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ICANN org

**Subject: Proposed Revisions to the ICANN Documentary
Information Disclosure Policy**

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Dear ICANN org,

In the *Harry Potter* series of books and films, access to the Marauder's Map was granted by saying the phrase "**I solemnly swear that I am up to no good**" after tapping the map. I imagine that the ICANN staff who crafted these proposed changes to the Documentary Information Disclosure Policy (DIDP) had that quote in mind, either explicitly or implicitly, when they sat down to edit the existing version of the DIDP.

This submission is in response to the call for public comments on the "Proposed Revisions to the ICANN Documentary Information Disclosure Policy" as per the notice at:

<https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021>

This submission, continuing in the language of *Harry Potter*, attempts to prevent ICANN staff from uttering "**mischief managed**" and **stands opposed** to the changes which **decrease transparency**, rather than increasing it.

As a preliminary matter, we support and endorse the following submissions that were already made by others, namely:

- a) Submission of Jeff Reberry of TurnCommerce¹
- b) Submission of Rose Marie Wong on behalf of Arif Ali, John Murino, Michael Palage, Flip Petillion, Mike Rodenbaugh, & Jan Janssen²

These thoughtful and substantive comments recognize that the proposed changes to the DIDP are **not consistent** with the already-approved recommendations from the WS2 Final Report. Rather than complying with the recommendations which would have enhanced accountability and transparency, ICANN staff seek to subvert and/or ignore those recommendations by proposing changes that would **decrease accountability and transparency**. The submission of *Arif Ali et al* goes into great detail, so we won't repeat their arguments, except to say that they are generally correct and consistent with our own position. ICANN staff appear to be living in an inverted "Bizarro World³" where up is down, left is right, and they believe they can get away with doing the **exact opposite** of what the bottom-up consensus driven multi-stakeholder model has recommended.

Furthermore, the WS2 recommendations **did not go far enough**, as they did **little to no proper outreach** to past users of the DIDP system (like my own company) for direct feedback on how to improve the system. All of the DIDP requests are publicly available⁴, and ICANN has all of the contact information of requestors (since the requests were all by email). But, the WS2 working group members did not survey those requestors (I've made 6 such DIDP requests, and received no direct requests for feedback from WS2). The stakeholders most directly impacted by changes to the DIDP were not directly consulted during WS2, and the process was not particularly data-driven.

The proposed role of the Ombudsman and/or Complaints Officer is laughable, given that those roles are nothing more than fanciful Potemkin villages, which have always provided ICANN with a mere facade of accountability, rather than true accountability. Indeed, Krista Papac (the ICANN Complaints Officer) literally told me on August 11, 2020 (while awaiting a response on a complaint I made) that:

My response has been completed and now I am just waiting for it to be reviewed.

- 1 See: <https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021/submissions/reberry-jeffrey-13-12-2021>
- 2 See: <https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021/submissions/arif-ali-john-murino-michael-palage-flip-petillion-mike-rodenbaugh--jan-janssen--06-12-2021>
- 3 See: https://en.wikipedia.org/wiki/Bizarro_World
- 4 See: <https://www.icann.org/resources/pages/governance/transparency-en>

While it was not explicit, I believe that this "review" was by ICANN Legal, since that is who I believe she answers to on the ICANN organizational chart. Regardless, ultimately she is not some "independent" final reviewer of a complaint (nor is the Ombudsman). When have they ever made recommendations that were vehemently and diametrically opposed to the ICANN org or its staff since the inception of their respective roles (contrast that with IRPs)? It would be a farce to have these roles do a "review" of adverse DIDP outcomes, since ultimately it would be circular, going back to ICANN Legal (who generated the adverse DIDP outcomes in the first place). ICANN Legal should not be reviewing their own DIDP decisions, either directly or through indirect intermediaries.

The exemptions to disclosure should be extremely limited. Both of the comments I endorsed above correctly oppose the new proposed "catch-all" clause. However, there are **existing** clauses that are equally as bad, and are effectively *de facto* "catch-all" clauses that have been misused by ICANN Legal to deny legitimate requests. ICANN Legal routinely invoke the current DIDP clauses like:

Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other §similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

or

Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

which are overly broad and illegitimate reasons to deny requests, as those reasons are entirely inconsistent with ICANN's Bylaws which mandate that they **"operate to the maximum extent feasible in an open and transparent manner."**

The US Freedom of Information Act (FOIA) and similar sunshine laws throughout the world exist so that the public can actually discover and hold officials accountable for malfeasance. The DIDP is supposed to be consistent with these principles, but ICANN staff find them "inconvenient" and thus attempt to directly subvert these important principles through these

proposed changes to the current DIDP.

As Justice Louis Brandeis so eloquently said, "**Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.**"

ICANN should be operating with **transparency by design**. This would eliminate the need to ask for documents in the first place, as they would already be public. Nearly all of ICANN's communications should be open (with very few exceptions) with no expectation of privacy, as they are doing tasks that are supposed to be in the public realm for the public good. ICANN staff who are unwilling or unable to operate transparently should leave for the private sector. Whether transparency is "inconvenient" to them is unimportant, as the greater public good demands transparency. Rather than decreasing performance, greater transparency would raise the bar for performance, as staff would have greater discipline knowing that all their actions have a full public audit trail. Those who are underperforming will have no place to hide, while those who excel will be fully recognized publicly.

The ICANN Board is already violating these transparency mandates by holding off-the-record "workshops" or dinners where the actual issues are debated and decided, and simply holding public meetings to present the outcome in a staged manner. This "Kabuki theatre" is inconsistent with transparency obligations. The Domain Name Wire podcast of November 15, 2021⁵, which interviewed former ICANN Board Member Ron da Silva, documented (starting around 11 minutes into the recording) that the Board has been making most of its deliberations purposefully "off-the-record" to avoid public scrutiny. That is unacceptable, and violates the ICANN Bylaws mandating transparency. A Board member that cannot handle the public scrutiny should simply resign, stepping aside in favour of others who invite and welcome scrutiny.

Indeed, it is in the shadows where mischief often takes place. That perhaps explains the true motivation of ICANN staff who wish to make changes to the DIDP in the wrong direction, to discourage the public from being able to document the misbehaviour or even the malfeasance of ICANN staff. Indeed, the very purpose of the DIDP is to enable outsiders to root out evil within the organization, via examinations and research by external forces. An organization that has nothing to hide would welcome such explorations. Yet, ICANN staff wish to preemptively block attempts by others to do that fundamental research that would expose their own misbehaviour. That is untenable.

5 See: <https://domainnamewire.com/2021/11/15/ron-da-silva-former-icann-board-member-dnw-podcast-363/>

It has not gone unnoticed that the timing of these proposed revisions to the DIDP by ICANN staff are taking place **very soon after** the decision in the Afiliás IRP⁶ (dated May 20, 2021) which concluded that:

In the opinion of the Panel, the Respondent [i.e. ICANN] in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. (page 3, paragraph 8)

The only reasonable interpretation of this timing is that ICANN just experienced a devastating loss, and now **wants to make it harder** for stakeholders and the public **to find similar instances of misbehaviour** in the future. Rather than actually learning something from their humiliating defeat, and embracing the outcome, ICANN staff is effectively saying to the community that they refuse to be held accountable, and want to put up obstacles to others who might hold them accountable in the future. Afiliás incurred enormous financial expenses (over USD \$11 million according to paragraph 379 on page 116 of the decision) to hold ICANN accountable, and ICANN wishes to make it even more expensive (both in time and money) for others to do so. Rather than acting as accountable servants working on behalf of the public interest, ICANN staff wish to be worshipped as unaccountable kings and queens.

It came to light in that IRP (page 90, paragraph 303) that Verisign would write to ICANN with letters marked "Highly Confidential", and that would be considered sufficient to prevent disclosure. This needs to change. **All** correspondence to ICANN should be on the record, with no expectation of privacy. Simply marking things "Highly Confidential" should not act as a magical shield to prevent disclosure to the public, since that would simply **enable** wrongdoers to hide their communications from scrutiny.

In conclusion, the proposed changes should be rejected. There should be transparency by design in ICANN's operations, so that DIDP requests are unnecessary (as documents and communications would already be public). The WS2 recommendations should be revisited and strengthened by directly surveying past users of the DIDP system.

Sincerely,

George Kirikos

6 See: <https://www.icann.org/en/system/files/files/irp-afiliás-final-declaration-redacted-25may21-en.pdf>