

## **ICANN Inputs - CCWG WS2 Transparency Subgroup Report**

**Summary:** The Transparency Subgroup provides a report with four areas of recommendation:

- 1) DIDP Modifications;
- 2) Proactive Disclosures – ICANN’s Interactions with Governments;
- 3) Transparency of Board Deliberations; and
- 4) ICANN’s Whistleblower Hotline.

ICANN organization appreciates the opportunity to provide input to the CCWG WS2 Transparency Subgroup report. We are providing these inputs to the Subgroup, with a copy to the public comments for the wider community, to identify facts that will support further deliberations among the Subgroup. There are a number of recommendations that are actionable and implementable, and many excellent ideas presented. There are other recommendations where there may have been some misunderstanding of how ICANN org does things, and we provide some facts for further consideration. This input is not intended as an interference into the work of the Subgroup, but a presentation of data for the Subgroup to determine next steps.

Within the report, there are some easily implemented and actionable items, such as some of the DIDP recommendations, and hotline improvements that are already underway.<sup>1</sup>

### ***DIDP Modifications***

The WS2 Subgroup report is based in large part on information disclosure practices from governments and large intergovernmental organizations, while acknowledging that ICANN is neither. The goal of increasing transparency as a means to increasing trust in ICANN is a consistent theme through the report.

Since 2008, the Documentary Information Disclosure Policy (<https://www.icann.org/resources/pages/didp-2012-02-25-en>), or DIDP, has been in place within ICANN. It was initially developed as part of ICANN’s Accountability and Transparency Frameworks and Principles, which was subject to community review and comment (<https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>) prior to the Board’s February 2008 approval. The DIDP, which has

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<sup>1</sup> Note that there are places where the narrative introduction to the document sets out suggestions that are not included within recommendations. For example, the discussion on the DIDP includes a suggestion that ICANN should have an obligation to create new documentation or compilations as part of a DIDP response. However, there is not a restatement of this as part of the recommendations. Similarly, there is some discussion regarding the availability of the IRP for a place of de novo review of the sufficiency of a DIDP response, but there are no recommendations regarding that discussion.

not been modified since 2008, sets out categories of documents that ICANN should, as a matter of practice, make publicly available, as well as a process for people to request from ICANN documents that are not already public. The DIDP obligates ICANN to respond to requests for documentation within 30 days, and sets out Defined Conditions for Nondisclosure, or categories of documents that were agreed to not be appropriate for public disclosure. Since the DIDP was developed, ICANN has received and responded to over 125 requests for information, and each request and response can be viewed at <https://www.icann.org/resources/pages/governance/transparency-en>.

A presumption of a right to access information and a presumption of availability of information, as identified by the Subgroup, is a positive baseline for the organization. Some of the recommendations, such as Recommendation 4, suggesting that ICANN should provide further assistance to requesters, provide a good baseline for enhancements to the DIDP process. Having documentation of how and when ICANN will reach out to requesters if a DIDP request is unclear makes sense. Similarly, Recommendation 6, encouraging responses as soon as possible, furthers access to information. Enhanced reporting (Recommendation 20) is already under design. Recommendation 21 (setting a regular review cycle of the DIDP) demonstrates how the process can be set for continuous improvement.<sup>2</sup>

#### *Factual Information on Current DIDP Practices*

ICANN org notes some factual information about DIDP practices already in place within ICANN may be helpful for the Subgroup's further dialogue. The DIDP process in practice already includes the following:

1. Responses reference information that is already public through the development of narrative responses to requests (Recommendation 8)<sup>3</sup>;
2. Responses include consideration of "severability" when portions of documents are appropriate for disclosure while redacting other parts; (Recommendation 17);<sup>4</sup>

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<sup>2</sup> Note that the Accountability and Transparency Reviews required under ICANN's Bylaws are on a five-year cycle.

<sup>3</sup> Narrative responses identifying publicly available information are a regular part of the DIDP response process. Sampling responses across years, a few examples of this practice are: <https://www.icann.org/en/system/files/files/didp-20170125-1-sobel-response-24feb17-en.pdf> (2017); <https://www.icann.org/en/system/files/files/didp-20160502-1-cis-response-01jun16-en.pdf> (2016);

<sup>4</sup> See <https://www.icann.org/en/system/files/files/didp-response-20150717-1-morris-14aug15-en.pdf> for an example of a partial release of a document in response to a DIDP Request.

3. Responses identify, by item requested, of the applicable conditions for non-disclosure, if items are not disclosed (Recommendation 18)<sup>5</sup>;
4. ICANN maintains a DIDP Response Process document identifying how requests are handled, including a centralization of the response function, at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> (Recommendation 4); and
5. ICANN has never taken 60 days to respond to a DIDP request, and since 2013 has responded to every request within a 30-day timeframe<sup>6</sup>.
6. DIDPs typically are submitted after some level of outreach to ICANN to see if the documentation is already available.
7. As stated in the DIDP Response Document, “Documents that have been determined as responsive and appropriate for public disclosure are posted in the appropriate locations on ICANN’s website.” This is in service of the idea that if a document is appropriate to release to a single person or entity within the ICANN community, it is likely appropriate for it to have a home on ICANN’s website for more general availability.<sup>7</sup>

For each of these recommendations, discussions of what changes are envisioned to ICANN’s current practice may help in the evaluation of the recommendations.

*Recommendations with potential for added costs or unintended effects*

ICANN operates within a specific budget. With the limited funding, recommendations that add costs to ICANN’s operations then result in trade offs to other items, such as the ability for community to implement new policies, or innovate on programs or other work underway. There are a few recommendations that could impose costs, or otherwise result in unintended effects on ICANN:

1. Recommendation 2, as written, could mandate a specific document management practice. While proper record keeping is essential, document retention and maintenance practices designed to organizational needs are

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<sup>5</sup> An example of how ICANN responds to DIDP requests on an item-by-item basis, including identification of the Defined Conditions for Nondisclosure applicable to a particular item in a request can be found at <https://www.icann.org/en/system/files/files/didp-20150921-1-moody-response-supporting-docs-21oct15-en.pdf>. This has been part of ICANN’s process since it first received a request with multiple requests in 2009 (<https://www.icann.org/en/system/files/files/ruiz-response-05jun09-en.pdf>).

<sup>6</sup> Since 2013, ICANN has responded to every DIDP Request within 30 days of receipt. Request 20121027 was responded to within 31 days.

<sup>7</sup> See, for example, Request 20150407-1, <https://www.icann.org/resources/pages/20150407-1-2015-05-08-en>, which discusses which documents will be made available in response to the DIDP Request, and where they are located on the ICANN website.

matters of operational excellence and legal compliance and not solely transparency.<sup>8</sup>

2. Recommendation 5, regarding requester’s preference of document format, suggests that it is an appropriate use of ICANN resources to come to ICANN and request documents that are already public be provided to individuals in a different format.
3. Recommendation 8, encouraging the use of the DIDP process to seek narrative discussion of information that is known to be publicly available could impose resource and costs.
4. Recommendation 15, requiring ICANN to proactively waive attorney-client privilege unless there is an ongoing or contemplated lawsuit or negotiation creates a directive on ICANN’s internal operations and practices that could impact resourcing and operations.
5. Recommendation 16, suggesting open contracting (or the automatic disclosure of all contracts over US\$5,000 or \$10,000, and modification of non-disclosure agreements away from industry standards) represents a shift of ICANN’s contracting process, and could have significant impact on ICANN’s ability to serve its mission within appropriate budgetary controls and in ways that might be impractical.
6. A modification of the “confidential business information” nondisclosure condition to focus on harm to ICANN and to “stakeholders” (Recommendation 11) could make the condition broader (to cover stakeholders that have financial interests but are not under a confidentiality expectation) while limiting applicability to a vendor that some may disagree is a stakeholder.
7. Recommendation 19, identifying a potential role for the Complaints Officer as the ongoing evaluator of the DIDP process, may not be aligned with the ICANN Org vision of the Complaints Officer role.

#### Recommendations of Ombudsman Role Need Other Inputs

On the role of the Ombudsman, if there is an allegation of unfairness in how ICANN handles a DIDP response, the Ombudsman typically has jurisdiction over that complaint.<sup>9</sup> To the extent that the Ombudsman is being tasked with new work (such as Recommendation 13 on labeling a requester as vexatious, or Recommendation 19 tasking the Ombudsman with responsibility for outreach on DIDP and reporting), the WS2 Ombudsman group is also considering the propriety of modifications to the Ombudsman’s role.

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<sup>8</sup> The Information Transparency Initiative and the Open Data Initiative, each discussed in the most recent Board Report prepared through the CEO’s office ([https://www.icann.org/static\\_documents/executive-team-reports-march-2017-public.pdf](https://www.icann.org/static_documents/executive-team-reports-march-2017-public.pdf)) are expected to result in additional information being available to the ICANN Community and being more easily accessible to the public.

<sup>9</sup> Under the new ICANN Bylaws, with the expansion of the Independent Review Process to actions of staff, if a response to a DIDP is in violation of the ICANN Articles or Bylaws, that could be a proper dispute under the IRP.

## ***ICANN's Interactions With Governments***

As the Subgroup identified, ICANN complies with its disclosure requirements on lobbying efforts.<sup>10</sup> In addition, ICANN regularly reports on government engagement, with information posted at <https://gacweb.icann.org/pages/viewpage.action?pageId=38502831> . Thanks to positive dialogue emerging out of the Subgroup, some of this information is now included in the Board Reports generated by the CEO's office in advance of every Board workshop, which provide details on ICANN's governmental engagement efforts. The most recent report is at [https://www.icann.org/static\\_documents/executive-team-reports-march-2017-public.pdf](https://www.icann.org/static_documents/executive-team-reports-march-2017-public.pdf), and the historical reports are collected at <https://www.icann.org/presidents-corner>. While these reports do not contain the full detail of information that the subgroup recommends be made public, the reports identify, on a regional basis, meetings and bilaterals attended by date and region. Further guidance on how ICANN interacts with governments is also set out on that page.

The subgroup has identified that for “greater clarity with regard to how ICANN engages government stakeholders” and providing awareness of “interactions with governments”, that ICANN should produce a detailed register including costs for engagement, engagement activities and topics of discussion for interactions beyond those lobbying activities. This is another area that might impose extra costs or have unintended effects on ICANN. Some questions or issues that could be part of future Subgroup deliberations on this issue could include:

1. The definition of “political activity” provided by the Subgroup includes an intention to influence *or* inform, directly *or* indirectly; the methods of engagement anticipated include “newspaper op-eds, letters, advertisements, speeches, emails, phone calls, in-person meetings, etc...”. These do not align with the definitions of “lobbying” or engagement in political campaigning that are applicable to ICANN by virtue of U.S. laws/tax regulations.
2. How would this apply to if an ICANN representative, or supported community member, delivers a speech in a room where governments might attend amongst others? Would intention be shown if the speaker knew government representatives are in attendance, even if there is a broad audience?
3. What if a pamphlet is designed for broad dissemination, and is handed out to a government representative?
4. What is the definition of a government – is it anyone who is employed by a governmental entity?
5. Who decides what is a matter of public policy?

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<sup>10</sup> ICANN does not engage in lobbying activities at the California state level, or any other state, so there is no need for state-specific lobbying reporting.

6. Governments come to ICANN in multiple capacities, including as ccTLD operators, or as individual contributors to policy processes. Would each of these touchpoints be a required area of reporting?
7. Would this recommendation include ICANN funded community stakeholders and their engagement, and if not, why not?

### ***Transparency of Board Deliberations***

Of the three recommendations presented in this section, ICANN org has some key areas where it agrees with the Subgroup. First, 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. (Recommendation 1). The idea that redactions should only exist for as long as necessary is also important to transparency. (Recommendation 3). For example, negotiation limits for rental of office space need to be kept confidential during negotiations, and likely for a period of time after negotiations are complete. However, at a future point that limit can probably be released. On the other hand, resolutions about specific employment matters are normally never appropriate for publication. Introducing information on when and how decisions on removing redactions are made could be a helpful improvement.

Recommendation 2, on the types of information appropriate to redact from minutes, will need to be revisited upon the completion of the review of the DIDP, and must be considered in light of the ICANN Bylaws requirements on the process and grounds for basis of removal from minutes. ICANN needs to retain an appropriate scope of redaction to meet its legal obligations. Withholding items from resolutions is not a frequent practice. Notably, if ICANN violates the Bylaws in how items are withheld from posting, the IRP is already available.

As it relates to Recommendation 1, these are the transparency practices that are already in place for ICANN Board deliberations:

- In accordance with the ICANN Bylaws, ICANN posts resolutions within a short time frame of approval, and since 2010, ICANN has been producing rationales to help support and explain the Board's actions.
- ICANN produces detailed minutes of minutes of meetings, and also since 2010, the Board makes available the documentation that supported its deliberations, the Board Briefing Materials.
- At the time of posting each set of Board minutes, ICANN posts the corresponding briefing materials for that meeting. A discussion of how those materials are prepared for posting is at <https://www.icann.org/resources/board-material/briefing-materials-guidelines-2011-03-21-en>. These documents are posted notwithstanding the defined condition for nondisclosure under the DIDP regarding deliberative process materials.

- A general discussion of ICANN’s redaction practices is available at <https://www.icann.org/resources/pages/publication-practices-2016-06-30-en>.
- In addition to the regular posting of resolutions, summaries of resolutions, and information about the outstanding action items from resolutions, is provided in the Board Report generated by the CEO’s office.
- The Board Report also provides information about Board workshop sessions, including identification of issues discussed and follow-up steps.

It would be helpful to understand if ICANN’s existing publication practice aligns with Recommendation 1 on the types of information that should be made available about the Board’s deliberations, or if Recommendation 1 is addressing other documents.

### ***Whistleblower Protection***

ICANN has in place an anonymous hotline policy, in place since 2009, which offers an extension of ways that ICANN org members can report concerns or lodge complaints of internal misconduct.<sup>11</sup> ICANN contracts with a third-party provider, that is available around the clock to receive complaints by phone or email. Any complaints received are then subject to investigation within ICANN. ICANN recently completed a third-party review of the anonymous hotline policy, through a company called Navex. The review indicated some areas where ICANN’s policy and processes could be improved to meet best practices.<sup>12</sup>

The Subgroup’s recommendations are well aligned with the Navex Report commissioned by ICANN to review the Anonymous Hotline. ICANN has already implemented some of the modifications to the policy,<sup>13</sup> and is on schedule for the

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<sup>11</sup> Some refer to this hotline as a “whistleblower” hotline, though ICANN, like many organizations, elects not to use the term “whistleblower” because the hotline can be used for broader purposes. In addition, within the ethics and compliance field, there is a movement away from using the term “whistleblower” for broad programs such as this, due to some of the negative connotations associated with that term, and the unique legal meaning of the term “whistleblower” within certain regulatory and business environments.

<sup>12</sup> Navex’s evaluation of the hotline is available at <https://www.icann.org/en/system/files/files/icann-hotline-policy-review-21mar16-en.pdf>; Navex’s report on external use of the hotline is available at <https://www.icann.org/en/system/files/files/icann-hotline-use-external-stakeholder-15may16-en.pdf>.

<sup>13</sup> The Policy as updated in October 2016 was provided to the WS2 Staff Accountability Subgroup and is available at <https://community.icann.org/display/WEIA/Staff+Accountability?preview=/59643290/64067386/Anonymous%20Hotline%20Policy%20v2-2016-Oct.pdf>.

remainder of the modifications to be in place by the end of the fiscal year. In terms of publication of the policy, ICANN is currently evaluating where this and other employment policies can appropriately be posted on the website.<sup>14</sup>

When posting the policies, the general publication of the hotline numbers on ICANN's website may be inconsistent with the Navex recommendation that the hotline not be opened up generally to the broader ICANN community. ICANN Org agrees with the Subgroup that the numbers should be easily accessible to any those that are covered by the policy. Internally, there are multiple places where ICANN employees can locate the hotline phone numbers. As the policy is extended to business partners, ICANN is already looking into tools to make the numbers easily accessible without need to make them generally available to anyone visiting ICANN's website.

Finally, the Subgroup's recommendation for a regular review of the hotline is also well taken, though imposing a 2-year cycle of review may impose costs that are not practical as a standard operating procedure.

We thank the CCWG Accountability Subgroup for its work on the draft recommendations and look forward to providing other inputs as appropriate during the finalization of the recommendations by the community.

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<sup>14</sup> For now, the collection of policies are accessible off of the WS2 Staff Accountability Subgroup wiki page at <https://community.icann.org/display/WEIA/Staff+Accountability>.