

6 December 2021

VIA PUBLIC COMMENT

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Proposed Revisions to the ICANN Documentary Information Disclosure Policy

Dear ICANN:

We hereby submit the following comments on the Proposed Revisions to the ICANN Documentary Information Disclosure Policy (the “**Revised Policy**”). These comments are based on our collective and extensive experience as counsel to clients that participate in ICANN’s various programs and processes, and as informed members of the Internet community.

The Revised Policy raises significant concerns about ICANN’s commitment to transparency. As the organization in charge of “ensur[ing] the stable and secure operation of the Internet’s unique identifier system,” ICANN has certain obligations towards the Internet community. Two of ICANN’s most important obligations are to operate “for the benefit of the Internet community as a whole” and to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes.” ICANN must “*operate to the maximum extent feasible in an open and transparent manner*” The Revised Policy does not support these obligations, even though it is intended to function as a “principal element of ICANN’s approach to transparency and information disclosure”.

We are consequentially concerned that the Revised Policy will only generate additional disputes between the Internet community and ICANN. Members of the Internet community will be repeatedly forced to initiate Accountability Mechanisms against ICANN not only to obtain documents that should be disclosed pursuant to ICANN’s transparency obligations but also to simply understand the reason for any decision to deny their requests for documents. These disputes are entirely avoidable by implementing a revised Documentary Information Disclosure Policy (“**DIDP**”) that properly embodies and supports ICANN’s commitments to transparency and information disclosure.

To assist ICANN in its policymaking, we offer this comment for ICANN’s consideration. As explained further below, ICANN has repeatedly recognized its commitment to operate with transparency, incorporating the commitment into its very Bylaws (**Section 1**). In line

with this and other commitments, ICANN formed a working group intended to enhance ICANN accountability, including its commitment to transparency (the “**CCWG-Accountability**”). The CCWG-Accountability published a Final Report with several recommendations intended to improve ICANN’s transparency regarding its DIDP. The Revised Policy, however, fails to effectively incorporate these recommendations and instead contains several troubling revisions to the DIDP that, we can confidently state, significantly compromise ICANN’s transparency commitments (**Section 2**).

1. ICANN’s Commitment to Transparency

ICANN’s constitutional documents recognize that the fundamental principle of transparency must guide ICANN’s actions. This is readily apparent upon even a cursory review of ICANN’s Articles of Incorporation and Bylaws, both of which bind the organization. As stated in ICANN’s Bylaws,

- “ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities ... *through open and transparent processes* that enable competition and open entry in Internet-related markets.”
- “ICANN commits to ... *[e]mploy open, transparent* and bottom-up, multistakeholder policy development processes that are led by the private sector.”
- “In performing its Mission, the following ‘**Core Values**’ should also guide the decisions and actions of ICANN: ... Seeking and supporting broad, informed participation ... to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest *and that those processes are accountable and transparent*[.]”
- “ICANN and its constituent bodies shall *operate to the maximum extent feasible in an open and transparent manner* and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. *ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN’s constituent bodies (including the detailed explanations discussed above).*”

ICANN’s Articles of Incorporation contain a similarly stated commitment to transparency, explicitly requiring the organization to operate “through open and transparent processes.”

ICANN implemented its DIDP in accordance with its Articles- and Bylaws-mandated “approach to transparency and information disclosure” The DIDP is intended to promote transparency by allowing members of the Internet community to request that ICANN disclose documents in ICANN’s possession (a “**DIDP Request**”). ICANN is “obligated” to respond to these DIDP Requests, thus granting the Internet community access to ICANN’s decision-making processes.

2. ICANN’s Commitment to Transparency Requires Greater Protections Than Provided by the Revised Policy

ICANN’s recent publication of the proposed Revised Policy, at first blush, appears to reflect an attempt to improve ICANN’s transparency by revising the DIDP. ICANN recognized that it must “improve[] [its] processes for accountability, transparency, and participation” based upon the ICANN community’s concerns that “the existing ICANN accountability mechanisms do not yet meet stakeholder expectations.” ICANN formalized its dedication to improvement by forming the CCWG-Accountability and instructing the working group “to deliver proposals that would enhance ICANN’s accountability towards all stakeholders.”

The Revised Policy is based upon the CCWG-Accountability’s proposals—but only to a limited extent. In June 2018, the CCWG-Accountability published its Final Report on the work performed as part of its Work Stream 2 (the “**WS2 Final Report**”). The WS2 Final Report contained the CCWG-Accountability’s recommendations on “[i]mprovements to ICANN’s transparency, focusing on *enhancements* to ICANN’s existing DIDP.” While several recommended improvements to the DIDP are reflected in the Revised Policy, the CCWG-Accountability also recommended that ICANN adopt the following enhancements to its DIDP, which ICANN has chosen not to include:

8.1.17 The DIDP should include a severability clause, whereby in cases where information under request includes material subject to an exception to disclosure, rather than refusing the request outright, *the information should still be disclosed with the sensitive aspects severed, or redacted, if this is possible.*

8.1.18 Where an information request is refused, or the information is provided in a redacted or severed form, *the DIDP should require that ICANN’s response*

include the rationale underlying the decision, by reference to the specific exception(s) invoked, as well as information about appeal processes that are available.

ICANN's implementation of these recommendations self-evidently will further enhance its commitment to transparency, as outlined in ICANN's Articles of Incorporation and Bylaws. And, yet, ICANN rejected these two recommendations in its Revised Policy.

2.1 Recommendation 8.1.17

Recommendation 8.1.17 states that ICANN should not simply deny DIDP Requests that seek documents protected by the "conditions for the nondisclosure of information" (the "**Nondisclosure Conditions**"). Rather, ICANN should disclose documents to the fullest extent possible by redacting or severing the parts subject to ICANN's Nondisclosure Conditions rather than refusing to make public the entire document.

The Revised Policy, however, contains no provisions providing for the disclosure of documents in redacted or severed form. The only potential redactions or severability even mentioned in the Revised Policy concern the redaction of personal information from DIDP Requests, which is already in the present DIDP.

ICANN's refusal to disclose documents requested by the public in redacted or severed form is contrary to both ICANN's Bylaws and the policies underlying the DIDP itself. The ICANN Bylaws impose upon ICANN a commitment to "operate to the *maximum extent feasible* in an open and transparent manner" In accordance with that commitment, the DIDP "is intended to ensure that information contained in documents concerning ICANN, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality." Any blanket refusal to disclose documents, especially documents that may only contain a small amount of information subject to Nondisclosure Conditions, is clearly contrary to the purpose of the DIDP and ICANN's Bylaws. In order to "operate to the maximum extent feasible" in a manner that is transparent, we strongly recommend that ICANN should provide for the disclosure documents to the greatest extent possible, redacting or severing confidential information only to the extent that is absolutely necessary.

We recommend that ICANN should amend the proposed Revised Policy to provide for the disclosure documents responsive to DIDP Requests with appropriate redactions. But, if ICANN remains of the view that the implementation of Recommendation 8.1.17 will not further ICANN's commitments to operating transparently to the maximum extent feasible, ICANN should explain its position to the Internet community.

2.2 Recommendation 8.1.18

Of arguably greater import, Recommendation 8.1.18 proposes that ICANN justify any decisions to deny DIDP Requests. The current DIDP requires that ICANN “provide a written statement to the requestor identifying the reasons for the denial.” In order to further current policy, the CCWG-Accountability proposed that ICANN not only identify why it denied a DIDP Request but also “include the rationale underlying the decision, by reference to the specific exception(s) [(i.e., Nondisclosure Conditions)] invoked[.]” That recommendation is in line with ICANN’s obligation to “implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN’s constituent bodies.”

Yet, the Revised Policy not only ignores but fully rejects Recommendation 8.1.18 as well as its obligation to provide a detailed rationale for ICANN’s decisions by removing *all* obligations by ICANN to provide any justification for denying a DIDP request. The Revised Policy *removes* ICANN’s obligation to “provide a written statement to the requestor identifying the reasons for the denial” without providing any replacement obligation in line with Recommendation 8.1.18. Such a change does not improve or enhance the DIDP—the very reason for implementing the Revised Policy. Rather, the change results in *less transparency* than the current DIDP.

By removing any obligation on behalf of ICANN to explain why it denied a DIDP Request, the Revised Policy not only contravenes ICANN’s Bylaws, but also fundamental principles of transparency. As stated by ICANN CEO Göran Marby, “Transparency should not lead to confusion.” Confusion, however, will inevitably occur when ICANN rejects DIDP Requests without any justification for the denial. ICANN’s lack of rationale for its denials will only confuse requestors and will likely cause a rise in Accountability Mechanisms against ICANN, since requestors will inevitably attempt to obtain some justification for the denial from ICANN. Simply stated, the Revised Policy allows ICANN to obscure its decision-making and will ultimately cause disputes between ICANN and the Internet community—the complete opposite of the “accountable and transparent” and “open and transparent processes” required by ICANN’s Bylaws.

Independent Review Process (“**IRP**”) Panels have, in fact, repeatedly held that ICANN must provide justify its decisions to comply with its transparency obligations. For instance, as explained by the IRP Panel in *Amazon EU S.A.R.L. v. ICANN*, ICANN must “articulate a well-founded public policy reason supporting its decision” in order to “act[] in a transparent manner consistent with its Bylaws as there would be scant possibility of holding it accountable for its decision.” The *DCA Trust v. ICANN* IRP Panel also explained that “accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner”.

The hierarchy of norms requires that the DIDP comply with ICANN's fundamental obligations. A policy that no longer requires the publication of a rationale would violate ICANN's essential obligations and therefore risks being a source for additional challenges and disputes. In addition, and irrespective of the CCWG recommendations, ICANN is committed to enhancing and reinforcing its accountability mechanisms. Good governance and the progressive enhancement and reinforcement of ICANN's accountability require that the DIDP becomes a more meaningful accountability mechanism. The current proposal is a step in the opposite direction.

The situation is aggravated by the fact that the proposal extends the DIDP Defined Conditions for Nondisclosure even further to include a "catch-all" clause. If accepted, ICANN risks to invoke the updated DIDP as a reason not to disclose any materials, "the disclosure of which could materially harm ICANN's financial or business interests or the commercial interests of its stakeholders who have those interests" and without providing any explanation. However, ICANN's financial and business interests are the public interest of the Internet community as a whole. The Internet community benefits from open and transparent decision-making processes regarding ICANN's financial and business interests, without which ICANN exposes itself to capture.

In line with the ICANN Bylaws, the current DIDP, prior IRPs, and Recommendation 8.1.18, ICANN should therefore amend the Revised Policy to state that, "[i]f ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons and rationale for the denial."

In light of the above, we urge ICANN to reject the proposed Revised Policy as it is presently drafted and incorporate language reflecting Recommendation 8.1.17 and 8.1.18. In order to act for the public benefit and operate with transparency, ICANN must not further inhibit attempts to obtain information about its processes.

ICANN has been conferred with a unique responsibility and duty of care to manage and regulate a global resource. It must do so fairly and in accordance with one of ICANN's core principles—transparency.

Sincerely,



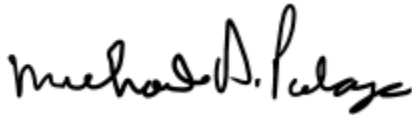
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