

# **Accountability and Transparency at ICANN**

## **An Independent Review**

Memorandum: Transparency and Internal Decision Making  
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## Contents

<b>INTRODUCTION AND APPROACH.....</b>	<b>3</b>
APPROACH.....	3
<i>Analytical Approach.....</i>	<i>4</i>
<i>Recommendations.....</i>	<i>4</i>
<b>ASSESSMENT: ICANN'S TRANSPARENCY POLICIES AND PRACTICES.....</b>	<b>5</b>
ACTIVE TRANSPARENCY.....	5
<i>ICANN's Documentary Information Disclosure policy.....</i>	<i>5</i>
<i>Assessing ICANN's Current Practices.....</i>	<i>6</i>
<i>Reconsidering the Active Transparency Policies.....</i>	<i>12</i>
<i>Summary.....</i>	<i>13</i>
PASSIVE TRANSPARENCY.....	13
<i>ICANN's policy.....</i>	<i>13</i>
<i>Assessing Practices.....</i>	<i>14</i>
<i>Reconsidering the Passive Transparency Policies.....</i>	<i>16</i>
<i>Summary.....</i>	<i>16</i>
PARTICIPATORY TRANSPARENCY.....	16
<i>ICANN's Current Policies.....</i>	<i>17</i>
<i>Assessing Practices.....</i>	<i>18</i>
<i>Reconsidering the Participatory Transparency Policies.....</i>	<i>23</i>
<i>Summary.....</i>	<i>26</i>
THE INFORMATION DISCLOSURE EXEMPTIONS.....	26
<i>ICANN's policy.....</i>	<i>26</i>
<i>Assessing Practices.....</i>	<i>28</i>
<i>Reconsidering Information Disclosure Exemption Policies.....</i>	<i>29</i>
<i>Summary.....</i>	<i>36</i>
EFFECTS ON THE TRANSPARENCY OF THE INTERNAL DECISION-MAKING PROCESS.....	37
<b>GENERAL SUMMARY AND CONCLUSIONS.....</b>	<b>39</b>
INFORMATION FLOW MODELS.....	39
ISSUES OF PRACTICES.....	39

ISSUES OF THE POLICY FRAMEWORK ..... 39

LOOKING FOR ROLE MODELS ..... 40

*Public sector* ..... 40

*Third sector?* ..... 40

*Private sector* ..... 40

## Introduction and Approach

When we sat down to write a memo on ICANN's internal decision-making process, we realized that we knew almost nothing about this process because of the lack of publicly available information about it and the internalized nature of information disclosure practices. We therefore thought it necessary to extend the task to an evaluation of ICANN's transparency structure in general. Such an approach would consider ICANN in terms of its understanding of accountability that almost exclusively—and with substantial support from the GAC<sup>1</sup>—rests on transparency.<sup>2</sup>

### *Approach*

In this background memo, we describe and analyze ICANN's transparency structure through three distinct modalities of transparency, which are borrowed analytical approaches to government transparency:<sup>3</sup> active transparency, passive transparency, and participatory transparency. These modes are each explained in more detail below.

For all three modes we first summarize ICANN's commitments to transparency as expressed in the ICANN Bylaws or in other ICANN information policies.<sup>4</sup> Then, we describe and evaluate ICANN's practices and finally re-evaluate ICANN's policy obligations.

In addition to the active, passive, and participatory modes of transparency, our analysis continues with two additional sections which cover ICANN's Information Disclosure Exemptions policy (or, as ICANN formulates more positively, the “conditions of non-disclosure”)<sup>5</sup> and the transparency of ICANN's internal decision making, overall.

The Disclosure Exemptions are formulated as a single policy that affects each mode of transparency. Because of the overarching impact this policy has, we chose to address the Exemptions policy in its own section. Additionally, we chose to separately address the transparency of ICANN's internal decision-making processes in order to relate back to our original starting point—how ICANN's entire transparency framework relates to ICANN's internal decision-making processes.

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<sup>1</sup> GAC, “Communiqué 30– Los Angeles,” October 31, 2007, [http://gac.icann.org/system/files/GAC\\_30\\_Los\\_Angeles\\_Communique.pdf](http://gac.icann.org/system/files/GAC_30_Los_Angeles_Communique.pdf).

<sup>2</sup> ICANN translates accountability (“Public sphere accountability”) into “Management Operating Principles,” which consist of transparency, an information disclosure policy (transparency and its exemptions), fair dispute resolution, financial transparency and external oversight of these activities. ICANN, “Accountability & Transparency Frameworks and Principles,” January 2008, <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>, at 7.

<sup>3</sup> See Herbert Burkert, “Die Transparenz der Europäischen Union,” in Hart, Thomas; Welzel, Carolin, Garstka, Hansjürgen (Hrsg.) Informationsfreiheit. Die “Gläserne” Bürokratie als Bürgerrecht? Verlag Bertelsmann Stiftung, Gütersloh 2004, p. 117-130.

<sup>4</sup> See ICANN, “Affirmation of Commitments,” Paragraph 9.1, September 30, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30-sep09-en.htm>.

<sup>5</sup> See “Transparency and Accountability Principles,” at 10.

## ***Analytical Approach***

To analyze ICANN's current transparency practices, we primarily evaluate ICANN's commitments to transparency, as stated in its policies and foundational documents, against ICANN's actual practices.<sup>6</sup>

In some of these policies and documents, ICANN has also committed to *further develop and continuously improve* its transparency policies and practices on its own initiative in light of its commitments to accountability and technological progress.<sup>7</sup> Because of this dynamic, we will also compare ICANN's transparency policies and practices to those currently used in analogous public and private sector entities.<sup>8</sup>

Each section will contain a summary of issues identified and suggest policy reconsiderations where appropriate. In our final observations, in Part 0, we give special consideration to ICANN's corporate role<sup>9</sup> and hybrid structure for the further development of transparency structures.

## ***Recommendations***

We conclude this memo with a set of recommendations, in which we suggest changes to ICANN's practices or policies.

Some of these proposals may also aim at a more fundamental reconsideration of ICANN's present structure. However, a more detailed discussion of this question is beyond the scope of this memo, and must be undertaken in a broader context.

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<sup>6</sup> Specifically, we analyze ICANN's commitments to transparency as stated in the following documents: ICANN, "Accountability & Transparency Frameworks and Principles," (hereinafter referenced as "Accountability & Transparency Principles"), January 2008, <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>; ICANN "Bylaws," as amended August 5, 2010, <http://www.icann.org/en/general/archive-bylaws/bylaws-05aug10-en.htm>; ICANN, "Articles of Incorporation," as revised November 21, 1998, <http://www.icann.org/en/general/articles.htm>; ICANN, "Affirmation of Commitments," (hereinafter referenced as "AoC"), September 30, 2009, <http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>; ICANN, "Documentary Information Disclosure Policy," as incorporated into ICANN, Accountability & Transparency Principles, 2008, at 9-11.

<sup>7</sup> See e.g., ICANN, "Accountability & Transparency Principles," 2008, at 26 ("To maximize the ease of participation in any consultation, ICANN will . . . [u]se developments in technology to enhance the consultation process."); ICANN Bylaws, Article I, Section 2, 7 ("In performing its mission, the following core values should guide the decisions and actions of ICANN . . . [e]mploying open and transparent *policy development mechanisms* that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.") (emphasis supplied). Compare with ICANN, "Affirmation of Commitments," Paragraph 9.1, ("ICANN commits to maintain and *improve* robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision making will reflect the public interest and be accountable to all stakeholders.") (emphasis supplied).

<sup>8</sup> Because ICANN perceives transparency policies to be most similar to those used in government entities, many of these examples will be drawn from public-sector models. See "Accountability and Transparency Principles," at 7 ("Public sphere accountability is one important aspect of ICANN accountability, and is relevant to the extent that ICANN performs a public trust function. This form of accountability is similar in some ways to that which would apply to governments and government officials.").

<sup>9</sup> See "Accountability & Transparency Principles," 2008, at 5.

## Assessment: ICANN's Transparency Policies and Practices

ICANN's framework provides three types of transparency mechanisms. Although ICANN uses a different taxonomy in its internal documentation,<sup>10</sup> we will refer to and define them as:

- **Active transparency:** ICANN actively makes documents available by putting them on its website.
- **Passive transparency:** ICANN provides documents upon request from members of the general public.
- **Participatory transparency:** ICANN involves the stakeholders and the general public in its decision-making processes by inviting comments and asking for consultation and thus shares and receives information.

### Active Transparency

#### *ICANN's Documentary Information Disclosure policy*

On February 15, 2008, the ICANN Board voted to adopt the "ICANN Documentary Information Disclosure Policy" (DIDP) as part of the *Accountability & Transparency Frameworks and Principles*.<sup>11</sup> The purpose of this policy is to "ensure that information contained in documents concerning ICANN's operational activities . . . is made available to the public unless there is a compelling reason for confidentiality."<sup>12</sup>

As required by the DIDP, ICANN proactively publishes "a comprehensive set of materials" to the ICANN website as "a matter of due course."<sup>13</sup> ICANN organizes these materials in "categories of documents" which ultimately relate to ICANN's operational activities. The DIDP states that the following categories of documents are to be made publicly accessible:

- *Annual Reports*
- *Articles of Incorporation*
- *Board Meeting Transcripts, Minutes and Resolutions*

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<sup>10</sup> According to ICANN's *Accountability & Transparency Framework and Principles*, ICANN describes its accountable and transparency mechanisms as: (1) "Public sphere accountability," "which deals with the mechanisms for assuring stakeholders that ICANN has behaved responsibly," (2) "Corporate and legal accountability," "which covers the obligations that ICANN has through the legal system and under its bylaws" and (3) "Participating community accountability" which "ensures that the Board and executive perform function in line with the wishes and expectation of the ICANN community." See ICANN, "Accountability & Transparency Principles," 2008, at 3-4.

<sup>11</sup> ICANN, "Adopted Board Resolutions | New Delhi," February 15, 2008, [http://www.icann.org/en/minutes/resolutions-15feb08.htm#\\_Toc64545917](http://www.icann.org/en/minutes/resolutions-15feb08.htm#_Toc64545917).

<sup>12</sup> ICANN, "Accountability and Transparency Principles," 2008, at 9.

<sup>13</sup> The DIDP does not ascribe a definition to the term "due course" and uses the phrases "as a matter of due course" and "in due course" somewhat interchangeably. *Ibid.*

- *Budget*
- *Bylaws (current)*
- *Bylaws (archives)*
- *Correspondence*
- *Financial Information*
- *Litigation documents*
- *Major agreements*
- *Monthly Registry reports*
- *Operating Plan*
- *Policy documents*
- *Speeches, Presentations & Publications*
- *Strategic Plan*
- *Material information relating to the Address Supporting Organization (ASO)*
- *Material information relating to the Generic Supporting Organization (GNSO)*
- *Material information relating to the country code Names Supporting Organization (ccNSO),*
- *Material information relating to the At Large Advisory Committee (ALAC),*
- *Material information relating to the Governmental Advisory Committee (GAC),*
- *material information relating to the Root Server Advisory Committee (RSSAC),*
- *material information relating to the Security and Stability Advisory Committee (SSAC).*<sup>14</sup>

## ***Assessing ICANN's Current Practices***

### **FOIA example**

The unique hybrid structure of ICANN as a standards body, corporation, and quasi-governmental entity makes evaluation of active transparency against a set of “best practices” difficult as there

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<sup>14</sup> See ICANN, “Accountability and Transparency Principles,” at 9-11.

are few analogous models. However, ICANN's DIDP is similar in many respects to U.S. administrative regulations that require proactive publication of agency documents. For example, the U.S. Freedom of Information Act (FOIA) requires each agency to publish "descriptions of its central and field organization . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; rules of procedure, descriptions of forms available; . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."<sup>15</sup>

## Developments in active transparency

Although FOIA only requires publication in the Federal Register, which at the time of its enactment in 1966 may have been much less accessible to the general public, the Federal Register is now accessible on the Internet in a user-friendly manner that allows various search and retrieval functions.<sup>16</sup> Agencies are also required to keep other documents, such as "final opinions, including concurring and dissenting opinions . . . ; statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and,] administrative staff manuals and instructions to staff that affect a member of the public," accessible to the public for "inspection and copying," usually kept in a reading room.<sup>17</sup> Also, agency records falling into these categories that are created after November 1, 1996 are specifically required to be made available through "electronic means."<sup>18</sup>

The U.S. government's requirements for agencies to proactively publish information in volumes like the Federal Register shows how important it is not just to provide information sequentially, but also to make it retrievable according to the various information organization categories a user might want to apply.

Indeed, ICANN makes some material available on its website.<sup>19</sup> In general, the documents are available on separate pages and can be accessed through one of several topical hyperlinks located on the homepage <<http://www.icann.org>>, through a dropdown menu, or in hyperlinked results retrieved from a search query. These topical hyperlinks resemble tabs, organized horizontally across the website's header, and include: "policy," "in focus," "resources," "documents," and "press room." At the very top of the homepage, there is a dropdown menu labeled "Quick Links," which allows a user to navigate specific pages relating to a large number of keywords propagated in the menu, such as: "Affirmation of Commitments," "Annual Report," "Bylaws." The website also has a "Site Map" and a "Site Index," as well as a Search box, powered by Google.

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<sup>15</sup> See U.S. Freedom of Information Act, 5 U.S.C. §§ 552(a)(1)(A)-(D).

<sup>16</sup> The Federal Register has been made available online, with additional search functionality and an open API at GovPulse, <http://govpulse.us>. See also Karim R. Lakhani, Robert D. Austin, Yumi Yi, "Data.gov," May 7, 2010, Harvard Business Press, p.11.

<sup>17</sup> See FOIA, 5 U.S.C. §§ 552(a)(2)(A)-(E).

<sup>18</sup> See FOIA, 5 U.S.C. § 552(a)(2).

<sup>19</sup> See ICANN, "Documents," available at <http://www.icann.org/en/documents>.

Document retrieval, however, is not necessarily easy. To retrieve a particular a document, a user must run a search query, scroll through the lengthy list of keywords in the Quick Link menu, or guess under which of the topical menu that document might be listed. This is not only an issue of navigation but also of the information itself; once it has been found, it is often not presented in the best usable manner. For example, a member of the general public who wants to follow the monthly registry reports is faced with data only in a CSV file format that might be useful for some of the stakeholder groups but is not very user friendly for the general public. Additionally, many documents are only available in PDF formats—in their present state, the only searchable elements are the document titles, not the actual contents of the document.

These observations might appear to be minor issues that are the mere consequence of differing opinions related to user-optimal information design. However, there are, as we illustrate in the context of the two other categories of transparency below, situations in which information design is crucial for accountability and transparency. In any case, ICANN might consider inviting the user community itself to develop applications to improve the accessibility, presentation, organization, and retrieval of material that ICANN is making available—similar to non-governmental applications of Data.gov.<sup>20</sup>

Other features would also benefit from improvements. For example, it is currently not possible for a user to independently reorganize the display of information on the website by using a sort function (reorganizing the material according to the date the document has been finalized), or by their relation to supporting organizations or advisory committee affairs, or on the basis of whether the material has been the object (or still is) of a consultation process. Instead, a search query automatically searches the entire ICANN website to match search terms, unless a user attempts to use the functionalities in the “Advanced Search” options, which are somewhat complex and not always useful. To produce meaningful results, the Advanced Search feature occasionally requires multiple attempts while continuously modifying search terms.

## Due course

In particular, advanced sorting functions, or document tags which also allow comparisons between the date a document is finalized and the date the document is published on the website, would help users to understand ICANN’s definition of “due course” in practice, which, repeatedly, has been the object of reconsideration requests.<sup>21</sup> Such analysis is not currently possible, partly because the documents are not tagged in such a manner and partly because the search mechanisms do not offer such a functionality which, by the way, would also be useful for ICANN’s internal information management oversight. In addition, this functionality would be useful for an audit of ICANN’s accountability and transparency practices.

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<sup>20</sup> Karim R. Lakhani, Robert D. Austin, Yumi Yi, “Data.gov,” May 7, 2010, Harvard Business Press, at 11.

<sup>21</sup> See e.g., ICANN, “Reconsideration Request 00-4,” May 6, 2000, <http://www.icann.org/en/committees/reconsideration/fausett-request-6may00.htm>; “Reconsideration Request 04-1,” March 4, 2004, <http://www.icann.org/en/committees/reconsideration/fausett-request-04mar04.htm>; “Reconsideration Request 05-1,” May 12, 2005, <http://www.icann.org/en/committees/reconsideration/fausett-request-12may05.htm>; “Reconsideration Request 10-1,” February 10, 2010, <http://www.icann.org/en/committees/reconsideration/palage-request-10feb10-en.htm>.

## Lack of audit

According to ICANN's 2008 Accountability and Transparency Frameworks and Principles:<sup>22</sup>

“ICANN has undertaken to conduct an annual audit of standards of accountability and transparency, including an audit of the commitments made in these Management Operating Principles. This audit will be conducted by an external party and the results of the audit will be published in the Annual Report.”<sup>23</sup>

However, the 2009 Annual Report does not contain such an audit or reference when such an audit is expected to be conducted.<sup>24</sup>

The lack of an audit mechanism makes it difficult, for the purposes of this memo, to meaningfully assess ICANN's practices across all three categories of transparency. Due to a lack of empirical material (e.g., time delay before publication) our ability to evaluate the conceptual, structural and procedural deficiencies and inconsistencies in guiding policies and practices is limited.

## Requests of Reconsideration as useful material?

As was previously noted, Requests for Reconsideration have been filed which request more information about ICANN's disclosure practices.<sup>25</sup> The very fact that such requests have been filed may signal problems with ICANN's current practices.<sup>26</sup> As we have seen, the statistics on Requests of Reconsideration do provide some insight, for example, into the challenges faced by the ICANN Board in meeting its self-imposed timelines.

The manner of how the Requests for Reconsideration are published to the website poses a transparency problem in itself. All the Requests for Reconsideration are listed via hyperlinks on a single webpage which organizes each Reconsideration Request filing in order of the date it was received. Each filing is listed under a title which contains a number assigned to each request by ICANN which is used to identify the filing year and the party filing the request.<sup>27</sup> In addition to the original Request document, additional documents are grouped under these title headings, including correspondence sent between the Reconsideration Committee, Committee recommendations, and related ICANN Board actions.

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<sup>22</sup> This appeared in the 2008 version of the *Accountability and Transparency Frameworks and Principles* following the receipt of the One World Trust Report on Accountability and Transparency. See also One World Trust, “Independent review of ICANN's Accountability and Transparency - Structures and Practices,” March 2007, <http://www.icann.org/transparency/owt-report-final-2007.pdf>.

<sup>23</sup> ICANN, “Accountability & Transparency Principles,” 2008, at 15.

<sup>24</sup> The *Annual Report 2009* does not contain any information on such an audit. Under the title “Governance and Accountability at ICANN,” at pp. 60ff, reproduces basically the contents of ICANN 2008. See ICANN, “Annual Report 2009,” 2009, <http://www.icann.org/en/annualreport/annual-report-2009-en.pdf>; ICANN, “Annual Report 2008,” 2008, <http://www.icann.org/en/annualreport/annual-report-2008-en.pdf>. As of the writing of this memorandum, the 2010 Annual Report has not yet been released.

<sup>25</sup> See *supra* Part II, A, 2, (c); note 21, and accompanying text.

<sup>26</sup> *Ibid.*

<sup>27</sup> For example, the first request listed is titled “Request 99-1: Eric Brunner and Bob Gough.” The “99” signifies the year of filing and the “-1” appears to signify the order of receipt for the given year. See “Reconsideration Requests,” <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Although the Reconsideration Requests webpage is intuitively organized, the titles and numbers that ICANN uses to individually identify requests are not intuitive. The titles lack meaningful descriptions, as they do not specify the nature of the request or provide any additional identifying information other than the filing party or the date filed. Therefore, to determine the object of a particular Reconsideration Request (and the eventual decision of the Board of Governance), an unfamiliar reader is required to open each hyperlink and read the full material.

In any case, although the organization of Reconsideration Requests may provide an example where improvements can be made, they require considerable initiative, and, consequently, may not necessarily be representative of ICANN's broader practice problems. Furthermore, a user must likely read the Requests together with other ICANN documents, in order to fully understand ICANN's position on the issue, and the considerations of the Board Governance Committee—in other words, there may not be an “easy” fix.

### **Criteria of publication**

The categories of material to be published actively are very general. Sometimes the category just refers to the origin of a document (Supporting Organizations). Sometimes the category description may give a false impression of the amount of information that might be actively accessible (e.g., “correspondence”).<sup>28</sup> This category (as all the other categories) remains subject to exemptions which—as we illustrate below—can be very broad.<sup>29</sup>

If only *parts* of documents have been made available with redactions or withheld information under the active transparency policy because of exemptions, the published parts appear to reference the relevant exemption.<sup>30</sup> There is, of course, no statistical information that indicates the total number of, and under which exemption, complete documents have not been made available.

All this would be helpful to learn more about the criteria and decision-making processes according to which the material made available to the public is chosen from the material available to ICANN.

### **Document management principles**

It might also be useful to apply document management techniques like those practiced in the public sector and large enterprises in the private sector. When fully utilized, these management techniques require an entity to register *all* documents within a management system immediately, and then, decide on their status of availability<sup>31</sup> at the moment they reach the organization they are entered into the system. Throughout each step, the process is thoroughly documented. Using such a system would also allow interested parties to obtain a quantitative

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<sup>28</sup>ICANN, “Correspondence,” <http://www.icann.org/en/correspondence>

<sup>29</sup> See *infra* Part II, D.

<sup>30</sup> For example: Preliminary Report of Special Board Meeting <http://www.icann.org/en/minutes/prelim-report-23jun10-en.htm> at the bottom referring to “other resolutions that shall remain confidential as an “action relating to personnel or employment matters,” pursuant to Article III, section 5.2 of the ICANN Bylaws.”

<sup>31</sup> More on the process of proactive classification in the context of discussing the exemptions *infra* Part II, D, 2, (b).

notion of how much material ICANN is actually making available according to its various transparency practices.

### **ICANN's own efforts: Wikis**

It seems that ICANN also is reconsidering how information is being made available, as ICANN appears to be in the process of actively making material that relates to past decisions available on the website in new formats.<sup>32</sup> On this issue, the ICANN staff has taken initiative by experimenting with a wiki-format:

“ICANN Staff has created searchable wiki pages to provide the public with easy-to-access information on every substantive resolution approved by the Board of Directors. We've loaded initial information on the 2009 resolutions to get your feedback and make improvements before implementing this fully. These pages are a work-in-progress. In the interest of getting early customer input, we decided to publish these resolution pages now. Do you like this wiki format? Have we chosen the right search categories? Is all the basic information provided in an easy-to-understand way? Do you have suggestions for additional information on particular resolutions? Please share your comments and suggestions via ICANN's public comment forum or use the comment box on the wiki page.”<sup>33</sup>

### **Conceptual limitations of the information design**

The wiki initiative faces conceptual limitations, as well as the limitations imposed by the information disclosure exemption policy. Conceptually, and almost more important than the exemptions, the wiki is constrained by its rather linear, passive and document-oriented information presentation understanding of information presentation in a Web 1.0 style. This conceptual rather than norm-oriented restriction also becomes obvious in the presentation of other actively published material that relates to procedures relevant in the ICANN context.

ICANN provides *general procedural information* (handbooks for example) relating to gTLD and ccTLD processes *specific procedural information* is only provided with regard to public comments, and only summarily.<sup>34</sup>

It is this kind of procedural information that could well be supplemented by web-based applications that *interactively show* rather than *verbally describe* how these procedures work. With its public dashboard,<sup>35</sup> ICANN has already made a step towards presenting its material in a more dynamic format.

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<sup>32</sup> More on the need for usable historical records *infra* Part II, C, 2(e).

<sup>33</sup> ICANN, “Board Resolutions,” <https://community.icann.org/display/ctap/Board+Resolutions>.

<sup>34</sup> See *infra* Part II, C.

<sup>35</sup> ICANN, “Dashboard -- ICANN Performance Metrics – Refreshed,” <http://forms.icann.org//idashboard/public>.

## ***Reconsidering the Active Transparency Policies***

The observations made thus far can all be addressed by making adjustments and modifications to ICANN’s practices. The categories of information that ICANN makes available through the DIDP are encouragingly broad. However, the role of the exemptions has to be kept in mind. And—as we have noted—in practice it is difficult to ascertain how the published material relates to the unpublished material.

The DIDP ascribes an appropriate deference to making documents available through an active transparency policy. This deference to active transparency, however, could be additionally reinforced by modifying procedures or policies to require ICANN to actively publish all material that has been disclosed previously in response to an information requests.<sup>36</sup>

## **Passive transparency turning into active transparency**

For example, changes in the US FOIA now require agencies to actively make materials available to the public that have previously been, or are likely to be, the object of a FOIA request.<sup>37</sup> These changes apply to “copies of all records, regardless of form or format, which have been released to any person,” as part of a disclosure pursuant to FOIA’s passive transparency policies,<sup>38</sup> and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.<sup>39</sup> Additionally, agencies are required to make “a general index” of these records publicly available in a user-friendly electronic format.<sup>40</sup> Agency administrations are furthermore encouraged to constantly screen their information holdings as to what new material they can make actively available rather than waiting for an information request.<sup>41</sup>

## **Correspondence**

ICANN should also consider modifying its disclosure policies to follow the policies used by countries that regularly publish and categorize lists of incoming and outgoing mail as either publicly accessible or confidential. Although the contents of certain mailings may not be publicly disclosed (e.g., in the instance of non-disclosure condition), a requirement to publish categorized lists provides an additional layer of transparency which acknowledges that such correspondence was sent or received.

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<sup>36</sup> See *infra* Part 0.

<sup>37</sup>See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (amending 5 USC § 552).

<sup>38</sup>See 5 USC § 552(a)(3). When agency records or information are not actively made available to the public by publication in the Federal Register, in hard or electronic copy, § 552(a)(3) requires agencies to make such records “promptly available” upon any request made by any person, so long as the disclosure of such records are not exempted under § 552(b).

<sup>39</sup> FOIA, 5 USC § 552(a)(2)(D).

<sup>40</sup>FOIA, 5 USC § 552(a)(2)(E).

<sup>41</sup> Cary Coglianese, Heather Kilmartin, and Evan Mendelson, “Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration,” 77 Geo. Wash. L. Rev. 924, 936-7 (2009).

## **Summary**

Due to the lack of a regular ICANN transparency audit, there is limited availability of metrics concerning active transparency practices. Such an audit and its regular repetition would be indispensable for all transparency practices.

More efforts are needed to increase the transparency of active transparency policies.

Information holdings made available in the context of passive transparency should automatically become available as part of an active transparency policy.

User friendly applications and a generally less old-fashioned and more user friendly design of the ICANN site should allow users to sort, organize and edit the material published under active transparency in a manner that suits their needs.

ICANN does not necessarily have to develop new web-based applications itself. Instead, ICANN can open its information resources, provide information on formats and structures, and invite members of the community to develop useful applications.

## **Passive Transparency**

### **ICANN's policy**

ICANN's current policy states that any member of the public may request information from ICANN that is not presently accessible to the public. As previously noted, this memorandum refers to this concept as "passive transparency." The policy includes a special procedure for making and responding to these information requests:

"If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."<sup>42</sup>

Information requests are subject to a series of enumerated conditions that prohibit or restrict the disclosure of certain information.<sup>43</sup> For example, ICANN is not required to provide information that is already available or create summaries of information. A special section of the *Accountability and Transparency Principles and Frameworks* addresses the availability of translations.<sup>44</sup>

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<sup>42</sup> ICANN, "Accountability and Transparency Principles," at 10.

<sup>43</sup> ICANN, "Accountability and Transparency Principles," at 9-10. The information disclosure exemptions will be discussed at length *infra* Part II, D.

<sup>44</sup> ICANN Bylaws, Article III, Section 7; see also ICANN, "Accountability and Transparency Principles," at 27.

## Public remedies and procedures for non-disclosure

If a request for information is initially denied, the DIDP states that the requestor may appeal the decision by following the Reconsideration Request procedures or the Independent Review procedures.<sup>45</sup>

According to the ICANN Bylaws, Reconsideration Requests may be submitted by a person or entity which has been “materially affected by an action of ICANN.”<sup>46</sup> Somewhat similarly, the Independent Review procedure provides a separate process by which “any person materially affected by a [Board] action or inaction,” which he or she believes to be “inconsistent with the Articles of Incorporation or Bylaws,” to submit a request for an “independent third-party review” of those actions or inactions.<sup>47</sup>

In practical terms, these procedures mean that a denial of information request can be appealed through the Reconsideration Request procedures, but, as a threshold matter, successfully obtaining an Independent Review of an information request requires that a violation of the Articles of Corporation or Bylaws occur as a result of a Board action or inaction.<sup>48</sup>

## Assessing Practices

Again, because of the lack of a transparency audit, it is difficult to assess whether ICANN has been complying with the DIDP in responding to specific information requests. Aside from the lack of an audit report, statistics concerning the number of requests received, including requests which have been denied and the reasons cited which support the non-disclosure, do not appear to be accessible on the ICANN website or available in other public documentation.

## External examples of passive transparency policies

A different approach is illustrated by the Asian Development Bank<sup>49</sup> (ADB), which is a financial institution partnered with both public and private sector entities. At the time of writing this memorandum, the ADB is currently reviewing its Accountability Mechanism Policy<sup>50</sup> and its transparency framework. For some time, the ADB has published lists which, among other things,

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<sup>45</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>46</sup> ICANN Bylaws, Article IV, Section 2(1). The following paragraph in this section states that “[a]ny person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been *adversely affected by*” either (a) “staff actions or inactions that contradict established ICANN policy(ies); or” (b) “one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information[.]” ICANN Bylaws, Article IV, Section 2(2) (emphasis supplied). It is unclear if the phrase “adversely affected by” as opposed to “materially affected” is intended to distinguish or establish threshold standing requirements for persons submitting Reconsideration Requests.

<sup>47</sup> ICANN Bylaws, Article IV, Section 3(1)-(2).

<sup>48</sup> Compare ICANN Bylaws, Article IV, Section 2 and Article IV, Section 3. Although the DIDP indicates that the Independent Review Process may be used to appeal a denial of an information request, it does not indicate how the Board might become sufficiently involved in the decision-making process such that the threshold requirement of an adverse Board action or inaction is satisfied. ICANN, “Accountability and Transparency Principles,” at 11.

<sup>49</sup> Asian Development Bank (hereinafter referenced as “ADB”), website available at <http://www.adb.org>.

<sup>50</sup> ADB, “Accountability Mechanism Review,” last updated December 28, 2010, available at <http://www.adb.org/AM-REview>.

document all information requests which have been denied and the corresponding reasons in support of the denial.<sup>51</sup> As of June 2010 a new Public Communications Policy is under review.<sup>52</sup>

ICANN does not provide a method for easily locating which, if any, requests for information are pending before the Reconsideration committee or Independent Review.<sup>53</sup>

The procedures to appeal denials ultimately suffer from serious limitations; this is discussed at length in Part II, D.

## **Ease of use**

The passive transparency policies and related procedures are not easy to locate. Underlying this is the lack of a reference on the ICANN homepage that directly states that it is possible to obtain information that is not available on the website by submitting an information request. Additionally, there is no form or link whereby an individual could make a request for such information. This leaves the impression that either the interface is not designed in a particularly user-friendly manner or that there is a tendency to discourage such information requests.

Most likely, uninitiated users would use the “Contact” link<sup>54</sup> to place such a request although the entry form on that page has no specific check box for launching an information request. This still would leave users without knowledge of their rights (and the limitations of their rights) and the necessary procedures. It is only if and when users know what to expect in the “Documents section” and from there the link “ICANN Documentary Information Disclosure Policy”<sup>55</sup> that they obtain information on this possibility under the somewhat unclear heading “Responding to Information Requests.” Exemptions of accessibility can then be found separately again under the somewhat opaque link to “Defined Conditions for Nondisclosure.”

The reach and impact of these exemptions, which significantly impact such access requests, will be discussed in Part II, D.

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<sup>51</sup> ADB, “Requests Received,” available at <http://www.adb.org/Disclosure/requests.asp?d=Denied+Requests>.

<sup>52</sup> ADB, “The Public Communications Policy of the Asian Development Bank – Disclosure and Exchange of Information 00 Consultation Draft,” June 2010, available at <http://www.adb.org/Documents/Policies/public-communications-policy/pcp-consultation-draft01.pdf>. See also new information policies at the World Bank, effective as of July 2010, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22635372~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>.

<sup>53</sup> Although the ICANN website has pages which host Reconsideration Request filings and Independent Review documents, there is no easily discernable method of determining which of the posted documents relate to information requests. Rather, a person would seemingly have to open every document on the page to determine the nature of the Reconsideration Request or Independent Review Process request. See ICANN, “Requests for Reconsideration,” <http://icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>; ICANN, “Independent Review Process Documents,” <http://icann.org/en/irp>.

<sup>54</sup> See ICANN, <http://www.icann.org/cgi/contact>.

<sup>55</sup> ICANN, “Documentary Information Disclosure Policy,” <http://www.icann.org/en/transparency/didp-en.htm>.

## ***Reconsidering the Passive Transparency Policies***

### **Procedure for review**

In the public sector, a person who has been denied access to an information request may be able to seek judicial review or initiate an alternative dispute resolution mechanism, such as a mediation procedure that may involve an information commissioner or an ombudsman. In either case, the mere denial of a request is sufficient to trigger the ability to seek review. The threshold requirements for both the Reconsideration Request and the Independent Review Procedure appeals mechanisms that are available to a denied requestor may seriously limit the possibility of appealing a denial of access to information.

While some limitations on both procedures may be justified for economic and efficiency reasons, the Independent Review Process is rather complex. Considering that ICANN relies on transparency for accountability purposes, an adequate procedure to review the refusal of information disclosures is necessary. In this context there might be a role for some sort of information policy that provides for a specific oversight mechanism of ICANN's disclosure practices. This will be discussed in more detail in Part C, in the context of participatory transparency.

### ***Summary***

An assessment of ICANN's passive transparency practices—specifically, the practices of answering individual information requests—again suffers from the lack of an audit process that evaluates ICANN's current practices against ICANN's information disclosure policy commitments and the lack of available data (e.g., requests received, requests denied, etc.) related to ICANN's current information disclosure practices.

Overall, passive transparency practices need to be reinforced by a robust easy-to-navigate website. Currently, ICANN's website suffers from organizational flaws that need improvements.

Finally, the ambiguities in the threshold requirements for Reconsideration Requests and the limitations in the Independent Review procedures need to be addressed by an appropriate change of the Bylaws or policies to reflect an appeal mechanism that is an appropriate remedy for appealing denials of information requests.

### ***Participatory Transparency***

The third kind of information flow, “participatory transparency,” describes the flow of information from the general public to ICANN within a formalized procedural environment.

In ICANN documentation, this concept is referred to somewhat interchangeably as “public comment” and “consultation.”<sup>56</sup> Since there may be significant differences between “public comment” and “consultation,” we will follow ICANN's indiscriminate use of both and return to this question when assessing practices and policies.

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<sup>56</sup> ICANN, “Accountability and Transparency Principles,” at 25-26. See also ICANN Bylaws, Article III, Section 6.

Our analysis concentrates on the *informational side* of the participation process and evaluates how this process contributes to the transparency of ICANN's internal decision making processes. Public participation, in terms of its procedural context, is the object of a separate memo.<sup>57</sup>

### ***ICANN's Current Policies***

ICANN's current policies concerning "public comments" and "consultations" are embodied in the ICANN Bylaws and in the *ICANN Consultation Principles*.<sup>58</sup> As a preliminary note, the *Consultation Principles* state that the "Bylaws set out clear frameworks for aspects of consultation, particularly those associated with policy development" and that the *Consultation Principles* do not "override or replace any of the Bylaw requirements."<sup>59</sup> As such, the *Consultation Principles* appear to reflect practical interpretations of the Bylaws requirements.

According to the Bylaws, when any pending policy decision being considered by the Board for adoption which "substantially affect[s] the operation of the Internet or third parties," ICANN is required to provide public notice of the policy, an opportunity for the public to submit comments on the proposed policy, and, in some circumstances involving matters of public policy, request the opinion of the Governmental Advisory Committee.<sup>60</sup> According to *Consultation Principles*, ICANN further commits itself to:<sup>61</sup>

- timely provide all necessary contextual information;
- share information about the purpose of the relevant consultation process and how information received from the public will be used;
- provide a calendar that allows mid- and long-term planning of public participation events;
- use online forums as the basic form of participatory involvement;
- improve participation by making use of other kinds of available participatory information technologies and by keeping up with the technological State of the Art; and,
- provide necessary translations for its internal audience.<sup>62</sup>

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<sup>57</sup> See Berkman team, "Accountability and Transparency at ICANN – an independent review," October 20, 2010, <http://www.icann.org/en/announcements/announcement-2-03nov10-en.htm>; see also additional documents to be posted to Berkman Center for Internet & Society, "Input to Accountability and Transparency Review Process," [http://cyber.law.harvard.edu/research/icann\\_study#](http://cyber.law.harvard.edu/research/icann_study#).

<sup>58</sup> See ICANN Bylaws, Article III, Section 6; ICANN. The "ICANN Consultation Principles" can be found in the *Accountability & Transparency Frameworks and Principles*. ICANN, "Accountability and Transparency Principles," at 25-26.

<sup>59</sup> ICANN, "Accountability and Transparency Principles," at 25.

<sup>60</sup> ICANN Bylaws, Article III, Section 6.

<sup>61</sup> ICANN, "Accountability and Transparency Principles," at 25.

<sup>62</sup> See ICANN, "Accountability and Transparency Principles," at 25-26.

## Additional obligations

These basic obligations are accompanied by a number of more procedural and technical commitments.<sup>63</sup> For example, the *Consultation Principles* also require ICANN to ensure that all comments are visible to all parts of the community, to tag comments so they are linked with their sender, provide summaries of comments at the end of a comment period as well as any related analysis conducted on the comments by ICANN staff, and conduct an annual review of the participatory process.<sup>64</sup>

## Assessing Practices

### No annual review to assess practices

Our analysis of ICANN's participatory transparency practices is hindered by the lack of annual transparency review or audit material. Some information was provided informally during interviews with ICANN staff and with participants of the public comment processes.<sup>65</sup> However, due to the lack of a formal annual review, we will primarily evaluate the structures and processes to identify inconsistencies between guiding policies and practices.

## Organization of website information relating to participation and comment

Members of the public who wish to find out how to participate in the ICANN decision-making process have a choice of search strategies: they might search for participation-related topics, or, if they are already aware of some of the ICANN processes as "initiated" users, they might focus their search by looking for opportunities to comment or get involved in consultations.

Looking for "participation" opportunities, they would have to go to "Quick Links" at the top of the homepage and scroll through a long list of such links until they get to "Participate in ICANN." There is no other indicator of participation on the homepage of ICANN. The "Participate in ICANN" link will get them to a page<sup>66</sup> showing them four alternative links: "What does ICANN do," "What's the effect on the Net," "What is going on," and, ultimately, "How do I participate?" This last link then leads to a page<sup>67</sup> that somewhat confusingly starts with "In answer to the question 'What is going on now?'" Although this is not the question that has led to this page, the page does link to ICANN's Supporting Organizations (obviously to inform participation in those organizations), and it does link to the "public participation site" which then turns out, however, to contain only information on ICANN's *meetings*.<sup>68</sup> Another link on that same page more

<sup>63</sup> The additional procedural and technical commitments can be found in the *Consultation Principles*. See ICANN, "Accountability and Transparency Principles," at 26.

<sup>64</sup> *Ibid.*

<sup>65</sup> See Berkman team, "Accountability and Transparency at ICANN – an Independent Review," October 20, 2010, <http://www.icann.org/en/announcements/announcement-2-03nov10-en.htm>; see also additional documents posted to Berkman Center for Internet & Society, "Input to ICANN Accountability and Transparency Review Process," [http://cyber.law.harvard.edu/research/icann\\_study#](http://cyber.law.harvard.edu/research/icann_study#).

<sup>66</sup> ICANN, <http://www.icann.org/en/participate>.

<sup>67</sup> ICANN, <http://www.icann.org/en/participate/how-do-i-participate.html>.

<sup>68</sup> ICANN, <http://meetings.icann.org/>

appropriately called “meeting sites” also leads to that meeting page. Thus two links with two different connotations lead from the “how-do-I-participate” page to the same “meetings” page. Lastly, the “how-do-I-participate” page also has a link to the “public comment webpage.”

This Public Comment webpage can also be reached by taking the alternative route the homepage provides, the one for—as we had qualified it—the “initiated” user going directly for “comment”. At the end of the homepage ICANN provides a section “Public Comment.” This section does not list or refer directly to ICANN's obligation in these processes. It instead provides a very general introduction to the Public Comment procedure and shows a two-column table that displays the issue in one column and the closing date for comments in the other column. Only when following a link “More” from this page does one arrive at the actual public comment page.<sup>69</sup> This page, however, can also be reached directly by clicking the “Public Comment” box at the right side of the homepage. The “Public Comment” page has a multicolumn table (with yet another general introduction of the “Public Comment” process) that divides the comment procedures in “Open for Comment,” “Awaiting Summary/Analysis,” “Recently Closed Comment Forums,” and an “Archived Forums” section. The difference between “Open for Comment” and the “Awaiting Summary/Analysis” sections is not quite clear. The first column seems to contain issues for which comments are still possible. The second column refers to mostly finalized processes—but not exclusively so. There are also items in that second column where comments are still allowed. Thus if a user intends to still make comments on an issue she would have to go fully through the second column as well. End dates for submissions in both these columns seem to change without reasons given. While such extensions are useful for obtaining more input they leave some doubts about the general reliability of fixed end dates for comments.

The columns section is followed on the same page by a series of boxes dedicated to each of the themes listed in the columns. Each box contains the issue, an “Open Date for Comments” box, a “Closed Date” box, an explanation of the background with links to other documents, and the name of the staff member or members responsible for the issue. The box also contains the questions *“Is it clear to you what this comment period covers? Do you have all the information you need to respond? Please click ‘More information please’ below to email ICANN directly.”* This link then opens an email-form for asking questions. In addition, each box contains at its bottom a series of links named “Announcement,” sometimes “Updated Announcement” as well as “Comment,” “Add a Comment” and—where appropriate—a link to the “Summary/Analysis of Comments.”<sup>70</sup>

The “Comments” link leads to comments that can be organized either by thread or chronologically. The Comment link itself does not directly reveal if there have actually been any comments or how many of them. One would have to go through the Comment Link in order to find out if there have been any comments. There is no opportunity to subscribe an issue in order to be notified if new comments have been made.<sup>71</sup>

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<sup>69</sup> ICANN <http://www.icann.org/en/public-comment/>

<sup>70</sup> It is not quite clear where the “Announcement” or “Updated Announcement” links connect to since none of those displayed during the test (9 August 2010) did lead anywhere.

<sup>71</sup> As far as can be determined as of the test date (9 August 2010), no such function exists.

We have described these pathways to participation and public comment in some detail because they might suggest that a more efficient and user-friendly design might be useful for members of the public unfamiliar with ICANN. Also, the current organization suggests some confusion between the terms “participation” and “comment,” similar to the confusion which we noted at the beginning of this section between “comment” and “consultation.”<sup>72</sup> Although “comment” seems to be included under “participation,” participation in the end only seems to mean participation in meetings (or perhaps engaging in a supporting organization).

### **Private comment as public comment?**

In another context the meaning of “public” in “Public Comment” seems to be questionable. While all boxes describing ongoing comment processes are identical in their structure, the consequences of the links offered may not always be the same.

For example, the issue “Accountability & Transparency Review Community Feedback” in the Public Comment section is displayed in a box that also contains the following text:

“In addition to the forum, the Accountability and Transparency Review Team resolved to create a private email address where community Members could confidentially provide their input: [atrt-private-input@icann.org](mailto:atrt-private-input@icann.org).”<sup>73</sup>

This link may create some confusion. The private communication channel thus established may well go directly to the review team, and the review team may have to be seen as an entity separate from and independent of ICANN (although ICANN's chairman is an ex-officio member). Still, the structure and appearance of the public comment item is identical with items where ICANN is inviting public comment. To avoid confusion and the impression that ICANN is now setting up a “private” communication channel, the ATRT and ICANN would have been best advised to signal in a significant manner that these intended private communications (as indeed the public ones to the ATRT) fall outside the traditional ICANN public comment process since they are directed at an independent entity. The ATRT may well have its reason for establishing such an independent channel to receive candid input (although probably not from ICANN staff because of ICANN's chairman being present in the team). In this case the channel could have been represented as such. However, if this process should be seen as a “joint” activity by ICANN and the ATRT, the latter's independence and the integrity of the public comment process of the former are at stake. The ATRT is then simply using a channel which does not belong to it or is at least communicating in a way in which it can be confused with ICANN. And ICANN would have difficulties with its self-imposed obligation that *all* Public Comment communications have to be exchanged under public scrutiny. Whatever the correct interpretation may be, this process reveals once again rather a vague understanding of the public comment procedures and the formalities it should imply in the interest of ICANN's accountability intentions.<sup>74</sup>

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<sup>72</sup> See introductory remarks *supra* Part II, C.

<sup>73</sup> ICANN, “ATRT Community Feedback,” <http://www.icann.org/en/public-comment/#atrt-community-feedback>.

<sup>74</sup> In the long run such practices might also tempt entities critically observing ICANN to also install “private communication channels,” in this case then for ICANN staff whistleblowers.

## Interpretation: participation only as commenting?

This confusion about participation and comment may have its source in the way ICANN seems to be interpreting its own Bylaws: Comparing the explicit quotations from the Bylaws in ICANN's information policy paper with the statements on information policies in that very same paper reveals a discrepancy: while the information policy related statements refer to “comment” and “consultation,” the Bylaws already quoted above<sup>75</sup> refer to “informed participation”<sup>76</sup> and “ensure that [the] most affected entities can assist.” But ICANN then continues to refer to participation only as “participation in any consultation.”<sup>77</sup>

While ICANN acknowledges the need for an information flow from the public to ICANN, it seems to downplay the aspect that such information flows are not only meant to enhance the informational input for ICANN and to keep this input transparent for the general public, but also to provide *participation-oriented* transparency in order to involve the general public *in the decision-making process*. Such an understanding of transparency would require that the participatory elements in “public comments” and “consultations” receive more attention, that “comment” becomes part of a true consultation process rather than an addition of a one-way communication channel and that both “comment” and “consultation” are seen as supplements and not as substitutes for participation.

Considering ICANN's conservative interpretation of its own Bylaws, this problem can no longer be only addressed by an improvement of practices but would need clarification in the Bylaws. We will address this question when reconsidering ICANN's policies with regard to participatory transparency.<sup>78</sup>

## Other structural issues

There are other structural elements in ICANN's current “public comment” information practices that could undergo improvements by taking into account recent developments in public sector consultation:

- document retrieval and the provision of context information,
- the timeliness of the information provided, and
- the treatment of historical information.

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<sup>75</sup> See *supra* notes **Error! Bookmark not defined.** - 64 and accompanying text.

<sup>76</sup> ICANN Bylaws, Article I, Section 2(4).

<sup>77</sup> ICANN, “Accountability and Transparency Principles,” at 25.

<sup>78</sup> See *infra* Part II, C, 3.

## Document retrieval and context

ICANN's public comment section not only suffers from problems of effectively guiding visitors through the site the "Public Comment" page itself, but, when compared to similar public sector websites, the public comment section lacks some features that would improve its usability and attractiveness and would bring it up to the level of the state of the art. Users who wish to effectively scrutinize the comment process, for example, encounter problems when they try to search just the "Public Comment" area page for submitters and the respective documents they have provided.<sup>79</sup>

Furthermore, interested parties who wish to analyze all documents provided under "Public Comments" or wish to know which of all the documents ICANN is offering under its "Documents" tab or "public comment" documents are also without appropriate tools: "Document" is leading to a "Documents" page<sup>80</sup> that contains no link to "Public Comment" documents, and those documents even if directly retrieved via other mechanisms (such as an all-site search), the results do not indicate if these documents been the object of a "Public Comment" process.

## Timeliness

There is also some doubt about the timeliness of ICANN's invitations for public comment. It is not clear if documents could not have been made available earlier for public comment since in most cases the only information available about timing relates to the time when the document's comment process starts. Even where documents carry information on when they had been finished there is often no explanation regarding why such a date is not also the date for opening the public comment process. There is no information about documents which are already in the "pipeline" or those which may be prepared for comment; in short there is a lack of a truly medium- or long-range forward-looking calendar of issues that will enter the public comment phase, a practice to which ICANN has committed itself and which is standard in public sector rulemaking procedures and ensures the preparation of meaningful participation.<sup>81</sup>

## Historical information

Information on past public comment processes provides valuable material to gain insights for improving future decisions. The reconstruction of past decision making contributes to the legitimacy of present and future decision making. ICANN—with its already mentioned archival section on the public comment page—does provide information on its past comment procedures.<sup>82</sup> However, some of the previous criticism on the present procedures also applies to

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<sup>79</sup> While you can view the names of individuals and organizations who have submitted a comment, there isn't an easy search function or a grouping mechanism that aggregates all comments submitted from a single source, or one that makes searches the name field of the submitter. See also the discussion of the importance of appropriate search mechanisms in public sector rulemaking at Cary Coglianese, Heather Kilmartin, Evan Mendelson, "Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration," 77 *Geo. Wash. L. Rev.* 924, 940 (2009).

<sup>80</sup> ICANN, "Documents," <http://www.icann.org/en/documents>.

<sup>81</sup> See Cary Coglianese, Heather Kilmartin, Evan Mendelson, "Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration," 77 *Geo. Wash. L. Rev.* 924, 926-933 (2009).

<sup>82</sup> ICANN, "Public Comments," <http://www.icann.org/en/public-comment/public-comment-200912.htm#cac-prop-supp-rules>.

this archival material, such as the lack of adequate search routines. In addition, the archival material—and this seriously affects their usefulness—tends to be presented in a manner that makes it difficult to reconstruct step-by-step and input-by-input any process from (at least) its moment of presentation for comment to its very end. There is, for example, no information available that would allow a user to reconstruct the basic comment procedures on the extension of gTLDs.

## **The tool issue**

As we have noted in this and other sections, the installation of simple basic but focused search tools could easily improve ICANN's current information practices and lead to more meaningful (informational) participation. The impact of such tools would not only be helpful in the area of participatory transparency but would also improve active transparency.

We have also seen that ICANN staff is experimenting with new ways of information arrangement and presentation.<sup>83</sup> It does seem that ICANN is giving more attention to the presentation and handling of information. But, again, as we have already stated when looking at the active transparency practices,<sup>84</sup> ICANN might consider opening its information resources and inviting the community to development applications to solve this problem.

## ***Reconsidering the Participatory Transparency Policies***

### **Oversight**

We have already noted several times that a promised comprehensive review of the participatory processes has not yet been delivered, nor has it been for the practices of active and passive transparency.

This delay in obtaining information on practices seems to indicate that there may be a need for some sort of institutional oversight entity within or outside of ICANN that ensures oversight over transparency practices. Such an entity could also systematically collect information that would be useful for optimization processes of participatory transparency. The installation of such an oversight entity and/or procedure would require a modification of the Bylaws and policies. Such a modification could not simply extend existing procedures like the Request for Reconsideration or the Independent Review because of the serious limitations of these procedures already discussed in the context of passive transparency.<sup>85</sup>

In the public sector such special obligations are imposed on information commissioners (e.g., in Canada and Australia), or Ombudsmen (as in the European Union) or—as in the US federal government—a special administrative unit (Office of Government Information Services—OGIS<sup>86</sup>).

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<sup>83</sup> See *supra* note 1.

<sup>84</sup> See *supra* Part II, A, 2(b).

<sup>85</sup> See *supra* Part II, B, 1-3.

<sup>86</sup> See National Archives, "Office of Government Information Services," <http://www.archives.gov/ogis>; Cary Coglianese, Heather Kilmartin, Evan Mendelson, "Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration," 77 *Geo. Wash. L. Rev.* 924 (2009).

In the ICANN context one might think of the Ombudsman as executing such an additional function. However, the institution of the Ombudsman within the ICANN strongly relies on the confidentiality of its operations—for reasons which might well be understandable—but which would necessarily provide a role model for transparency oversight.

## Scope

We have already noted that ICANN seems to be interpreting participation rather conservatively as merely providing an opportunity to comment.<sup>87</sup> To what extent participation as such should and could be improved is beyond the framework of this memo.

## Reformulating informational participation

From an informational perspective, however, it would be useful to ensure, through a stronger wording in the Bylaws, that ICANN will no longer be interpreting (informational) participation as yet another one-way communication from the public to ICANN. Instead, ICANN's participation policy should be formulated as an obligation to establish and operate a means for *consultation*.

Such a change in wording would enable ICANN to at least experiment with new practices of information and communication.

## Establishing dialogue

In 2009, the Task Force on Transparency and Public Participation made several suggestions on how to improve the US process of federal rulemaking.<sup>88</sup> One such suggestion aimed at involving agencies more strongly into a *dialogue process* with the public rather than relying on one-way communication.<sup>89</sup> Access to such dialogues might well be restricted to members of the public who provide meaningful input and could also be more intensive with one group than with others. Such dialogues might well provide insights that could lead to reconsiderations on ICANN's part and help to legitimize changes in planned policies.<sup>90</sup> Since we have already

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<sup>87</sup> See *supra* Part II, A, 2(d).

<sup>88</sup> See Cary Coglianese, Heather Kilmartin, Evan Mendelson, "Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration," 77 *Geo. Wash. L. Rev.* 924 (2009). In addition, the European Union has been engaging in improving its highly complex rulemaking processes, See: European Commission, "Better Regulation," [http://ec.europa.eu/governance/better\\_regulation/index\\_en.htm](http://ec.europa.eu/governance/better_regulation/index_en.htm) and European Commission, "Better Regulation -- Consultation," (noting "The decentralised organisation of consultation needs a common framework in which to operate to ensure that consultations are carried out in a transparent and coherent way throughout the Commission. In 2002 the Commission set out principles and minimum standards for consulting external parties. The consultation standards are part of the Better Lawmaking action plan, which aims at clearer and better European legislation. According to these standards attention needs to be paid to providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback. These consultation standards apply in particular at the policy-shaping phase to major proposals before decisions are taken. In particular, they apply to proposals in the impact assessment process which are included in the Commission's Annual Legislative and Work Programme. The consultation standards have been applied from 2003 onwards." (emphasis supplied) [http://ec.europa.eu/governance/better\\_regulation/consultation\\_en.htm](http://ec.europa.eu/governance/better_regulation/consultation_en.htm); see also "COMMUNICATION FROM THE COMMISSION: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission," Brussels, COM (2002) 704 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDF>.

<sup>89</sup> See Coglianese, Kilmartin, Mendelson, at 947.

<sup>90</sup> See for such an effect in public sector rulemaking: Shapiro 2007, 36 and 45.

introduced some reservations about private communication in public comment processes,<sup>91</sup> it is necessary to emphasize that any more intensive dialogues would still remain under public scrutiny.<sup>92</sup>

### **Private channel exemption**

There might also be situations in which “private communication” between ICANN and those commenting might be more desirable. Such “ex parte” procedures, however, should be properly regulated in the Bylaws. Additionally, such procedures should require that the existence of such an “ex parte communication” is made public, that the exchanges are carried out in a manner that cannot not be confused with the public comment process, that there are material reasons for such a special exchange which have their basis in the (re-formulated)<sup>93</sup> exemption rules, that ICANN does not commit itself to confidentiality beyond what would be permitted by the exemption clauses, and that ICANN would have the obligation to summarize the content of such special communications within the framework of (justified) confidentiality rules.

### **Extending the material accessible in the dialogue process**

When re-wording the exemption policies<sup>94</sup> consideration may also be given to the question to what extent (finalized) draft documents from the staff to the ICANN board should be made accessible in the dialogue process between ICANN and the general public.<sup>95</sup>

### **Critical issues regarding participatory transparency**

When referring to the state of the art in electronic rulemaking, one should also not exclude critical issues in the current discussions:<sup>96</sup> Better information and easier interactive mechanisms of participation and dialogue do not necessary increase public participation in number or in quality. Very often—as it may also be the case for many of the ICANN issues—objects of public comment and dialogue need highly specialized expertise and require sustainable commitments that often can only be provided and maintained by professional observers of such processes. This may well be true for a considerable amount of ICANN activities, particularly where highly technical details are being discussed.

This, however, is not an excuse to omit the mechanisms in place on which ICANN's accountability and with it, its legitimacy ultimately rests. The general public may well find a way, for example by using trustworthy and knowledgeable intermediaries, to participate meaningfully in such decision-making processes.

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<sup>91</sup> See *supra* Part II, C, 2(c).

<sup>92</sup> About the problems of exparte communications during the rulemaking procedures in the context of US administrative law, see Coglianese, Kilmartin, Mendelson, at 932-948.

<sup>93</sup> See recommendations *infra* Part II, D, 3.

<sup>94</sup> See *supra* Part II, D, 3.

<sup>95</sup> See Coglianese, Kilmartin, Mendelson, at 938 (referring to the example in the Clean Air Act, 42 U.S.C. §§ 7401 et seq., 7607(d)(4)(B)(i) (2007)).

<sup>96</sup> *Ibid.*

## **Summary**

Limitations in the current structure of (informational) participation (and the limitations already stated in the context of passive transparency) require the installation of an information oversight process and/or entity which would also oversee participatory transparency.

The “Public Comment” procedure has to be transformed into an efficient dialogue process with interested parties and the general public. For this purpose, adjustments to the information and communication design are needed.

Changes in the policy and Bylaw framework should encourage ICANN to participate more interactively in these dialogue processes.

## ***The Information Disclosure Exemptions***

### ***ICANN's policy***

ICANN’s active, passive, and participatory transparency policies and practices are governed by a set of exemptions listed in the ICANN DIDP under the title “Defined Conditions for Non-Disclosure.”<sup>97</sup>

According to these rules there is no, or only limited, transparency where ICANN has “identified . . . conditions for the non disclosure of information.”<sup>98</sup> Such “conditions” comprise the following categories of information:

- Information that has been exchanged with governments or international organizations with an expectancy of confidentiality;<sup>99</sup>
- internal information and information exchanged with entities with which ICANN is cooperating that would compromise or would be likely to compromise ICANN's internal decision making procedures;<sup>100</sup>
- information that would constitute an invasion of privacy or information from internal appeal procedures;<sup>101</sup>

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<sup>97</sup> ICANN, “Accountability and Transparency Principles,” at 10-11.

<sup>98</sup> ICANN, “Accountability and Transparency Principles,” at 10.

<sup>99</sup> “Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN’s relationship with that party.” ICANN, “Accountability and Transparency Principles,” at 10.

<sup>100</sup> “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.” ICANN, “Accountability and Transparency Principles,” at 10 and “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.” ICANN, “Accountability and Transparency Principles,” at 10.

- information provided by a third party, which, if disclosed, would affect the economic interests of this party or information covered by a confidentiality agreement;<sup>102</sup>
- confidential business information or information related to purely internal policies and procedures;<sup>103</sup>
- information affecting the core interests (life, health, safety) of an individual or information affecting the administration of justice;<sup>104</sup>
- privileged information and information affecting investigations;<sup>105</sup>
- documents in draft form;<sup>106</sup>
- information relating to the security and stability of the Internet,<sup>107</sup>
- trade secrets and commercial and financial information not publicly disclosed by ICANN,<sup>108</sup> and
- vexatious or frivolous information requests.<sup>109</sup>

## Override provisions

ICANN may override these exemptions if it decides “under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>110</sup>

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<sup>101</sup> “Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>102</sup> “Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>103</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>104</sup> “Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>105</sup> “Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>106</sup> “Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>107</sup> “Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.” ICANN, “Accountability and Transparency Principles,” at 11.

<sup>108</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>109</sup> “Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.” (ICANN, “Accountability and Transparency Principles,” at 11.)

For areas outside these exemptions ICANN installs an additional “safety catch” under the following provision:

“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.”<sup>111</sup>

## ***Assessing Practices***

### **Lack of audit and reconsideration material**

As noted several times before, the lack of an in-depth audit of transparency practices makes it difficult to gain any insight into how ICANN uses these exemptions or the exemptions to these exemptions.

Also, Reconsideration Requests provide no further information, since none of these requests—in as far as they have been the subject of reviews by the reconsideration committee<sup>112</sup>—have so far addressed the issue of exemptions.<sup>113</sup> However, the application of exemptions does appear in some Board meetings minutes.<sup>114</sup>

### **Proactive classification**

Although there is a lack of empirical on how ICANN applies the exemptions in actual practice, ICANN might benefit borrowing public-sector models. Some provisions in ICANN’s exemptions already reflect public-sector “best practices,” such as the override provision or making parts of documents publically accessible which are not covered by the exemptions.

The practices of exemptions, however, also have an information management side that contributes to better practices in administering such exemptions. ICANN may, for example, consider proactively classifying<sup>115</sup> its documents at the moment they receive them or they come into existence in order to speed decisions on accessibility. Such procedures would give the ICANN Board and the staff a better appreciation of its confidentiality practices. Such “classifications” as it is public sector practice—should then be regularly reviewed.

<sup>110</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>111</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>112</sup> As mentioned *supra* Part II, A, 2, the Board Governance Committee <http://www.icann.org/en/committees/board-governance/> had received the reconsideration request 10-1 <http://www.icann.org/en/committees/reconsideration/palage-request-10feb10-en.htm> of 11 February 2010. This request not only criticized the timeliness of publication of certain material that has to be published (with suggestions for change in the Bylaws by the Board Governance Committee) but this request also required the posting of staff papers to the Board in advance of the Board meetings. For formal reasons (not showing harm) this request had been denied (<http://www.icann.org/en/committees/reconsideration/reconsideration-recommendation-10-1-12mar10-en.htm>).

<sup>113</sup> See e.g., ICANN, “Requests for Reconsideration,” <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

<sup>114</sup> See *supra* note 30.

<sup>115</sup> See also the suggestions for improving the rulemaking processes at Cary Coglianese, Heather Kilmartin, Evan Mendelson, “Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration,” 77 *Geo. Wash. L. Rev.* 924, 937 (2009).

## ***Reconsidering Information Disclosure Exemption Policies***

Under the circumstances—without empirical data—it is difficult to comment on ICANN’s *use* of the exemptions, it is possible to comment critically on the *policies* in general.<sup>116</sup>

When we compare ICANN's exemptions to those contained in a set of selected international freedom of information legislative promulgations, including the US Freedom of Information Act (FOIA),<sup>117</sup> Canada’s Access to Information Act (AIA),<sup>118</sup> the EU Regulations for access to documents of EU institutions (EU-Reg),<sup>119</sup> and the Australian Freedom of Information Act. (AFOIA),<sup>120</sup> two kinds of problems with the ICANN policies become visible:

- (a) Problems posed by individual categories of the exemptions
- (b) Problems posed by the exemption to the exemptions (public interest override), as well as by the catch-all exemption of the confidentiality override

### **Problems posed by individual categories of exemptions**

The list of ICANN's exemptions is rather comprehensive and fairly general in its wording. When comparing ICANN's exemption rules with those from the selected international freedom of information regimes we find many equivalents as the following table shows:

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<sup>116</sup> Already the GAC had been critical with regard to the of role of exemptions in ICANN's policies: "GAC members are aware that the ICANN Board sometimes deals with sensitive issues, such as cases concerning delegation and re-delegation, where it is not appropriate to publish all of the information considered in the decision making process. However, even in those circumstances, when the ICANN Board publishes its agendas and minutes it should identify which topics are regarded as sensitive, and offer an explanation of why they are considered sufficiently sensitive to justify keeping related information confidential." GAC, "Communiqué 30– Los Angeles," October 31, 2007, at 8.

<sup>117</sup> Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2009)).

<sup>118</sup> Access to Information Act, R.S.C. Ch. A-1 (1980) (Can.), at <http://laws.justice.gc.ca/PDF/Statute/A/A-1.pdf>.

<sup>119</sup> Council Regulation (EC) No. 1049/2001 of May 31, 2001, regarding public access to European Parliament, Council and Commission documents. See also European Commission, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=L:2001:145:0043:0048:EN:PDF>. See also EC, "REPORT FROM THE COMMISSION on the application in 2009 of Regulation (EC) No 1049/2001, regarding public access to European Parliament, Council and Commission documents," Brussels, COM (2010) 351 final (Jun. 30, 2010), at [http://ec.europa.eu/transparency/access\\_documents/docs/rapport\\_2009/COM2010351\\_EN\\_ACT\\_part1\\_v1.pdf](http://ec.europa.eu/transparency/access_documents/docs/rapport_2009/COM2010351_EN_ACT_part1_v1.pdf) which may serve as an example for an audit type of report into transparency regulations.

<sup>120</sup> Freedom of Information Act (Commonwealth), 1982, No. 3 as amended (2010) (Austl.), at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/6865104573D2FF4FCA25773E001F0EA6/\\$file/FreedmInfo1982\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/6865104573D2FF4FCA25773E001F0EA6/$file/FreedmInfo1982_WD02.pdf).

<b>ICANN Exempted Categories</b>	<b>US FOIA Exemptions</b>	<b>Canada AIA Exemptions</b>	<b>EU-Reg Exemptions</b>	<b>Australia FOIA Exemptions</b>
Exchange with governments under expectancy of confidentiality	National defense and foreign policy interest protections, 5 U.S.C. § 552(b)(1)(A). <sup>121</sup>	Information exchanged with the government of a foreign state or an institution thereof, AIA, Art. 13 (1)(a) and 15 (1).	Documents relating to international relations. Art. 4,1(a).	Art.26 A, 33, 33A
Internal communication (deliberative process)	Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. § 552(b)(5).	Information on federal-provincial consultations or relations. See AIA, Art. 14, 21.	Documents for internal use or received by an institution which relates to undecided matters. Art. 4, 3.	Art. 26A , 33A, 34, 35, 36
Privacy	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6).	Any record that contains personal information, AIA, Art. 19.	Documents which would undermine the protection of privacy and integrity of individuals. Art. 4, 1(b).	Art. 27A, 41
Economic interests of third parties		Confidential, financial, commercial, scientific, or technical information of third parties. Art. 20 AIA	Documents which undermine the protection of financial, monetary, or economic policy of Community or member states. Art. 4, 1(a).	Art. 27
Confidential business information	Trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(2).	Financial, commercial, scientific or technical information that belongs to the government. AIA, Art. 18(a).	Documents which would undermine the protection of commercial interests, including IP. Art.4 2.	Art.27, 43

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<sup>121</sup>“This section does not apply to matters that are . . . specifically authorized under criteria established by an Executive Order of national defense or foreign policy.” FOIA, 5 U.S.C. § 552(b)(1)(A).

Core interests of individuals		Information could threaten the safety of individuals. AIA, Art. 17.	Documents which undermine the protection of privacy and integrity of individuals. Art. 4, 1(b).	
Privileged information			Documents that undermine the protection of court proceedings and legal advice. Art.4, 2.	Art.42
Information relating to investigations	Records or information compiled for law enforcement purposes only. 5 U.S.C. § 552(b)(7).	Law enforcement and investigations with qualifications. AIA, Art. 15 and 16.	Documents that undermine the protection of the purposes of inspections, investigations and audits. Art. 4, 2.	Art.40
Communication covered by confidentiality agreement	Trade secrets and commercial or financial information obtained from a person and privileged or confidential, 5 U.S.C. § 552(b)(2).	Information supplied to government in confidence, with certain qualifications. AIA, Art. 20(b), (d).	Member states may request non-disclosure, without prior agreement. Art. 4, 5.	Art. 45
Security and stability (of the Internet)	Comparable to national defense and foreign policy interest protections. 5 U.S.C. § 552 (b)(1))(a).	Comparable to national defense and foreign policy interest protections, and emergency management plans. AIA, Art.15, 16, 20(b.1).	Documents which undermine the protection of public security, military, international relations. Art. 4,1. "	Art. 37
Trade secrets	Trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(2).	Government trade secrets and third party trade secrets. AIA, Art. 18 and 20(a).	Commercial interests and IP. Art. 4, 2.	Art.43 (1)(a)

Frivolous use	Similar to provisions in US Fair Credit Reporting Act, 15 U.S.C. § 1681 <i>et seq.</i> and cost consequences in the Government in the Sunshine Act, 5 U.S.C. § 552b(b)(2)(i). C.f. proceedings in <i>forma pauperis</i> , 28 U.S.C. § 1915(e)(2)(B)(i) and Fed. R. Civ. P. 11(c).	No specific regulation but: n his 2000-2001 Annual Report, the Information Commissioner instead recommended an appeal to his office following a refusal to process a request. <sup>122</sup>	not regulated	Art. 24 (1) (a) and (b)
Financial information not publicly disclosed by ICANN				

In most cases—as the table above shows—ICANN exemptions have at least two equivalents in international freedom of information regimes. However, regardless of these equivalents there remain categories of exemptions where the ICANN approach seems to be worth further attention:

- the exemption of the deliberative process,
- the peculiar role of exemptions of “drafts,”
- the internal policies and procedures exemption,
- the protection against frivolous use, and
- the exemption relating to financial information not publicly disclosed by ICANN.

### Protection of the internal deliberation process

ICANN's protection of the deliberative process as such is not a singular phenomenon. Art. 14 and 21 of the AIA (restricted to specific matters) and Art. 26A, 33A, 34, 35, 36 AFOIA as well as “exemption 5” (5 U.S.C. § 552(b)(5)) of the FOIA provide similar protections.

As for exemption 5 of FOIA, this exemption may not be directly obvious from its wording protecting “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>123</sup> However, consistent interpretation by the courts have established this exemption as the “Deliberative Process

<sup>122</sup> Department of Justice (Canada), “A Comprehensive Framework for Access to Information Reform,” 2009, at 3.2, <http://www.justice.gc.ca/eng/dept-min/pub/ati-aai/04.html>.

<sup>123</sup> FOIA, 5 U.S.C. § 552 (b)(5).

Privilege” seeking to avoid that the FOIA is being used where common law and civil law rules would otherwise provide protection from discovery.<sup>124</sup>

Art. 4,3 of the EU Regulations provides a similar protection of the internal decision making process.

However, the ICANN policy goes further by including a broad range of its external communication partners.<sup>125</sup> While exemption 5 of the FOIA<sup>126</sup> and also Art. 4, 3 and 4,4 EU-REG, in as far as third parties are involved at all, would also in principle include such third-party communication, interpretations by the relevant courts both in the European Union and in the US have secured a restricted application of the exemption that is not necessarily reflected in the ICANN wording.<sup>127</sup> In ICANN's case, of course, we have to consider that the broadness of the exemptions is eventually balanced by a (possible) application of the public interest override already mentioned above. However, this override has its own problems, as we shall see below.<sup>128</sup>

It would be better if this broadness would already be addressed by a more restrictive wording of the exemption itself clarifying that only such information of the internal decision making process is affected that “if disclosed, would or would be likely to *seriously* compromise the integrity of the deliberative and decision-making process.”<sup>129</sup>

## Example EU-REG

The EU-REG take such a differentiated approach to the internal decision making process: The relevant Art.4 reads:

“3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

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<sup>124</sup> See e.g., *N.L.R.B v. Sears Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504 (1975).

<sup>125</sup> See *supra* notes 100 and 102.

<sup>126</sup> Department of Justice 2009, “Guide to the Freedom of Information Act, Exemption 5,” 357-360.

<sup>127</sup> With regard to the European Union see e.g., Court of First Instance judgments of 11 March 2009 in Cases T-121/05 and T-166/05, *Borax Europe Ltd v Commission*. In the U.S., courts apply a “functionality” test to determine if an internal memorandum that contains information obtained from parties who are not agency employees is exempt under § 552(b)(5) on grounds that such information is the product of a temporary consultancy relationship between agency and third party. *State of Texas v. Interstate Commerce Commission*, 889 F.2d 59 (5<sup>th</sup> Cir. 1989) (per curiam), *Durns v. Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986) *reh'g denied*, 806 F.2d 1122 (D.C. Cir. 1986), *cert. granted, vacated on other grounds*, 486 U.S. 1029, 108 S. Ct. 2010 (1988).

<sup>128</sup> See *infra* Part II, D, 2(b).

<sup>129</sup> ICANN, “Accountability and Transparency Principles,” at 10 (emphasis supplied). Similar arguments with a similar rewording suggestion have been made in the process of revising the EU regulation. See “Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL regarding public access to European Parliament, Council and Commission documents (presented by the Commission),” Brussels, 30.4.2008, COM (2008) 229 final, 2008/0090 (COD) at 18f.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.”<sup>130</sup>

## The role of drafts

The exemption “draft” at stake here as well has been left out of the comparative table because the exemption relates to the character of the document as such rather than to the category of information it contains. ICANN excludes from accessibility all “*Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*”<sup>131</sup> Nevertheless the draft exemption is essential in the context of getting better insight into ICANN's internal decision making processes.

## “Draft” in international legislative enactments

Drafts are exempt in the FOIA and the EU-REG by restricting access to “documents,” in the case of the FOIA access is restricted to “matters,” in the AIA Art. 3 states that of specific documents are excluded from disclosure.<sup>132</sup>

Considering the regulations in these international legislative enactments, ICANN should make a distinction between documents that it may call “drafts” internally but which are in fact finished documents in as far as they are being transferred to another entity. Such a “draft” exemption at least would then no longer cover finalized staff documents which are transmitted to the Board,<sup>133</sup> while, of course, still other exemptions might apply, in particular, the one protecting the deliberative process. Still it would have to be shown then that such “drafts” would indeed affect the “candid exchange” of opinions.

## Internal policies and procedures

ICANN's exemption for “internal policies and procedures” finds its equivalent in the FOIA only and only as far as “internal personnel rules and practices of an agency” are concerned.<sup>134</sup> Only if we read the alternatives “*confidential business information and/or internal policies and procedures*” to mean “internal policies and procedures of businesses” would this restriction be equivalent to similar other legislative enactments protecting confidential business information.

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<sup>130</sup> REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ 31 May 2001, L145,43ff.

<sup>131</sup> ICANN, “Accountability and Transparency Principles,” at 11.

<sup>132</sup> Although the primary disclosure provisions under FOIA reference “agency rules, opinions, orders, records and proceedings” under 5 U.S.C. § 552(a), the exemptions section of this subchapter, § 552(b), states that disclosure requirements “[d]o not apply to *matters.*” However, § 552(b)(7) specifically notes “records or information” -- the especially broad wording of this provision may be applicable to a broader range of materials other than official “records.” See also the request for reconsideration discussed *supra* note 112, AFOIA, Art. 34(1)(d) (Austl.).

<sup>133</sup> See *supra* note 112.

<sup>134</sup> FOIA, 5 USC § 552(b)(4).

## Frivolous use

ICANN's access exclusion on the grounds of frivolity or use corresponds with similar restraints in other legislative enactments. However, such restrictions do not always appear in the direct context of freedom of information regulations, but seem to be based on more general legal concepts. The FOIA, for example, does not contain such an exemption, while the Fair Credit Reporting Act and the Government in the Sunshine Act both have such explicit restrictions.<sup>135</sup>

In other cases, courts may occasionally use—although with reluctance—other means to discourage frivolous suits.<sup>136</sup> Neither the AIA, nor the EU-REG have such limitations, while the AFOIA has a limitation in Art. 24 (1) (a) and (b). The European Commission has remained skeptical as to the usefulness of this type of exemption; in its proposal for a new transparency regulation it discourages the introduction of such a clause:<sup>137</sup>

“The Commission does not propose a provision for rejecting requests that may be qualified as excessive. Instead, it is proposed to extend the ability to request clarifications under Article 6(2) to cases where the requested documents cannot be easily identified.”<sup>138</sup>

## Financial information not publicly disclosed by ICANN

This ICANN exemption is somewhat puzzling, if not arbitrary. It seems to imply that ICANN, by the sole act of making financial information public, declares that any information not published is exempted from disclosure. There is no further material criterion to be considered. There is also no counterpart in any of the comparable access to information enactments.

## The “public interest” override

The public interest override<sup>139</sup> is an important corrective to the sometimes very general wording of ICANN's exemptions.

The international legislative enactments contain similar overrides which either override special sets of exemptions and/or to grant fee waivers or fee reductions.<sup>140</sup> Nevertheless, while in other legislative enactments the override introduces yet another consideration in the discussion of exemptions which have already been formulated restrictively, in the ICANN context this override

<sup>135</sup> See Government in the Sunshine Act, 5 U.S.C. § 552b(i); Fair Credit Reporting Act, 15 U.S.C. § 1681n.

<sup>136</sup> See “proceedings in *forma pauperis*, 28 U.S.C. § 1915(e)(2)(B)(i); (Proceedings in *forma pauperis*) and Fed. R. Civ. P. 11(c).

<sup>137</sup> “Proposal for a regulation of the European Parliament and of the council regarding public access to European Parliament, Council and Commission documents,” Brussels, COM (2008) 229 final, [http://ec.europa.eu/transparency/access\\_documents/docs/229\\_en.pdf](http://ec.europa.eu/transparency/access_documents/docs/229_en.pdf).

<sup>138</sup> *Ibid.*, at Section 2.2.5.

<sup>139</sup> See *supra* Part II, E, 1(a).

<sup>140</sup> See AFOIA, Art. 33A(5) (overrides exemption of protection of relation with states of the Australian Commonwealth), AFOIA Art. 39(2) (with regard to financial or property interests of the Commonwealth), AFOIA Art. 40(2) (operations of agencies). For provisions in the EU-REG, see EU-REG, Art.4 (2) (commercial interests of a natural or legal person, including, intellectual property, court proceedings and legal advice the protection of inspections, investigations and audits) and Art.4 (3)(internal decision making process). As for “cost privileges” see FOIA, 5 U.S.C. § 552 (a)(4)(A)(iii), AFOIA, Art. 29 (5)(b) and 30A (1).

replaces rather broad criteria with equally broad criteria without making exemption decisions necessarily more predictable.

### **Final harms test**

This lack of predictability becomes even more obvious with ICANN's "harms test" exemption: Even if none of the exemptions apply and information should thus be accessible ICANN still reserves the right to withhold information if it "*determines that the harm in disclosing the information outweighs the public interest in disclosing the information.*"<sup>141</sup> In other words, despite the already rather broad wording in other exemptions, if no other exemption applies on the face of its wording, ICANN may still withhold information.<sup>142</sup>

There is no equivalent to the effect described above in comparable international transparency enactments or policies. It is the very purpose of transparency policies, as it should be the purpose of an organizational information policy as well, to be able to determine ex ante, and in a foreseeable manner, the conditions under which information can be withheld. This final ICANN reservation makes one wonder why exemptions have been defined at all.

### **Summary**

There is very little information available on the use of exemptions by ICANN. However, the policies—if summarily compared with transparency policies in the public sector—reveal some problems that need to be addressed:

- The categories of exempted information are fairly comprehensive, while each of the exemptions, individually, are described in fairly general and broad terms. This is particularly true for exemptions protecting drafts and the internal decision making process.
- Some of the exemptions, such as those protecting internal policies and procedures, the exclusion of frivolous use, financial information not publicly disclosed, stand out as rather singular and seem to be driven by an overly defensive approach towards transparency.
- An overall "public interest" override, also in itself fairly general, may provide an opportunity to counterbalance the broadness of the exemptions, if used properly—on which there is no information that relates to ICANN actual practices. The "harms test" override, however, with which ICANN gives itself authority to withhold information even when none of the exemptions apply, questions the purpose of formulating exemption policies altogether and needs to be eliminated.

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<sup>141</sup> See *supra* Part II, D, 1(a); ICANN, "Accountability and Transparency Principles," at 11.

<sup>142</sup> ICANN, "Accountability and Transparency Principles," at 11.

### ***Effects on the Transparency of the Internal Decision-Making Process***

It is only occasionally that one gains some insight into the inner mechanics of ICANN's internal decision-making processes. Even then, such insight is general and limited in scope.

In its Annual Report 2009, ICANN describes its internal management practices as a work in progress:

“Administrative improvements. ICANN continued to focus on preparing for a post-Joint Project Agreement (JPA) environment, to maintain an appropriate organizational structure to serve ICANN’s increasingly globalized technical coordination functions. With the conclusion of the JPA and the signing of the Affirmation of Commitments (AoC) in September 2009, this focus will continue into fiscal year 2011 and beyond.

Addressing its “Operating Plan Objectives,” ICANN then differentiates between more complex activities and less complex activities where it is not always clear where the line is being drawn between the two types of activities. For the former ICANN “uses a tried-and-true project management process with documented processes and management practices. First implemented during fiscal year 2006—2007, the process has matured over time and has been used in both the IDN Program and the New gTLD Program, among others.”<sup>143</sup> The latter activities are managed in a traditional “goal setting and performance monitoring process.”<sup>144</sup>

### **Accessibility of information on internal decision-making processes**

The main barrier that prevents substantial improvements in transparency of the internal decision-making process is ICANN's disclosure exemption policies—which exclude access to information relating to these processes, in particular the exemption of drafts and the protection of the deliberative process. While ICANN has the possibility to override these exemptions when disclosure favors the public interest, there is no evidence in ICANN's actual practices that show ICANN has actually overridden the broadly worded exemptions. Specifically, there are no available metrics on when information has been requested, when information has been actively provided, or when, in the consultation processes, ICANN has favored disclosure over withholding information. This applies not only to information contents but also to procedures, of which only very general information is available, i.e. that ICANN has a planning process which consists of a strategic plan that is then translated into an Operating Plan which if approved is then put into practice.<sup>145</sup>

The most promising approach of partially opening these internal procedures is by redesigning the policies as well as the practices of what we have called participatory transparency. This can be accomplished by transforming “Public Comment” into an interactive dialogue which accompanies ICANN's policy making processes—at least where decisions “*substantially [affect]*

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<sup>143</sup> ICANN Annual Report 2009, at 29.

<sup>144</sup> ICANN Annual Report 2009, at 29.

<sup>145</sup> ICANN, “Accountability and Transparency Principles,” at 23.

*the operation of the Internet*<sup>146</sup>—there might be an opportunity to externalize the essential part of ICANN's internal decision making.

As part of the transformation, significant changes to the rules governing exemptions will have to be made, such as rewording the “draft” exemption and limiting the exemptions relating to the deliberative process and internal procedures, and reconstructing the public interest override.

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<sup>146</sup> ICANN Bylaws, Article I, Section 2.

## General Summary and Conclusions

### *Information flow models*

For analytical purposes, we have looked separately at active, passive and participatory transparency. In the case of passive transparency we have argued that the information flow coming from ICANN to a requester should become the object of active transparency and that the information should not only be received by the requester but the information should also become part of the active communication inventory to save others the need to initiate similar requests and to let the general public benefit from all requests. Looking at participatory transparency, we have observed that the information flow from the general public to ICANN and ICANN's pre- and post-Public-Comment activities should be transformed into a fully-developed consultation process.

### *Issues of practices*

After analyzing ICANN's various *practices* of transparency, and noting that ICANN justly emphasizes the importance of transparency as a form of accountability, one is struck by the impression of how comparatively little effort seems to have been put into an adjustment and modernization of ICANN's interface with the general public.

This is particularly surprising for an institution that is seen by many to incorporate the INTERNET in the literal sense. Many of the points criticized could be addressed by a more dedicated effort to improve information design—guided by an engagement for the transparency default, keeping in mind the transparency interests and the information retrieval behavior of the user community and by looking for best practices at the sites of organizations with similar tasks. Instead, one is faced with a website that seems to have incrementally grown with the size and complexity of ICANN's activities without conceptually fully mastering them—at least in as far as their representational aspects are concerned.

### *Issues of the policy framework*

Going through the various *policy* reconsiderations, the exemption policies or—as ICANN has chosen to call them somewhat aseptically—“Conditions for Nondisclosure” are at the core of all deficiencies. They are comprehensive, they are overbroad, and they are driven by a “belt-plus-suspender”-philosophy where any seemingly transparency friendly rudiment is disciplined by an all comprehensive confidentiality override. This approach to exempting information from disclosure affects active transparency (although seemingly less so because the public has no way to know what is just *not* actively made available), passive transparency (because the exemptions discourage its use and keep this important accountability instrument underdeveloped) and participatory transparency (because it makes ICANN too inhibited to engage in real dialogue instead of a series of one-way communications).

The issue of exemptions will have to be addressed in the same manner as it has been addressed in the public sector: reduction of exemptions, precision of exemptions, allowing for a broad public interest override (but without a confidentiality “over-override”), strict classification and

declassification policies and some form of oversight and most of all, with less fear and more courage.

If this issue is addressed properly, the most promising change should be encouraged with regard to participatory transparency. That is, implementing procedures and instruments that would allow ICANN and the interested public to engage in dialogue that would encourage all participants to reconsider their positions in the interest of the goals ICANN and its community stands for.

### ***Looking for role models***

#### ***Public sector***

We have mainly measured ICANN's practices and policies against current standards in the public sector.

#### ***Third sector?***

When looking for examples for transparency and accountability mechanisms, ICANN could also look at non-governmental organizations. In many cases they, too, illustrate a type of membership that could serve as a primary source of legitimacy and consequently build credibility and legitimacy through the manner in which they conduct their operations and by establishing mechanisms of accountability and transparency towards the general public.

#### ***Private sector***

ICANN has also emphasized its responsibilities, as they flow from its corporate structure and its "points of tension" in terms of its public sector role.<sup>147</sup> On this point, the GAC has noted that:

"[I]t would not be reasonable to suggest holding ICANN to the same standards of accountability that would apply to government officials, who in democratic societies are held to quite a high standard of accountability to the political level, and through them to the population."<sup>148</sup>

Indeed it seems that most of ICANN's intentions as expressed in its policies and in parts of its practices may seem to be driven by the intention to meet public sector standards; however, another part of its policies and practices, particularly those relating to exemptions and substantive reviews of its own transparency activities, are driven by seeing itself as a corporation. We feel that this "double-bind" is the true source of the "fear"—we have observed this before—and must be addressed if ICANN is looking for an effective and sustainable improvement in its transparency policies and practices.

For this purpose we invite a two step deliberation:

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<sup>147</sup> ICANN, "Accountability and Transparency Principles," at 5f.

<sup>148</sup> GAC, "Communiqué 30- Los Angeles," October 31, 2007, at 6. However the GAC went on: "On the other hand, governments' definitions of accountability might prove useful for our consideration of this topic" confirming ICANN's double-bind situation.

## Changes in corporate transparency

First, transparency regulations and policies increasingly extend to corporations. This is particularly true where they are connected with public interest or public utility functions. Such corporations may become objects of transparency requirements either indirectly by being required to provide information to public sector entities, which are in turn required—with or without filtering—to make this deposited information accessible to the general public. In addition, some legal Freedom of Information enactments have started to extend direct obligations to such corporations, mainly when they are organizationally related to the public sector (e.g., Canada's Crown Corporations) or if they have a key role in information holdings in which there is a public interest.<sup>149</sup>

Already the GAC has documented the following observations:

“Business entities also have accountability mechanisms, often a mix of those mentioned above. With regard to fiduciary accountability, there is almost always a requirement that finances be managed in a manner appropriate both for the proprietors or investors and for the state (which has usually got expectations related to taxation, compliance with laws, and in some senses with ethical norms of behaviour). Sometimes a political mechanism is used to ensure fiduciary responsibility (shareholders' meetings; Board elections), sometimes a more administrative approach (appointed Boards, Annual Meetings, Annual Reports, etc.). The market also imposes its own kind of accountability: investors/shareholders/consumers “vote” by providing or withdrawing resources. This environment should perhaps be examined to see if any models can be found that would have lessons for ICANN, but the fundamental difference between the imperatives of for-profit businesses and not-for-profit organizations may muddy the waters.”<sup>150</sup>

In the light of these observations and the tensions between a public role and a corporate role, transparency obligations may start to cease functioning as intended. Indeed, for quite some time corporations have been proactively developing transparency frameworks for their corporate policies in areas where there currently are no legal obligations for such transparency. So ICANN's “corporate” side of the brain could be set at ease- in as far as transparency is concerned.

## ICANN as a sui-generis institution

On the other hand, regardless of these developments, ICANN still legally remains a corporation with obligations as a corporation. This specific characteristic is best addressed—if one does not aim for an even more fundamental change—by acknowledging that ICANN is a sui generis institution<sup>151</sup> with elements of an international standard organization and a government agency

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<sup>149</sup> See also Promotion of Access to Information, Act 2, Part 2, Ch.1, Sec. 11 (2000) (So. Africa) (codifying that requesters have access to certain records from “public bodies” that do not fall under an enumerated exception), available at <http://www.sun.ac.za/university/Legal/dokumentasie/access%20to%20information.pdf>.

<sup>150</sup> GAC, “Communiqué 30- Los Angeles,” October 31, 2007, at 7f.

<sup>151</sup> John Palfrey, “The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed,” 17 Harv. J.L. & Tech. 409, 410 (Spring 2004).

or government<sup>152</sup> and a non-for-profit organization under Californian law. As Palfrey had already observed in 2004:

“[T]he Board appears largely to have based its decisions upon the recommendations of professional staff and of the powerful Supporting Organizations (SOs), in which users can participate. An Internet user approaching the ICANN process from the outside would have little way to determine how to participate meaningfully in the decision-making process<sup>153</sup> . . . .

“Would-be participants, and even academics with a lot of time on their hands, must work hard to seek to understand the decision-making process. From a formal, legal perspective, ICANN is a corporation, governed by the laws of the state of California, USA, and more immediately, by its own charter and by-laws. From an historical perspective, ICANN has certain attributes in common with a standards body, a partially volunteer-driven effort that joins interested persons in their individual capacity, a variety of corporate interests, and a substantial number of academics from around the world.<sup>35</sup> From a functional perspective, though, ICANN has elements of a government entity, in this case an association of persons joined by a compact to make decisions about a particular process or series of interests, and functioning most like an administrative agency.”<sup>154</sup>

Due to this hybrid character, ICANN should not only be looking for public sector examples or new strategies in the corporate area, but also for other similarly hybrid role models. Eventually, ICANN must develop its own full brain and courage—even if *sui generis*.<sup>155</sup>

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<sup>152</sup> Ibid., at 409-20.

<sup>153</sup> Ibid., at 409-10.

<sup>154</sup> Ibid., at 409-20.

<sup>155</sup> See e.g., Asian Development Bank, <http://www.adb.org/>, which is a similar hybrid organization that is currently reviewing its Accountability Mechanism Policy and its transparency framework. See also ADB, <http://www.adb.org/AM-REview>. The ADB already publishes on its website *inter alia* the list of all information requests which it has denied including the reasons for denial. ADB, “Disclosure Requests,” <http://www.adb.org/Disclosure/requests.asp?d=Denied+Requests>. As of June 2010 a new Public Communications Policy is under review. ADB, Public Communications – PCP Consultation,” <http://www.adb.org/Documents/Policies/public-communications-policy/pcp-consultation-draft01.pdf>.