

Comments for the CCWG – Accountability Work Stream 2 – Draft Recommendations to improve ICANN’s Transparency

Dear All

I read the document containing the draft recommendations and submit the following comments heading wise for everyone’s kind perusal.

Comments on Improving ICANN’s Documentary Information Disclosure Policy (DIDP)

The document requires creating a dedicated team who could provide the information to the requester within a specific period of 30 days and discusses various aspects of providing information in comparison with the policies in the world.

However the document does not highlight any classification of information and time line to provide different information. Classification of information is required to ascertain whether the information (a) can be immediately provided or (b) have to be obtained from other sources for which time is required or (c) information which has to be denied for any security or business reasons or (d) request is abusive or vexatious. Further how to determine the request is abusive (d) above is critical and requires attention.

Once a request for information is received the team can categorize the request as (A), (B), (C) and (D).

S. No.	Request Category	Type of Information
1	A	Refers to information readily available. It can be provided immediately on the same day or not less than 2 days.
2	B	Refers to not readily available for which information needs to be gathered, drafted in consultation with internal team or external agencies or which will involve considerable time (not less than 10 days).
3	C	Refers to matters which are related to Confidential Information, trade secrets and information relating to root zone, agreements or financial data or security related issues which cannot be shared due to disclosure clauses or security of internet. My humble opinion is to not classify security related issues into minor or major, to enable minor details to be shared with the requester. Sharing of minor security details may be avoided to prevent problems or halting of services of ICANN or any other agency. Security related issues may be kept under one fold and classification may be avoided. The team will respond whether such data can be provided or not.
4	D	Refers to matters in which the request is not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual (please view comments under Recommendation No.13 below)

Kind Note: For handling matters covered under “C” - A separate and special team “*Confidential Data Management and Disclosure Team*” may be constituted which will exclusively handle and decide such

requests. The team will comprise staff who have knowledge and experts in the field of Confidential Information.

For handling matters covered under D - A separate team and special team "*Abuse Team*" can specially be constituted which will exclusively handle and decide abuse related requests. This team will comprise staff who have knowledge and expertise in the field of abuse and legal functions.

The sentence in the draft "Another problem with the DIDP is the time table for response" (Page 6, 3rd Para, fist line) is covered in the above table.

Once a request is received a formal acknowledgement may usually be given acknowledging the receipt of the request. The information may be categorized whether it falls under (A or B or C or D). The second stage is to send an interim reply to the requester whether the information requested is readily available or not. Interim reply has to be sent as soon as possible so that the requester understands that his request is being worked upon.

Comments on Page 6: Para commencing "Another problem..... In this Para it is noted that the calendar days for replying to the requester was derived from practices adopted by individual countries (Serbia, Denmark, Lithuania, Bulgaria, Indonesia and India). In my humble opinion taking countries into account may not be appropriate, instead practices/methods adopted by similar Not for Profit (International Organizations) could have been considered.

Ref: Page 8: Para commencing "The exception..... In this Para deletion of words like "trade secrets" has been proposed. I politely disagree with this. Words like "**trade secrets**" and "**security**" may be included in the proposed clause. Excluding such words may pave way for providing the same on requests which is not acceptable for stakeholders and may lead to legal issues.

Comments on Improving ICANN's Anonymous Hotline (Whistleblower Protection)

Page 17 (Last Para): Hotline Policy Scope: It is noted that the scope is more widened to include stakeholders under the hotline policy (stakeholders including registries, registrars, governments and so on and future contract of operation with ICANN). I humbly submit that this may lead to complications for the following reasons:-

- (a) Each stakeholder may already have its own whistleblower policy or rules or similar rules in different forms, hence the applicability of ICANN's rules on the stakeholders may not be possible A
- (b) Applying hotline policy on stakeholders (who already have some policy/mechanism in place) may be termed as interference in stakeholder's organizational functioning.

Hence clarity is requested in this aspect.

Page 18: Para 3: commencing "Another measure.... In this Para "email, personal email, phone calls etc" have been suggested as medium for acknowledging the receipt of the report of the reporter under hotline policy. I suggest including "**sms**" also.

Page 18: Para 4: This Para outlines that classifying “urgent” and “non-urgent” is too arbitrary. This is a good consideration and I agree with this. Every report must be treated without differentiation on urgent and non urgent basis.

Comments on Summary of Recommendations (Page No.20)

While I agree to the majority of the recommendations, I humbly submit my objections for few recommendations:-

Recommendation No.3: E-filing of reports/complaints may be permitted. The said recommendation does not mention about e-filings. At the same time sending reports/complaints by letters and fax may also be encouraged. I request that the recommendation may be modified to mention e-filing of complaints.

Recommendation No.9: This recommendation relates to root server aspects. I would like to know if any comments or advice has been received from **Root Server System Advisor Committee (RSSAC)**.

Recommendation No.13: (This recommendation says that requests which are not reasonable, excessive or overly burdensome, not feasible, abusive or vexatious or made by a vexatious or querulous individual” should be amended so that either the Ombudsman or the Complaints Officer automatically reviews any decision to use this exception). I politely disagree with this recommendation for the following reasons:-

- (a) As stated supra the “**abuse team**” may handle all requests which are abusive, vexatious or overly burdensome (either to provide the information or refuse the information). If information is rejected by the team, an appeal may be filed before the Ombudsman or the Complaints Officer.
- (b) An appeal challenging the decision of the abuse team will enable the Ombudsman or the Complaints Officer understand that a specific expert team has already worked on the issue.
- (c) The requester also knows that an expert team has already looked into this issue.
- (d) Assuming that the recommended clause is accepted it may lead to overburdening the work of the Ombudsman or the Complaints Officer (if the number of abuse complaints raises).

For the foregoing reasons it is suggested that only an appeal may lie before the Ombudsman or the Complaints Officer. The Ombudsman or the Complaints Officer will hear the appeal and decide whether the decision taken by the abuse team rejecting the request as abusive or vexatious is justified or not.

Comments in respect of requests which are overly burdensome: I submit that sometimes the requested information may be really over burdensome or difficult to procure or preparing the same will be time consuming.

Reliance is placed on the legal maxim **lex non cogit ad impossibilia**¹ - meaning “**Law does not compel a person to do that what is impossible**”. Information for long periods or information which is time

¹ Order passed by the Hon’ble High Court of Bombay (Nagpur Bench) in Letters Patent Appeal No. 276/2012 in Writ Petition No.3818 of 2010 dated 30.07.2012

consuming to prepare need not be provided. Hence rejecting such requests which are burdensome or impossible is legally valid.

Recommendation No.14: This recommends deletion of reservation of ICANN's right to deny disclosure if the harm in disclosing the information outweighs the public interest in disclosing the information. It is suggested to retain the sentence and not delete it. This right may help ICANN in case where ICANN does not want to disclose some information for any cause of public interest.

Recommendation No.15: This recommendation speaks about disclosing the information which is under attorney client privilege if the disclosure does not affect the pending litigation or negotiation. While agreeing with this, I submit that client's permission may be necessary to disclose information which is under attorney client privilege else the concept of uberrimae fiedi (utmost good faith) will be defeated.

Recommendation No.18: This speaks about appeal process. I agree with this recommendation. It may be clarified whether the Ombudsman or the Complaints Officer will be the appellate authority over the decision taken by the team rejecting the request or who is the appellate authority. The requester may be informed about the second appeal process (requester's right to challenge the challenge the decision made in appeal) and the jurisdiction the second appeal can be filed.

Thank you all

Best Regards

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