

NCSG comments on the CCWG-Accountability Work Stream 2 Draft Recommendations to improve ICANN's transparency

Link to report:

<https://www.icann.org/en/system/files/files/ccwg-accountability-ws2-draft-recs-improve-transparency-21feb17-en.pdf>

The Non-Commercial Stakeholder Group (NCSG) welcomes the opportunity to comment on this important report and believes that in large part the recommendations will contribute significantly to enhancing ICANN's transparency.

Comments by section are as follows:

Executive summary

The Draft Recommendations to improve ICANN's transparency is a well-researched, well-developed, and well-thought-out document that moves ICANN in the right direction for its post-transition work, responsibilities, and accountability. The NCSG supports the thrust of the executive summary and the importance of considering each of the areas of focus – they are all key to enhancing ICANN's overall transparency. We thank the Cross-Community Working Group (CCWG) for these important recommendations.

Small editorial issue:

Phrasing of the first line of the second paragraph seems to suggest that transparency standards are a right – this is obviously not the case and should be reworked.

1. DIDP

The report highlights the important deficiencies in ICANN's current Documentary Information Disclosure Policy (DIDP) and specific improvements that can be made. Clarity as to process and timelines is essential, and we request additional text be added to the section that addresses this. We would also like to reinforce the importance of responding to requests that are not vexatious or unduly burdensome (for example, the implied discretion that can be exercised by staff to abandon a DIDP requests because there may be competing work pressures, etc., should be considered unreasonable). While we endorse the principle that ICANN must be able to set aside requests that are deliberately vexatious or abusive, it is a matter that is delicate. We would suggest that an external appeal mechanism be developed to permit a person whose request has been denied for this reason to receive independent review. The concept of seeking consent to invoke the clause is sound, but independent review of the decision would also be desirable.

We also note that the Recommendations, on the whole, seem reasonable in terms of the resources that we would anticipate are required to implement them. It is worth noting that, given ICANN's stated commitment to transparency, and the broader importance of transparency to ICANN's ability to fulfill its function, it is reasonable to expect some expenditure in order to create and maintain a robust system.

Nothing that has been suggested in the *Draft Recommendations to improve ICANN's transparency* appears excessive on that front.

The breadth of exceptions is also problematic and the report does a good job of making a case for greater specificity and placing parameters on those exceptions.

The report notes the importance of the duty to document. While ICANN has a commendable commitment to transparency, and to transcription of its policy development process (PDP) and working group processes, finding archival documents or locating material through search on the website falls short of what is required. Furthermore, unlike government departments who are required to produce finding aids or registries of information in the records, ICANN's finding aids are not standardized, nor is the dating and labelling system for archival documents. A records management project to standardize the dating and labelling of documents, and produce finding aids, would be a great project that would improve the transparency of the website and facilitate as well as minimize DIDP requests.

We would also express specific support for recommendations to further clarify the exceptions for commercial information (#11) and for attorney client privilege (#15). While both of these exceptions touch on important public interests, it is vital that exceptions to protect these interests be phrased with sufficient clarity and specificity to avoid unnecessary classifications. In other words, these exceptions, like all of the others, should be grounded in a concrete test for harm that will flow from disclosures. If careful consideration supports a conclusion that no harm will result from disclosure, it stands to reason that the material should be disclosed.

Among the other important recommendations of this section, recommendation #14 deserves to be highlighted: "The following sentence should be deleted: 'Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.'"

Transparency will have little meaning if ICANN can refuse requests on vague "public interest" grounds. Clearly, the standard should be higher than a mere allegation of public interest concern or even vague harm; specifically, ***the harm to the public interest must be greater than the public interest in accessing the information.*** That is fair and reasonable. Overall, the equities of the disclosure must be written to lean *towards* the disclosure request not *against* it, as the CCGW proposes. It follows that any denial of disclosure that is based upon public

interest grounds should be fully justified, including the nature and specifics of the public interest(s) in question.

Further, we express strong support for recommendation #15: “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.” We agree that attorneys at ICANN (and often those hired by ICANN) play a significantly different role than attorneys who serve typical private sector clients, due to ICANN’s unique role overseeing a global public resource. Accordingly, their ability to exempt attorney work from DIDP requests should be narrowed in an analogous way to those of public sector attorneys, as the CCWG recommends.

Overall, the recommendations for improving the DIDP seem very reasonable and are to be commended.

2. Documenting and reporting on interactions with governments

The report notes the importance of having greater clarity vis-à-vis ICANN’s engagement with governments. We agree that with ICANN’s new Empowered Community in which the Governmental Advisory Committee (GAC) plays an important role, it is important that there is far greater clarity and transparency around ICANN’s relationships with governments, government officials, and individuals or companies engaging with governments on behalf of ICANN.

The report importantly notes the limitations of the obligations on ICANN to report federal lobbying activity. This lobbying is, one must assume, but one part of a broader “engagement” strategy with governments and entities representing government interests in the United States and beyond. Transparency as to ICANN’s engagement with governments outside the U.S. is critical to the understanding ICANN’s relationship with one important part of the overall ICANN community.

We generally support the recommendations, but draw attention to our suggestions below.

With regard to the recommendation “All expenditures on an itemized basis by ICANN both for outside contractors and internal personnel devoted to “political activities” both in the U.S. and abroad” we believe a threshold is necessary to ensure the approach is appropriate to achieving the goal of greater transparency. Clearly, ICANN’s US\$1,000,000 threshold is too high. However, no threshold – as the report seems to suggest – may well be too low. A threshold of US\$20,000 may be a reasonable number that should encompass most lobbying/education/engagement activities.

One issue not raised in the report is the inadequacy of the rather ambiguous category of “education/engagement.” These are not the same thing, and it would be helpful – as well as bring clarity to this important aspect of overall transparency – if this “term” were further elaborated on and possibly broken down into more specific activities.

3. Transparency of Board deliberations

As with the report's findings for the DIDP, the NCSG supports the report's call for greater guidance, structure, and specificity with respect to the Board's exemptions from disclosure. We also note the Board's suggestion at the 2017 Copenhagen meeting (ICANN58) that its minutes and other documentation provide more information and a rationale for decisions taken by the Board.

The NCSG supports the recommendations with regard to transparency of Board deliberations.

4. ICANN's Anonymous Hotline

There does not seem to be a link in the Work Stream 2 (WS2) report to the NAVEX Global report.¹ In addition, the policy and procedures should have a link.²

Hotline Policy Scope section:

The NCSG agrees with the issues raised in the report related to the matter of the definition of "business partner" and believes that this should be further defined and the scope clarified.

One issue that is unclear is if external issues go to the Ombudsman to whom do internal issues go to? How are complaints or issues raised by employees on the hotline addressed?

Addressing fear of retaliation:

We would like clarity as to who comprises the Hotline Committee; if it is four Board members, there may need to be a more independent mechanism to review these complaints. Having an outside entity manage the hotline is useful, but if the review is internal – by Board members – then it defeats the purpose of outsourcing and thereby the impartiality of the mechanism as a whole. We would recommend that two of the members should be external to the Board, possibly Nominating Committee (Nomcom) appointments.

Recommendation 2: consider renaming the "hotline" or Whistleblower line to the more formal "Confidential disclosure of wrongdoing reporting line." Translation issues arise from the use of such local, vernacular expressions.

Recommendation 7 - revise as follows: ICANN needs to more effectively address complaints of retaliation against the reporter by stating unequivocally that alleged retaliation will be investigated by an independent panel of experts. In order to address the reluctance of potential reporters of wrongdoing due to fear of retaliation, this independent review needs to be clearly advertised, and the policy must state clearly that any reports of retaliation will be investigated independently with the same level of rigor as alleged wrongdoing. ICANN should also guarantee

¹ <https://www.icann.org/en/system/files/files/icann-hotline-policy-review-21mar16-en.pdf>.

² <https://www.icann.org/search/#!/?searchText=hotline%20policy%20and%20procedures>.

remedies for reporters who suffer from retaliation as well as clarify that good faith reporting of suspected wrongdoing will be protected from liability.

Recommendation 8: While we understand the different triggers for the development of these different policies, all related to transparency, thought should be given at this point in time to incorporating them all in a revised, integrated policy suite. The key issue for the harassment policy, the acceptable behaviour standards and the “hotline” is the reporting of wrongdoing. The policy and procedures are not clear enough between these accountability mechanisms, and there should be linkages between them and common definitions. Much behaviour crosses lines, and in a multistakeholder environment it should be clear to anyone, staff, contractor, contracted party, or ordinary stakeholder that they may complain about a variety of behaviour. Who you report to could very well depend on your status, but again, bringing them into one policy suite would make the avenues more clear.

Recommendation 9: NCSG has commented in the past that ICANN needs a privacy policy. On the issue of data protection rights with respect to these policies, it is commendable that the organization is keeping up and issuing statements related to the data protection rights in Singapore and Brussels. However, ICANN has offices in other jurisdictions, or employees working in other jurisdictions and therefore maintaining records in other jurisdictions with data protection law. A more fulsome explanation of what rights all individuals have under data protection law should go into the whistleblower procedures. People need to know that whoever they talk about may have access rights to their testimony.

We therefore recommend the development of a comprehensive privacy policy for ICANN, so that there is some consistency in approach to the handling of personal information in all jurisdictions, particularly across these various policies that are aimed at enhancing accountability and transparency.