**ATRT2 Recommendations**

Analysis of Accountability and Transparency in

Policy Development and Implementation Processes

**Findings of ATRT1**:

ATRT1 reviewed ICANN’s policy development and implementation processes, and made many recommendations about the inputs and standards used for making or appealing decision.[[1]](#footnote-1) Both to ease assessment of their implementation and to shed light on the interrelationships between ATRT2’s Affirmation of Commitment mandate[[2]](#footnote-2) and the ICANN Board’s decisions on policy and its implementation, a number of these issues have been grouped in this analysis. Importantly, the evaluations and recommendation made in this document presume the default condition of transparency as a basis for all ICANN activities. In those instances where the Chatham House Rule[[3]](#footnote-3) is invoked, discussions are closed and/or reports get redacted, the decision to overrule the transparency imperative still should be publicly documented.

**Recommendations**:

*Recommendation 20*: The Board should ensure that all necessary inputs that have been received in policy-making processes are accounted for and included for consideration by the Board. To assist in this, the Board should as soon as possible adopt and make available to the community a mechanism such as a checklist or template to accompany documentation for Board decisions that certifies what inputs have been received and are included for consideration by the Board.

*Recommendation 23*: As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms - the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms and of their inter-relation, if any (i.e., whether the three processes provide for a graduated review process), determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability. The committee of independent experts should also look at the mechanisms in Recommendation 2.8 and Recommendation 2.9 of the Draft Implementation Plan. Upon receipt of the final report of the independent experts, the Board should take actions on the recommendations as soon as practicable.

*Recommendation 25*: As soon as possible, but no later than October 2011, the standard for Reconsideration requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.

*Recommendation 26*: As soon as possible, but no later than October 2011 the ICANN Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

ATRT2, under the terms of its mandate, also determined that the following issues[[4]](#footnote-5) should be addressed in this analysis of accountability and transparency in policy development and implementation processes:

* Publication of yearly statistical reports on transparency
* Enhancement of the employee Hotline that allow relevant information to become transparent (Whistleblower Policy).

**Summary of ICANN’s assessment of implementation:**

### With regard to Board consideration of inputs in policy decision making, Staff undertook an analysis[[5]](#footnote-6) to determine what can be learned based upon actual community usage and participation patterns. The study period was from 1 January 2010 through 31 December 2012, and involved harvesting information from each of 212 archived Public Comments Forums. Ultimately, a checklist was created that is now used with GNSO PDP recommendations to ascertain that all inputs were received. This checklist, now embedded in Standard Operating Procedure, only has been used once to date.

With regard to restructuring review mechanisms, an Accountability Structures Expert Panel (ASEP) was commissioned in September 2012. It included three international experts on issues of corporate governance, accountability and international dispute resolution. The ASEP reported on October 2012 and the Board acted upon its recommendations on 20 December 2012, approving amendments to By-laws Article IV, Section 2 ([Reconsideration](http://www.icann.org/en/about/governance/bylaws/proposed-bylaw-revision-reconsideration-26oct12-en.pdf)), Section 3 ([Independent Review](http://www.icann.org/en/about/governance/bylaws/proposed-bylaw-revision-irp-26oct12-en.pdf)), and the corresponding [Cooperative Engagement Process for Independent Review](http://www.icann.org/en/news/irp/proposed-cep-26oct12-en.pdf).

With regard to the Ombudsman, the Ombudsman undertook a review of his office and function in accordance with ATRT1 Recommendation #23. The Ombudsman recommended to the Board Governance Committee (BGC) that a regular meeting schedule be established, possibly through a committee of the ICANN Board. In turn, the ICANN Board decided (1) that regular meetings would be held by the Executive Committee, and (2) Ombudsman reports that require the full ICANN Board's attention shall be provided to the ICANN Board as a whole, as needed and determined in consultation with the Executive Committee and the Ombudsman.

###

### ~~With regard to Board consideration of input in Policy Decision making (Rec #20)~~

~~The adequate implementation of this recommendation can obviously have positive effects on 9.1,~~ *~~c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof)~~* ~~as the rationale for Baords decisions could be based on the relevant public inputs. Also in terms of~~  *~~d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community;~~* ~~requires a convincing argument that the process was transparent and all inputs were considered; and finally only the trust of an effective process can create trust in the model~~ *~~e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development.~~*

~~The next few recommendations can be considered as a safeguard for the stakeholders in case they would not agree with the Boards decisions. “Reconsideration of Board’s decisions” is not a new issue for ATRT2. It actually pre-dates the AoC, and was studied as far back as 2002[[6]](#footnote-8). It was already part of the ATRT1 and in fact predates the AOC. ATRT1 created 4 Working Groups to produce the first report, each group focusing its work on sub-elements of paragraph 9.1. ATRT1‘s WG #4 looked at all 3 review mechanisms of the Board’s decisions and made specific recommendations back in 2010 (Recommendations 23, 25 and 26 on pp.55-56). Recommendation 23 specifically proposed that ICANN “seek input from a committee of independent experts on the restructuring of the three [Board] review mechanisms—the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman.” ATRT1 specifically asked that the expert review consider suggested procedures for compelling the Board to reconsider a decision and for removing the entire Board. The specific ATRT1 recommendations are listed below:~~

~~Furthermore on Page 47 of ATRT1 report there is more detail on this issue:~~

* ~~Reconsideration - Since 1999, there have been 44 requests for Reconsideration raised to the BGC and its predecessor committee. Of these, 32 (72.7%) were rejected or denied, or recommended that the Board take no action. In two cases, the complainant withdrew the request, and one case was declared to be groundless. Nine cases (20.4%) were approved by the BGC and adopted by the Board. One request is currently pending.~~

* ~~Several Reconsideration requests looked at by WG4 did not include sufficient published documentation for WG4 to determine whether or not the Board reconsidered them, requiring further investigation by ICANN Staff.~~

##

## Summary of community input on implementation, including effectiveness

ATRT2 conducted face-to-face sessions with stakeholders in Beijing and Durban as well as a community-wide survey to gather their views on ICANN’s progress towards institutionalizing more accountable and transparent policy development and implementation processes. Those relatively few responses to the survey were generally negative (see all of them in the ATRT2 archive at [https://community.icann.org/display/ATRT2/Questions+to+the+Community](https://community.icann.org/display/ATRT2/Questions%2Bto%2Bthe%2BCommunity)). For example, this graphic summarizes some of the survey responses:

Explicit Reconsideration process concerns were raised by some members of the ICANN community. The Registries Stakeholder Group (RySG) challenged Staff’s implementation of ATRT1 recommendations #23 and #25, claiming that they were fundamentally flawed and in fact ran counter to the concept of accountability. The RySG went on to assert that the Board ignored the public comments. Likewise, the Non-Commercial Stakeholders Group (NCSG), responding to ICANN’s rejection of its Reconsideration #13-3 (regarding the TMCH+50 case), publicly stated its “belief that the Board’s response, or rather, the manner in which it was couched and the rationale which the Board (through its representative sub-committee on the matter) chose to employ, was such as to land yet another blow to the vaunted [Multi-Stakeholder Model].” Perhaps all of the expressed frustration can be summed up by one individual’s challenge that “the ATRT2 should address the questions left unresolved by ATRT1: should ICANN provide an independent and binding appeal from Board decisions? What body should have that authority?”

There was limited input on the Ombudsman in the open comments or in the face-to-face discussions with the ICANN community. One report did question the independence of the Ombudsman, noting that the office “appears so restrained and contained.”

### ~~With regard to Board consideration of input in Policy Decision making~~

~~Maria Farell pointed out that part of the Board considering all input in Policy decision includes the transparency wherein all of the Staff advice given to the Board is also made available to ICANN community.~~

### ~~With Regard to restructuring review mechanisms~~

~~Some of the community response to ATRT2 questionnaire show a level of discontent on the implementation of these recommendations, the one on reconsiderations in particular, if we consider at least the first three questions of our initial questionnaire as related to the issue of reconsideration.~~

~~More general comments related to Q’s 1-3, and to the implementation of the “Reconsideration” recommendations in particular~~

~~Other responses to the questionnaire didn’t get into the specific 1-10 metric success of the implementation success of ATRT1 recommendations, but at least 3 commentators mentioned the reconsideration issue specifically:~~

~~Registries Stakeholder Group~~

~~“In addition to specific ATRT recommendations, ICANN failed with respect to Items 23 and 25, which called on ICANN to create an experts panel to assess and make recommendations for enhancements to ICANN’s Reconsideration and Independent Review processes, are examples. Nothing was done on these issues until September 11, 2012, when ICANN appointed an Accountability Structure Experts Panel (ASEP). The Panel issued its report in a commendable time, on October 26, suggesting a radical alteration of the standard of review to be applied by an independent review panel. Under this change,~~ *~~in considering whether or not an action or inaction by ICANN or the Board violated ICANN’s Bylaws~~*~~, the relevant questions are limited to asking whether or not the Board: (1) acted without conflict of interest in taking its decision; (2) exercised due diligence and care in having a reasonable amount of facts in front of them; and (3) exercised independent judgment in taking the decision, believed to be in the best interests of the company.~~

~~Only two comments were submitted on the report, both of which expressed the view that the recommendations were fundamentally flawed and in fact ran counter to the concept of accountability. In addition, they noted more work was needed because the timing of the expert panel was such that resources to comment were limited. The Board fundamentally ignored the public comments, using a consent agenda in April to establish the panel with a comment that a RySG point about using outside experts could be followed.”~~

~~NCSG on Request for Reconsideration #13-3~~ *~~Staff action of 20 March 2013 titled Trademark Claims Protection for Previously Abused Names’.~~*

~~“The second illustration relates to the recently released Board response to the Reconsideration Request filed by the NCSG regarding the late decision to expand the Trademark Clearinghouse (TMCH) to accommodate 50 variants of previously abused names. Without going into the merits of such an expansion here, we wish to state our belief that the Board’s response, or rather, the manner in which it was couched and the rationale which the Board (through its representative sub-committee on the matter) chose to employ, was such as to land yet another blow to the vaunted MSM model. Other members of the ICANN community who may not have agreed with the NCSG’s substantive position on the TMCH+50 issue also thought that the Board could have chosen a number of different ways to craft its response, achieving the same substantive result without threatening the MSM process. While NCSG reserves its rights to pursue any other means available to it under ICANN’s processes to continue engaging with the ICANN Board, we respectfully request ATRT2 to take a look at this incident and determine if the response received by the NCSG to its Reconsideration Request goes against ICANN’s principles of accountability in terms of its effect on the MSM model.”~~

~~S. Gunnarson (Summary section only)~~

~~“ICANN has fallen short of implementing a critical recommendation from the first Accountability and Transparency Review Team (“ATRT1”).~~

~~...~~

~~First, ICANN has not fully implemented ATRT1’s Recommendation 23. That Recommendation, calling for an expert study of procedures to review decisions by the ICANN Board of Directors, was not carried out for nearly two years. Delayed implementation is not full implementation. Worse yet, the report issued by ASEP avoided the issue of an effective appeal from Board decisions that gave rise to ASEP’s creation and Recommendation 23 in the first place. ASEP’s recommendations, moreover, make it more difficult to challenge and reverse ICANN Board decisions—hardly a refinement of ICANN policy in keeping with Recommendation 23 and the concerns expressed by ATRT1.~~

~~ATRT2 should address the questions left unresolved by ATRT1: Should ICANN provide an independent and binding appeal from Board decisions? What body should have that authority?~~

~~Furthermore, among the confidential reports~~~~[[7]](#footnote-9)~~ ~~the ATRT received from some members to the community the following comments regarding the ombudsman were listed:~~

~~“Reconsideraton process is a Board Governance Committee process that is a peer review process in matters relating to action / inaction by the Board and it becomes an Executive Review process in matters concerning Staff Action/Inaction. Due to the 'peer' review nature of the process, it is an internal process, or almost a self-evaluation process. When an issue reaches this process, the BGC ought to have an unrestrained scope and a total willingness to correct a wrong decision / inaction by all available means. This is not how the Reconsideration process is designed (or this is not how the design of the reconsideration process was interpreted by the BCG).”~~

1. ~~Reconsideration issues raised during Durban meetings with SO/ACs: to whom is ICANN accountable?~~

~~Moreover, the reconsideration issues continued to be raised in the Durban meetings, both specifically on reconsideration and in general terms. I want to summarize some of my personal notes taken from the Durban meetings, that I consider important to bring the reconsideration issue into a larger context (“overarching issues” instead of a long list of single, apparently disconnected recommendations as per ATRT1) and should be discussed within ATRT2 during LAX3:~~

* + ~~The gross generalization that no reconsideration request has been successful ever, is not 100% true in my view if your look at some recent policy recommendations derived from the requests as per hereunder. On top of it, apparently if something is really wrong, in some cases then the recommendation seems to go BACK on the PDP process, even if the request was denied. There is no formality in the procedure though. here things seem to be mixed up between the policy decision and the implementation!~~
	+ ~~That there is no other review instance, what puts into question ICANNs Board overall accountability. {Should the BCG, that reviews reconsideration, have stayed out of the first decision? Should the Board have its own internal tribunal?} In any case, it could be considered to be a serious aberration that Staff may use the reconsideration process to make case law jurisprudence on the bylaws!~~
	+ ~~Some recent reconsideration requests brings us again to the question that GAC’s “late” advice increases uncertainty that cannot be solved trough the reconsideration {there is another black hole here: should GAC should be closer to the PDP process or closer to the reconsideration process........}. Although there is a parallel discussion on bringing GAC “earlier” into the PDP process, GAC still lacks a clear policy of direct and permanent participation in the PDP.~~
	+ ~~Related to the previous point, I consider that the BC comments on “public interest” proposes the option that “public interest” issue should be considered at the BEGINNING of any relevant PDP that really merits the question. If GAC is involved in the PDP cycle from the very beginning and has to take a position on “public interest”, agreeing that the effort is focused on public interest principles, does this solve the GAC late advice problem? At least it would require a justification on where the process did lose its original intent.~~
	+ ~~Furthermore, and based on the internal staff reviews of the PDP process by M. Konings, would an “endogenous” PDP process would make reconsiderations unnecessary? It is my personal view that the major flaw on the internal analysis of the PDP presented in Durban is the “closed loop” mentality prevailing across ICANN, that keeps everybody outside wondering. No beginning stage where outside factors are considered, like the outside definition of public interest as proposed by the BC; no milestone reviews by outside agents, and no higher instance to the Board internal reconsideration (....”and the Cabots speak only to God” syndrome). If the outside expert does not consider an “OPEN” PDP process (open beyond the inner circle), considers exogenous factors at different stages, no progress on the issue can be expected.~~

**With Regard to the Ombudsman**

~~Among the confidential reports~~~~[[8]](#footnote-10)~~ ~~the ATRT received from some members to the community the following comments regarding the ombudsman were listed:~~

~~“The Ombudsman process is defined as an independant (sic) process but the independence of the Ombudsman appears to be incomplete. The Ombudsman is to investigate complaints against ICANN at any level, but the office of the Ombudsman appears so restrained and contained.~~

## Summary of other relevant information

With regard to Board reconsideration, since December 2010 eight new Reconsideration Request processes were initiated and six of those “resolved.” In the course of its work, ATRT2 found that the general perception throughout the ICANN community is that Reconsideration Requests “all end up in a negative decision.” An analysis of the results bears this out:

* Request 13-5: Booking.com B.V. (Staff action/inaction on non-exact match “hoteis”)

BCG recommendation pending.

* Request 13-4: DotConnectAfrica Trust (Board action/inaction on the GACs Beijing communique impact on dotafrica application)

**Denied** as per BCG recommendation, Board resolution not finalized

* Request 13-3: Non-Commercial Stakeholders Group (against staff action on TMCH+50)

Initially **Denied** by BCG**,** but eventually recommends to adopt **“revised”** recommendation to be brought to the ongoing community discussion on policy versus implementation within ICANN.[[9]](#footnote-11)

* Request 13-2: Nameshop (Board/ Staff inaction *on Applicants Support*)

**Denied**.[[10]](#footnote-12)

* Request 13-1: Ummah Digital, Ltd. (against staff action *on Applicants Support*)

**Denied**.

* Request 12-2: GNSO Intellectual Property Constituency (against Board decision on .cat)

**Denied.**

* Request 12-1: International Olympic Committee (board decision)

**Denied** (“*at this time*”)[[11]](#footnote-13)

* Request 11-1: Michael Gende (staff inaction)

**Denied**.

With Regard to the Ombudsman, under the ICANN bylaws[[12]](#footnote-14):

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

### The Ombudsman maintains its own a set page on the icann.org [website](http://www.icann.org/en/help/ombudsman).[[13]](#footnote-15) Annual reports have been included under this page from 2005 – 2010.[[14]](#footnote-16)

The Ombudsman now reports to the Board on a quarterly basis in addition to publishing an annual report. Furthermore, the Ombudsman has a Facebook page and writes a regular [blog](http://omblog.icann.org) on various topics.

~~A new Ombudsman was hired, since the ATRT1 report, in July 2011. In his first report in 2012 report, the Ombudsman included a list of topic on which he had dealt with over the year, and wrote that: “the majority of complaints received are outside my jurisdiction”~~~~[[15]](#footnote-17)~~

In discussions with the ATRT2[[16]](#footnote-18), the Ombudsman mentioned additional functions that were not include in the explicit Bylaws charter, including:

* “To ensure that there is transparency of the flow of information.”
* “A mandate to assist with keeping peace and harmony within the ICANN community. “
* Involvement in some issue with new gTLD program and Dispute Resolution providers that may have not been anticipated as part of the Ombudsman function by program implementers.

On questions of whether the Ombudsman should have a role in Whistleblower process at ICANN, the current Ombudsman mentioned to the ATRT2 that he, as well as his predecessor, had spoken to ICANN legal staff about this issue, and that he was basically told “no.”[[17]](#footnote-19) He also mentioned that the role had been defined 10 years ago and perhaps that was in issue to be explored.[[18]](#footnote-20)

~~In closing his discussion with the ATRT, Chris LaHatte the Ombudsman said:~~

~~“it often makes me wonder whether we ought to consider why so many people are coming to my office with problems which cannot be resolved. And there is a whole range of issues in particular with registrars, the usual set of things like, ‘My register is being difficult and not permitted a transfer.’~~

~~“Which are to a considerable extent covered by compliance, but there is also from time to time issues out there about the way things have happened between registrars and resellers and their customers, and between government organizations, the ccNSOs and such like, where there has been unfairness. “~~

## ATRT2 analysis of recommendation implementation

### With regard to Board consideration of input in policy decision making (ATRT1 Recommendation #20), ATRT2 found this implementation to be incomplete. Although the ICANN Board and the GAC have developed a modality that allows the latter’s advice to be received, reviewed, considered, and discussed with decisions explained, and the Supporting Organizations have rich Bylaws text defining processes for consideration of policy advice, the remaining Advisory Committees may offer advice but there is no defined response mechanism. In fact, there isn't even Bylaws obligation on the ICANN Board to respond.

### With Regard to restructuring review mechanisms (ATRT1 Recommendation #23), ATR2 also found this to be incomplete. Review mechanism is only the last stage of the PDP process, but one where the objectives of AOC 9.1(d) are at risk. Review mechanism should be a “final” guarantee that there is wide support for the decisions. It should not be seen as a way to solve process logjams at this stage alone.

With regard to Board Reconsideration issues, ATRT2 found that Recommendations #25 remains **incomplete**. While steps were taken to clarify the process, the issues described above indicate that it still requires clarification. Regarding Recommendation #26, though, this item is **complete**. A time line and suggested format for generating a Reconsideration Request can be found at <http://www.icann.org/en/groups/board/governance/reconsideration>.

With Regard to the Ombudsman (ATRT1 Recommendation #24), this item also is **complete**.ATRT2 believes, however, that ICANN needs to reconsider the Ombudsman’s charter and the Office’s role as a symbol of good governance to be further incorporated in transparency processes.

# **Proposed New Recommendations by ATRT2**

## Hypothesis of problem

Full transparency requires an ability for employees to report irregularities in a safe and reliable manner. While ICANN has a hotline that is meant to serve the whistleblowing activities, evidence does not indicate that this program has been used effectively.

##

## Background research undertaken

While ATRT1 did not make any specific recommendations on a manner in which continual assessment could be done, previous ICANN-contracted reports did include relevant suggestions:

In 2007, **One World Trust** concluded[[19]](#footnote-21) that

*ICANN should consider implementing processes that act as deterrents to abuses of power and misconduct which would protect staff who might want to raise such instances. Specifically, ICANN should consider developing a whistleblower policy that enables staff to raise concerns in a confidential manner and without fear of retaliation; and developing appropriate systems to foster compliance.[[20]](#footnote-22)*

In 2010, the **Berkman Center for Internet & Society** reiterated[[21]](#footnote-23) One World Trust’s recommendation that ICANN carry out a yearly transparency audit that would be published as part of an annual Transparency Audit.[[22]](#footnote-24)

## Relevant ICANN bylaws/published policies/published procedures

## ATRT2 analysis & rationale

ICANN already issues an annual report on implementation and progress on ATRT1 recommendations. Additionally, while staff does not anticipate any issues with being able to report how the Anonymous Hotline is being used, ICANN’s ability to report publicly on results from Anonymous Hotline may be limited in certain cases due to legal implications. ICANN may be limited to providing a generic disposition due to such legal limitations.

## Draft recommendations

[ATRT2 wiki Rec 12]

That Bylaws Article XI be amended to include:

*The ICANN Board will respond in a timely manner to formal advice from all Advisory Committees explaining what action it took and the rationale for doing so.*

[ATRT2 wiki Rec 13]

The ICANN Board should convene a Special Community Committee to discuss options for improving Board accountability with regard to restructuring of the Independent Review Panel (IRP), the Reconsideration Process. The group will use the report of the Experts Group Report (ESEP) on Restructuring as one basis for its discussions.

[No further recommendation(s) regarding ATRT2 wiki Rec 14]

[ATRT2 wiki Rec 15]

The Ombudsman role as defined in the Bylaws shall be reviewed to determine whether it is still appropriate as defined, or whether it needs to be expanded or otherwise revised to help deal with the issues such as:

* A role in the continued process review and reporting on Board and Staff transparency.
* A role in helping employees deal with issues related to the public policy functions of ICANN
* A role in proper treatment of whistleblowers and the protection of employees who decide there is a need to raise an issue that might be problematic for their continued employment.

~~The Ombudsman roles and responsibilities should be based on standards and best practices as defined by:~~

* ~~International Ombudsman Association (IOA)Standards of Practice~~
* ~~IOA Best Practices and their Code of Ethics~~
* ~~Standards promulgated by the International Ombudsman Institute.~~
* ~~Online Dispute Resolution Standards of Practice recommended by the Advisory Committee of the National Centre for Technology and Dispute Resolution~~

[No further recommendation(s) regarding ATRT2 wiki Rec 16]

[ATRT2 wiki Rec 35]

As part of its yearly report, ICANN should include

* A large range of Transparency efforts and metrics.
* A discussion of the degree to which ICANN, Staff and Community, are adhering to a standard of default transparency or where decisions to either use Chatham House Rule or redaction is made on a case by case basis and is documented in a transparent manner.
* Statistical reporting on ICANN Board information and report disclosure, to include:
	+ the usage of the Documentary Information disclosure Policy (DIDP)
	+ Percentage of Board Book and other information that is released to the general public
	+ Number and nature of issues that Board determined should be treated at either:
		- Under chatham House Rule
		- Completely confidential
* A section on employee whistleblowing activity, to include metrics on:
	+ Reports submitted
	+ Reports verified as containing issues requiring action
	+ Reports that resulted in change to ICANN practices
* An analysis of the continued relevance and usefulness of existing metrics, including
	+ considerations on whether activities are being geared toward the metrics (aka, teaching to the test) without contributing toward the goal of genuine transparency
	+ Recommendations for new metrics
* ~~This report could be created under the supervision of (the ICANN Ombudsman.) external auditor~~
	+ ~~This would require a change to By-laws on the Ombudsman scope~~
* ~~[The transparency function requires an additional hire, within the Ombudsman office, to work with the various AOC review groups to provide continuity of the transparency function across all AOC groups.] This function can be provided by an external auditor.~~

[ATRT2 wiki Rec #36]

Adopt the One World Trust and/or Berkman Center recommendations to establish a viable whistleblower program. The processes for ICANN employee transparency and whistleblowing should be made public. ICANN also should arrange for an annual professional audit of its whistleblower policy to insure that the program meets the global best practices.

* ~~Improvement to be made to employee whistle-blowing process to meet the best practices for transparency.~~
* ~~Special attention to be paid to employee protection.~~
* ~~Processes for ICANN employee transparency and whistleblowing to be made public~~
* ~~ICANN must arrange for an annual professional audit of its whistleblower policy to insure that the ICANN program meets the global best practices as established b~~*~~y:~~*
	+ *~~[UN Government Accountability Project](http://www.whistleblower.org/program-areas/international-reform/united-nations)~~*
	+ *~~[UN Policy](http://www.whistleblower.org/storage/documents/UN_Policy.pdf)~~*
	+ *~~[UK: Public Concern at Work](http://www.pcaw.org.uk/business-support)~~*
	+ *~~others tbd~~*
* ~~Information on whistleblower program to be include in anual Transparency report (Recommendation 35), including:~~
	+ ~~Results of annual whistleblower audit~~
	+ ~~Basic Metrics including:~~
		- ~~Reports submitted~~
		- ~~Reports verified as contaiing issues requiring action~~
		- ~~Reports that resulted in change to ICANN practices~~

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## Public Comment on Draft Recommendations (to be completed later)

## Final recommendation (to be completed later)

1. See Final Recommendations of the Accountability and Transparency Review Team (31 December 2010) at <http://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf> [↑](#footnote-ref-1)
2. See <https://community.icann.org/display/ATRT2/Mandate>, in particular 9.1 (Ensuring accountability, transparency and the interests of global Internet users) subsections (c), (d) and (e). [↑](#footnote-ref-2)
3. See <http://www.chathamhouse.org/about-us/chathamhouserule> “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” [↑](#footnote-ref-3)
4. It should be noted that while not discussed to an extent in the ATRT1 report, the last two issues were documented in both the [2010 Berkman Center for Internet & Society report](http://www.icann.org/en/about/.../review-berkman-final-report-20oct10-en.pdf_) and the [2007 One Work Trust report](http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf_) on “ICANN Accountability and Transparency – Structures and Practices.” [↑](#footnote-ref-5)
5. See <https://community.icann.org/pages/viewpage.action?pageId=41885192> [↑](#footnote-ref-6)
6. See <http://archive.icann.org/en/meetings/accra/indrev-topic.htm> [↑](#footnote-ref-8)
7. ~~In order to make sure that ATRT received all possible comments, including those where those making the comments felt a need to maintain their confidentiality, the ATRT2 created a confidential email list. Some particpants in ATRT2 opted out of particpating in the collection of confidential issues. An appendix (TBD) covers the confidential activities and [will discuss] the issues found in those contacts in a confidential manner. Quote from that list are given without specific attribution.~~ [↑](#footnote-ref-9)
8. ibid [↑](#footnote-ref-10)
9. The BCG wrote, “*The Request, however, does demonstrate the import of the ongoing work within the ICANN community regarding issues of policy and implementation, and the need to have clear definitions of processes and terms used when seeking community guidance and input. As such, we believe it is advisable for the Board to pay close attention to the policy/implementation debate, and to make sure that the issues raised within this Request be part of that community work. Further, we believe that it is advisable to ask the community to address the issue of how the Board should consider and respond to advice provided by the Supporting Organizations (outside of the PDP) and what types of consultation mechanisms, if any, are appropriate in the event the Board elects not to follow that advice. As ICANN evolves, this is an important question for consideration in upholding the multistakeholder model.”* [↑](#footnote-ref-11)
10. : [↑](#footnote-ref-12)
11. This issue still pending on a general policy development process between GAC and GNSO on IGO protection. [↑](#footnote-ref-13)
12. See [http://www.icann.org/en/about/governance/bylaws - V](http://www.icann.org/en/about/governance/bylaws%22%20%5Cl%20%22V) [↑](#footnote-ref-14)
13. See <http://www.icann.org/en/help/ombudsman> [↑](#footnote-ref-15)
14. See <http://www.icann.org/en/help/ombudsman/reports> [↑](#footnote-ref-16)
15. See <http://www.icann.org/en/help/ombudsman/documents/annual-report-2011-27mar12-en> page 3 [↑](#footnote-ref-17)
16. See <http://durban47.icann.org/meetings/durban2013/transcript-atrt2-13jul13-en.pdf> [↑](#footnote-ref-18)
17. The current Ombudsman, Chris LaHatte, noted, “the answer really was, well we have a perfectly good law which deals with that so you don’t need to go there. I can’t comment from a legal perspective on whether that’s a good answer as opposed to the correct answer.” He also indicated that the Ombudsman needs “freedom of information powers, and indeed I have those, because it’s in my Bylaw that if I want to see any documents from within ICANN or in the ICANN community, then they must be provided.” He went on to note, however, “That’s not quite the same of course as whistleblowing, but it is perhaps the first step towards that sort of function. If someone were to come to me and say, ‘I want to make this confidential complaint about something that’s happened.’ And it is effectively a whistleblowing complaint, then I have the ability to investigate.” [↑](#footnote-ref-19)
18. LaHatte noted “And the Bylaw it seems to also be restrictive in its approach in that it says the role is between ICANN staff and the community, but in other areas of the by-law it’s not quite as explicit, and it talks about supporting structures. And it’s perhaps understandable in the context of something which was written in 2003, 2004 when it was a lot smaller, much less complicated, and when the supporting organizations hadn’t reached the degree of sophistication which they have some seven or eight years later.” [↑](#footnote-ref-20)
19. See <http://www.icann.org/en/about/transparency/owt-report-final-2007-en.pdf> [↑](#footnote-ref-21)
20. In fact, One World Trust made many recommendations, including:

	* To ensure compliance with any organisational policy, it is important that there is high level oversight and leadership. Without this, implementation will only ever be piecemeal. To ensure implementation of the information disclosure within ICANN therefore, responsibility for overseeing the policy should be assigned to a senior manager.
	* Supporting this, a set of indicators should be developed to monitor the implementation of the policy, and an annual review should be undertaken which identifies how ICANN is complying with the policy, where there are problems, and the steps that are to going be taken to address these (see recommendation 5.1 in section 8).
	* While ICANN has three mechanisms for investigating complaints from members of the ICANN community, the organisation does not have a policy or system in place that provides staff with channels through which they can raise complaints in confidentiality and without fear of retaliation. Having such a policy (often referred to as a whistleblower policy) is good practice among global organisations. A whistleblower policy that provides such protections serves as an important means of ensuring accountability to staff as well as preventing fraudulent behaviour, misconduct and corruption within an organisation.
	* While the Ombudsman, Reconsideration Committee and the Independent Review Panel provide complaints based approaches to compliance, to generate greater trust among stakeholder, ICANN needs to take a more proactive approach.
	* To address this issue, ICANN should consider a regular independent audit of their compliance with accountability and transparency commitments. Alternatively, it could develop a permanent compliance function to emphasize prevention by identifying shortcomings as they emerge and before they become systemic problems. In either case, a regular report on compliance should be produced and publicly disseminated. [↑](#footnote-ref-22)
21. See <http://www.icann.org/en/about/aoc-review/atrt/review-berkman-final-report-20oct10-en.pdf> [↑](#footnote-ref-23)
22. Specifically,

 [↑](#footnote-ref-24)