



IPC Comments on the CCWG-Accountability Work Stream 2 Draft Recommendations to Improve ICANN's Transparency

The Intellectual Property Constituency (IPC) of the Generic Names Supporting Organization welcomes the opportunity to comment on the CCWG-Accountability Work Stream 2 draft recommendations to improve ICANN's transparency,¹ developed as required by Annex 12 of the final report of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability Work Stream 1).

These recommendations will contribute to addressing the IPC's concerns with ICANN governance, though their effect will need to be carefully measured. The IPC is committed to ensuring that the voices of the businesses and individuals who own intellectual property are fully appreciated and considered in ICANN processes, and will remain watchful of any harmful effects that may become apparent as changes to ICANN bylaws translate into practice.

The IPC appreciates the improvements that have been proposed with respect to (1) enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP); (2) transparency of ICANN's interactions with governments; (3) improvements to the existing whistleblower policy; and (4) the transparency of Board deliberations. We believe these proposed measures will contribute to improved accountability.

- The IPC offers general support for improvements to ICANN's DIDP, which will contribute to needed transparency in ICANN's processes and decision-making. Specifically, we note our support for:
 - Clarifying the duty of ICANN staff to fully and accurately document records;
 - Improved ICANN transparency in its contracting processes – and the proposal that ICANN utilize open contracting processes, including the automatic disclosure for all contracts above \$5,000 save those falling under DIDP exceptions;
 - That requests should receive a response “as soon as reasonably possible” with a cap on timeline extensions being an additional 30 days; and

¹ <https://www.icann.org/public-comments/ccwg-acct-draft-recs-2017-02-21-en>.

- Reviewing the DIDP every five (5) years to continue to assess ways to improve it.
- The IPC supports recommendations that would improve the documenting and reporting of ICANN's interactions with governments.
- The IPC supports recommendations that would improve transparency into ICANN Board deliberations.

However, certain of the proposals raise significant concerns. In particular:

- The CCWG should not adopt Recommendation 11, which states that “The exceptions for “trade secrets and commercial and financial information not publicly disclosed by ICANN” and for “confidential business information and/or internal policies and procedures” should be replaced with an exception for “material whose disclosure would materially harm ICANN’s financial or business interests or the commercial interests of its stake-holders who have those interests.”
 - Generally speaking, this recommendation fails to take into account business realities, in particular the legal standards for maintaining trade secrets and the legitimate reasons that may exist for maintain the confidentiality of business information.
 - Trade secrets are a form of competitively-sensitive business information which requires confidentiality in order to maintain its status as a trade secret. For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 39, has the following standards for trade secrets:
 - The information must be secret (i.e. it is not generally known among, or readily accessible to, circles that normally deal with the kind of information in question).
 - It must have commercial value because it is a secret.
 - It must have been subject to reasonable steps by the rightful holder of the information to keep it secret (e.g., through confidentiality agreements).
 - Since a trade secret only exists so long as it is kept confidential, Recommendation 11 would seemingly require ICANN to destroy trade secret protection for any such information that was subject to a DIDP, subject only to a vague “material harm” standard. This is not appropriate treatment for trade secrets, and this part of Recommendation 11 should not be adopted.
 - While “confidential business information” does not raise the same level of concern, there are many legitimate reasons why information needs to be kept confidential, which would not be resolved by a “material harm” standard. There may be appropriate methods for dealing with confidential information in a disclosure protocol, but removing any exception for confidential business information is not appropriate. This part of Recommendation 11 should not be adopted.

- The concerns regarding an exception for “commercial and financial information not publicly disclosed by ICANN” are somewhat more understandable. It does seem circular, though we note that the CCWG’s explanation is a bit disingenuous – in fact, many times DIDPs request information that has been publicly disclosed by ICANN, but may not be easy to locate (which raises different transparency concerns). However, there may be legitimate reasons that ICANN does not disclose this information, which would not be protected by a “material harm” standard. A more nuanced analysis is required before determining that there should not be any such exclusion. It may also be appropriate to consider modified disclosure for this category of information that would protect both ICANN’s legitimate interests and the public interest in disclosure.
- Finally, the reference to “internal policies and procedures” in the current policy is ambiguous. Reading the sentence as a whole, it seems that “confidential ... internal policies and procedures” are included in the exception, but so are “internal policies and procedures” that are *not* confidential. The former exception seems appropriate and should not be deleted. This latter exception seems difficult to justify; however, it does not appear that the CCWG sought any information regarding ICANN’s reasons for this exception. We would urge the CCWG to seek this information and making a determination based on this information, rather than merely deleting the provision without understanding the reason it may exist.
- The CCWG should re-examine Recommendation 15, which states that “The DIDP exception for attorney-client privilege should be narrowed so that information will only be withheld if its disclosure would be harmful to an ongoing or contemplated lawsuit or negotiation, and explicitly mandate the disclosure of broader policy-making advice received from lawyers.
 - This approach to attorney-client privilege seems overly simplistic. While legal advice directly related to “policy-making” (which may not be the right term, since in many instances policy is “made” in GNSO Working Groups and the like, and not by the ICANN “organization”) should, broadly speaking, be disclosed where possible, there may be legitimate reasons for maintaining the privilege rather than waiving it. Recommendation 15 fails to take this into account.
 - There may also be legal advice that is not related to a lawsuit or negotiation where waiver of the privilege raises legitimate concerns. Recommendation 15 fails to take this into account as well.
 - The CCWG should explore ways to balance legitimate reasons to maintain attorney-client privilege and the public interest in disclosure
- The CCWG should not adopt Recommendation 16, which states, “ICANN should consider adopting open contracting, whereby all contracts above \$5,000 are automatically disclosed, and non-disclosure clauses are limited in their application to the legitimate exceptions found in the DIDP.”

- This Recommendation goes well beyond the scope of the DIDP and beyond the scope of the CCWG WS2 efforts relating to transparency.
- “Open Contracting” is a relatively new movement and concept that has largely been applied to government contracting. It involves a number of practices and procedures throughout the contracting process that may or may not be appropriate for ICANN, and really has nothing to do with the DIDP. Any movement toward “open contracting” by ICANN should be separately considered, and not bootstrapped to recommendations on the DIDP.
- That said, ICANN should be encouraged to consider contracting in a manner that allows for maximum disclosability during a DIDP. However, it is inappropriate to consider forcing ICANN to contract only with parties that agree to an “open contracting” process.
- The CCWG should consider significant changes to Recommendation 12, which states that “Where an exception is applied to protect a third party, the DIDP should include a mechanism for contacting this third party to assess whether they would consent to the disclosure.”
 - First, it is unclear who would contact the third party. Allowing the DIDP requestor could raise concerns, since, unlike ICANN, they will have no relationship with the third party. If, for example, the “trade secrets” or “confidential business information” exceptions are being invoked in connection with a third party’s trade secrets or confidential business information, it would likely be more appropriate (and may be contractually required) for ICANN to contact them. In any event, the recommendation would benefit from clarity, and it would seem most logical for the contact to be made by ICANN in all instances.
 - Second, and of greater concern, is the statement on page 6 that “The third-party’s objections to disclosure should also be noted as part of the decision-making process, though they should not be granted an automatic veto over whether the information will be released, a decision which should remain in the hands of ICANN.” If it is the third party’s information that is being requested, their objections should be dispositive.
 - For example, if a third party has disclosed trade secrets to ICANN, it would likely destroy trade secret protection for these assets if this information was disclosed, and could subject ICANN to legal claims. If a third party discloses that party’s information to ICANN with an agreement that it will remain confidential, this agreement needs to be honored.
 - Any exceptions to this should be narrowly tailored. Disclosure of a third party’s confidential information or trade secrets over their objections is an extreme step that should not be taken lightly.
 - Concerns that ICANN is somehow “gaming” disclosure by invoking this or other exceptions should be dealt with directly, and not be eliminating legitimate exceptions, particularly where a third party’s rights are concerned.

Respectfully submitted,

Intellectual Property Constituency