuds Advisory Panel
- Transparency of Board Deliberations
- Transparency of Governmental Engagement
- Transparency of Open Contracting

Ombuds Panel - Implementation Guidance

Original recommendation

ICANN should establish an Ombuds Advisory Panel made up of 5 members to act as advisers, supporters, wise counsel for the Ombuds and should be made up of a minimum of at least 2 members with ombuds experience and the remainder with extensive ICANN experience.

The Panel should be responsible for:

- Contribute to the selection process for new Ombuds which would meet the various requirements of the Board and community including diversity.
- Recommending candidates for the position of Ombuds to the Board.
- Recommending terms of probation to the Board for new Ombuds.
- Recommend to the Board firing an Ombuds for cause.
- Contribute to an external evaluation of the IOO every 5 years.
- Making recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11.

The Panel cannot be considered as being part of the Ombuds office and cannot be considered additional Ombuds, but rather external advisors to the office.

Any such advisory panel would require the Ombuds to maintain its confidentiality engagements per the Bylaws.

Implementation Guidance

This implementation guidance was prepared following the Board raising concerns about the independence of the Ombuds function at the San Juan and Panama meetings. The guidance explains how the CCWG expects the recommendations to be implemented.

The Ombuds panel is not meant to be a decision-making body – it is only there to assist the Board or relevant Board Committee with the specific tasks enumerated in the recommendation. The Panel is specifically prohibited from getting involved in any matter

before the Ombuds; the Ombuds shall not seek, even on anonymized terms, guidance from the Panel on any matter before the Ombuds.

The Panel will only have the six specifically enumerated powers set out in the recommendation.

In implementing the portion of the recommendation “recommend to the Board firing an Ombuds for cause” - because under the Bylaws only the Board has the power to fire the Ombuds, the CCWG advises that the Board should implement this recommendation by preparing and publishing information about the process any ICANN community participants can use to provide the Board with feedback about, or raise concerns regarding, the performance of the Ombuds. The Panel is welcome to offer feedback on the performance of the Ombuds but can only provide any feedback through this process (aside from the regular external evaluation). The CCWG suggests this clarification to preserve the right of the Panel to raise any concerns with the performance of the Ombuds function while not interfering with the Board’s responsibilities in managing the engagement of the Ombuds and considering concerns raised in an appropriate way.

In implementing the portion of the recommendation “Make recommendations regarding any potential involvement of the IOO in noncompliant work based on the criteria listed in recommendation 11”, this should only occur at the request of the Board.

Finally, a formal process to select the panel members should be created. This should ensure that candidates have extensive ICANN and/or ombuds experience, and also have complete independence from the SO/ACs. The selection process may be designed in any appropriate means to achieve independence, such as by selection by the Board, an independent recruitment firm, or other appropriate process.

Regardless of the process which is selected the ICANN Board should post details regarding the process that will be utilized.

Open Contracting Implementation Guidance

Original recommendation

Original recommendation - 16) Wherever possible, ICANN's contracts should either be proactively dis-closed or available for request under the DIDP. The DIDP should allow ICANN to withhold information subject to a non-disclosure agreement, however such agreements should only be entered into where the contracting party satisfies ICANN that it has a legitimate commercial reason for requesting the NDA, 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).

Implementation Guidance

As the recommendation starts with the language "wherever possible" we would recommend that ICANN publish a document clearly stating its position on the limited use of NDAs and documenting the information that will make available on its contracted relationships, as discussed below.

In the first year of implementation ICANN should publish a register of all suppliers (name of supplier, country or origin and actual annual amount) it pays 500,000\$US or more per fiscal year broken down by categories (e.g., computer equipment, software, telecommunication services, contracting etc.). Starting in the second year of implementation ICANN should lower this threshold to 250,000\$US. The Board should review this threshold amount on a regular basis to effectively ensure transparency.

In scoping ATRT4 or future ATRT reviews SO/ACs should consider if the information provided in the above Register meets their requirements. Should they feel the need for adjustments they should request the review consider this.

Transparency of Board Deliberations Implementation Guidance

Original recommendation

Original recommendation -The DIDP exception for deliberative processes should not apply to any factual information, technical reports or reports on the performance or effectiveness of a particular body or strategy, as well as any guideline or reasons for a decision which has already been taken or where the material has already been disclosed to a third party.

Implementation Guidance

For the sake of greater clarity, current publications of Board Briefing Materials appear to fulfil this requirement

Note: As ICANN organization points out, documents/information already provided to a third party (without obligation to keep as confidential) should not be withheld simply because of a deliberative process exception.

Original recommendation

Original recommendation - The Bylaws should be revised so that material may only be removed from the minutes of Board meetings where it would be subject to a DIDP exception. Decisions to remove material from the minutes of Board meetings should be subject to IRP appeal.

Implementation Guidance

The basis for redaction of Board minutes and withholding information from a DIDP request should be substantially consistent. For the most part this would seem to be the case including if the CCWG-Accountability recommendations which apply to the DIDP are implemented. As such ICANN should publish a register of all redaction of Board minutes explaining the basis for the redaction. Additionally, the register should explain how the basis for this redaction aligns with the DIDP exceptions and if it does not align with such an exception explain why.

Note: Re IRP appeal – this is currently in the Bylaws.

Original recommendation

Where material is removed from the minutes of Board meetings, the default should be to allow for its release after a particular period of time once the potential for harm has dissipated.

Implementation Guidance

When redacting any information, the Board should identify if the redacted information can eventually be released or not (ICANN should publish the list of the classes of information which can never be disclosed by law, or other reasons, such as staff employment matters etc.). If redacted information is identified as eventually being subject to release it should identify the conditions which would allow the release (this information should be included in the above-mentioned Register). The CEO (or his/her designee) would annually review redacted information which is noted as being conditionally subject to release to see if the conditions for release are met and shall release all appropriate information and update the Register accordingly. For all redactions (other than those that are part of a category that can never be disclosed), the redacted material should be disclosed during the annual Register review process in the 15th year after the redaction was first entered onto the Register.

Government Engagement Implementation Guidance

Original recommendation

In the interest of providing the community greater clarity with regard to how ICANN engages government stakeholders⁷ and to ensure that the ICANN community and, if necessary, the Empowered Community is fully aware of ICANN's interactions with governments, the CCWG-Accountability recommends that ICANN begin disclosing publicly the following (notwithstanding any contractual confidentiality provisions) on at least a yearly (but no more than quarterly) basis with regard to expenditures over \$20,000 per year devoted to "political activities",⁸ both in the U.S. and abroad:⁹

- All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel.

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- All identities of those engaging in such activities, both internal and external, on behalf of ICANN.
 - The type(s) of engagement used for such activities.¹⁰
 - To whom the engagement and supporting materials are targeted.
 - The topic(s) discussed (with relative specificity).

B. Implementation Guidance

Note - This recommendation needs to be consistent with DIDP exceptions, specifically the exception which states:

Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party (note - the WS2 Transparency recommendations for DIDP did not mention or modify this exception which is currently included in the DIDP and as such it would be expected to stand).

The above discussion of DIDP policies is by way of explanation, and does not expand the application of this policy

Overall one must recognize that ICANN is a critical actor in the DNS and has significant expertise in the area. ICANN's corporate objectives include a number of activities and programs to share this expertise with all interested parties including governments.

As such any activities where ICANN is presenting information which is publicly available or which is part of formally published ICANN position on a subject through training programs, conferences or individual meetings should not be required to be disclosed beyond the reports which are currently published by ICANN and reports regarding bilateral conversations with governments.

Note: Reporting on bilateral conversations can be found in the ICANN Quarterly Reports. Additional information on specifics of these reports can be requested via the DIDP subject to the stated exceptions. An example of such a report can be found at <https://www.icann.org/en/system/files/files/quarterly-report-08may18-en.pdf> page 29

To further facilitate the community's understanding of ICANN's objectives in discussions with governments it should publish an annual Government Engagement Strategy which should describe the focus of its interactions with governments for the coming year. This document should be derived from existing documentation including but not limited to annual planning, CEO reports to the Board and correspondence with the GAC.

