



Comment
on the
Internet Corporation for Assigned Names and Numbers
Office of the Ombudsman
Literature Based Evaluation Report

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Introduction

In order to be both well understood and an optimal performing ombuds program, the Internet Corporation for Assigned Names and Numbers (ICANN) Office of the Ombudsman (the Office) has developed and initiated an exceptionally complete and deliberate assessment process. The “Literature Based Evaluation” (the Report) and this analysis (the Commentary) of that Report are two, new-to-the-field assessment process components. The Report intends to demonstrate that the Office design is well grounded in available theory. The Commentary is to fact-check and verify that claim.

Background and Overview

Ombuds programs are enacted to deal with conflict. While rarely stated as such, these programs are intended to be functional; to achieve some end. For example, certain organizational ombuds programs, assessed by the author, were deployed with the intent to decrease the host organization’s litigation exposure. Classical ombuds by contrast exist to enhance the ability of citizens to gain the attention of, and appropriate reaction from government systems. A third type, executive ombuds, exist in either the public or private sectors and receive issues from either the public, a regulated community, or members of the host institution with the intent of addressing mis-steps or failures-to-act by that institution.

When one endeavors to determine what any ombuds program, of any type, does or achieves, the absence of established measurement, evaluation, and assessment criteria immediately becomes apparent. Only recently has the subject received meaningful attention. Much more remains necessary. This is the context in which the Office has initiated its assessment process.

In the Report, Frank Fowle ICANN ombudsman posits that his Office embodies in its structure and intended operation the theoretical criteria present in the limited literature, so as to resemble an ideal program. In my professional opinion the Report obtains this objective, making clear that needed elements are present. Further, if the Office performs to the intent of the design it will in fact be model, and likely be both effective and valuable.

Commentary Purpose

ICANN, through the Ombudsman, requested this Commentary in order to assure the factuality of assertions of the Report. Simply stated, regarding the Literature Based Evaluation this Commentary answers:

- Was the methodology sound?
- Were the findings accurate?
- Do the findings suggest adjustments to the Office for enhancement?

Neither this Commentary nor the Report are about program performance. The focus is intention. This demarcation is critical and the Report crosses it on occasion (Paragraph 2 on each page 42 and 43 offer examples). Neither document quantifies Office activities (measurement). Neither examines Office measures to generate a value proposition (evaluation). Nor do the documents pursue whether ICANN achieves, by creating the Office, any intended outcome (effectiveness). These activities are worth pursuing and on page five the Report states each will be. The Report and this Commentary examine if the intended structure and planned operations reflect the relevant theory and thereby afford the Office the opportunity for measured high performance, significant value creation and achievement of intended effect. Focusing first on intent, structure and theory is exactly the right and recommended departure point.

Process

This Commentary was developed through close review of The Report, after consideration of all the noted literature (all of which was previously familiar to the author). Each of the Office's empowering documents (Article V of the ICANN Bylaws, the Ombudsman Framework, the Results Based Management and Accountability Framework, etc.) were also scrutinized. Additionally, the Chair of the ICANN Audit Committee was interviewed via telephone to develop information exchange protocols and define desired end-points. Finally, the ICANN Ombudsman and the author conducted an ongoing iterative process via telephone and e-mail exchange.

Challenges

While the Report expands the envelope thus creating new space in the arena of ombuds assessment, it faces two major issues, both external to the program itself.

The first challenge is endemic to the consideration of ombuds programs: the weak lexicon and lack of accepted practices for assessment effect all who examine ombuds. The amorphous nature of ombuds program performance, in general, along with the dearth of rigorous thinking exacerbates the challenge of separating measurement from evaluation from effectiveness. The Report struggles with this issue as well, including in the opening paragraphs of the introduction, where evaluation is expanded to subsume effectiveness.

Constituting the second challenge is the absence of standards of practice for executive ombuds. On page 9, the Report states that the ICANN Office is “an Executive Ombudsman.” However, the opening page of the Ombudsman Framework declares, “The Ombudsman will adhere to the standards of practice adopted by The Ombudsman Association (*sic*).” These standards serve organizational ombudsman, not executive. TOA (now IOA) standards strongly object to certain practices (investigation, decision-making, on-line case related communications,) demanded of the Office by the Bylaws and the Results Based Management Framework. While executive ombuds may be thought of as a hybrid of the classical and organizational models, there is a limit here.

Unfortunately there are NO espoused public standards of practice for executive ombuds. The IOA standards are employed for the Office because they are “as good as it gets.” The confusion created by citing the IOA standard ensnared the author, an experienced practitioner in the field. It could quite possible impact others as well, including users. This lack of clarity may effect user expectations for the Program, and thus performance and assessment.

The Office is not responsible for the absence of executive ombuds standards, nor assessment protocols, but must still manage these challenges.

The Report

Goal & Literature

With the intent of comparing the formative development of the Office with standards and criteria present in the literature, the first step was to search for appropriate sources.

As the Ombudsman writes in the Report (and as suggested in this Introduction) there exists in the public domain “no documentation specific for these purposes.” Accepting this, Fowlie turned to the more generalized literature. The Report names seven different pieces. Expressing a desire to utilize literature that states criteria in the positive and to focus on design rather than case outcomes, the relevant literature was narrowed to three sources.

In selecting the three works for the Report, the Ombudsman has demonstrated a clear understanding of the hybrid nature of an executive ombuds program. Rick Russel’s Creating the Ombuds Office is largely targeted to organizational ombuds design (the assertion that an ombuds is only as good as its investigations being a notable separation). The United States Ombudsman Association’s primer Essential Characteristics of a Classical Ombudsman, as the title implies is intended for classical programs. The final selected work, The American Bar Association’s Standards for the Establishment and Operation of Ombuds Offices is a broad overview speaking to ALL types of programs.

No other set of three works on ombudsmanry would have covered a broader spectrum, been any more worthy of considering, or offered as complete a list of criteria. This was a more than adequate review of the literature and results in a very significant list of criteria.

Criteria

Drawing on the three sources, the Report presents 54 criteria to compare with the Office's empowering documents (ICANN Bylaws, Frameworks, etc.) and with the enacted processes (data management, budgeting, hiring etc.). The complete list of criteria is presented in the Appendix.

The Report briefly discusses how certain of these criteria are present in each of the three works and may therefore be considered "universal" criteria (page 10).

More could have been done though to discuss the overlap amongst the criteria. While each is important and specifics do distinguish the criteria, significant overlaps exist. The Report itself in no less than three places, states how one criterion is met by citing the description for other criteria. Page 46 offers the best example of this, where Criterion 52 is considered. At least four sets, encompassing 11 criteria (A. 28, 30, 37; B. 35, 48; C. 40, 47, 53; and D. 43, 46, 52) appear to be so similar as to constitute a single element. This overlap is in part due to the fact that Essential Characteristics of a Classical Ombudsman refines and expands on points directly from Standards for the Establishment and Operation of Ombuds Offices.

Whatever the reason for the overlap, core principles exist (Alignment, Integration, Independence, Confidentiality, Neutrality, Impartiality, Administration, and Oversight) that effectively group the 54 criteria and would have simplified the presentation while adequately expressing the necessities. However, the rigorousness and detail offered is part of what makes the Report a breakthrough work in the field. The criteria list could, with minor modification, be applied to ANY ombuds program to vet whether it is properly designed, empowered and enacted.

Achievement of Criteria

For each of the 54 criteria, the Report describes how the Office meets the criteria. For most, 34 of 54 or 63 percent, direct reference or quotation from empowering documents are made. For each claim of empowerment by document, the author examined the document in question and agrees it offers the authority reported.

Explanations for 31 percent of the criteria assert enacted processes or actions to claim achievement. For example, a description of the hiring process for the Adjunct Ombuds serves to show how criterion 33 “Independence – Sole authority to hire staff” is met. These were checked via discussion with the Ombudsman or the Chair of the Audit Committee. All assertions made in this manner appear also to be accurate.

One criterion cannot be said to have been achieved either via document or Ombudsman action – 6 “Community Buy-in.” This criterion can only be achieved through appropriate program development involving stakeholders, roll-out, and then performance. According to the Report and the Audit Chair, many stakeholders were involved in the decision to implement the Office. Further, as the Board is largely “stakeholders” some degree of buy-in can be considered as present, since the Board has elected to have the program and continue it.

The only possible mechanism to determine Community Buy-in is surveying. Given the potential user population (every domain name holder or internet user on the planet) this is an overwhelming and in fact unadvisable task. Narrowing the survey pool to identified constituencies (those with issues in the past, high risk communities, etc.) would simplify the task. Through out-reach initiatives the Office is at once querying Community Buy-in and developing it. Community Buy-in to some degree will be demonstrated by program usage (which while occurring, is beyond the scope of this Commentary).

Similarly, criterion 13 is not demonstrable by enabling document or action. Even so a “qualified and knowledgeable incumbent” does occupy this position.

Previous experience as an Ombuds, advanced degree in the field (with pursuit of a terminal degree in process) and a high level of involvement with relevant professional associations serve to convince the author of this.

One criterion simply does not rise to a standard acceptable for consideration. Discussed on page 27, criterion 19 is not particular to ombudsing. “Balanced Time Management,” doubtlessly is something every program should aspire to. However, it is not definitive of ombudsing per se. Other criteria that are undertaken by other non-ombuds functions (17 Filing System, 18 Data Base) describe specific and necessary nuances (access limited to the ombudsman and confidentiality protections respectively) as to be useful and definitive of ombudsing. Not so 19.

In total, approximately 50 meaningful criteria have been extrapolated from the selected literature. The Report clearly conveys how these criteria are “at work” within the Office. It is the author’s professional opinion that overall and to a more than acceptable degree, the criteria are being achieved as described.

Considerations

The structure of the ICANN Office of the Ombudsman appears sound and thereby suggests performance. Several issues rose to the author’s attention though through the preparation of this commentary, any of which potentially could dramatically impact the Program and its performance. Careful consideration and appropriate action in regards to each will likely enhance and preserve the Office.

Integration/Board and Committee Responsiveness

While Criterion 1 makes clear there is significant Alignment between the Office and the organization’s goals, culture and aspirations, significant questions regarding the degree of Program integration (active connection) are raised by the Report. There are descriptions of at least three interfaces between the Ombudsman and either the full Board, or Committees of the Board that have not occurred in accord with policy, or been completed at all.

Specific to this effort, the failure of the Governance Committee to ratify changes to the Ombuds Framework is very disconcerting. The Framework is an empowering document for the Program. Many of the assertions of criteria achievement made in the Report would in fact be null without the Framework is. Also contributing to this concern is the assertion that the Governance Committee has yet to formally ratify the "After One Year Update." Further, that a recommendation from the Ombudsman raised to the Board's attention was not managed within the 60-day window stipulated augments concerns about integration. Quite possibly, any one knowing of these events could question the regard that the Board and Committees have for the Office. As the Office may not make Binding decisions regarding policy etc., and that its singular power is suasion through communication, when protocols of communication and timelines are not upheld, what power the Office has is diminished.

I encourage the Board and the Committees to address these standing issues as soon as possible, and manage interaction with the Office in the future within prescribed time limits.

Size of potential user population/Resources

The breadth of the potential service population (literally the entirety of the on-line community) is staggering. The potential clearly exists for the Office, managed by a sole practitioner (with limited support for travel and leave) to be completely overwhelmed by caseload. In my professional opinion no other ombuds program of any type, has a larger potential user population. The volume of potential users creates a challenge for deploying resources both currently and especially in the future. The Office has conducted worthwhile outreach in a purposeful manner. But reaching the entirety of the population is almost impossible. Appropriate agency strategies (informing others so they may direct users to the program) are in position. These worthwhile efforts could be a double-edged sword if too many new users are "created."

Hopefully the Office succeeds at aiding the organization to improve performance and fairness through the Program's trend recognition, recommendations and other inputs. Even so, caseload data must be carefully monitored for up turn. Environmental factors possibly leading to increased case loads also warrant watching. It is possible that a policy change, market event, or other input could radically increase usage thus overwhelming the Office.

Confidentiality

No issue more prominently contributes to the identity of an ombuds program, or presents more risk, than confidentiality. Not surprisingly, no issue generates more debate and contention in the field.

Overall, the structure of the Office appears to manage confidentiality well. There is one phrasing regarding confidentiality that bears examination. Page 45 of the Report declares, "The Bylaws clearly indicate that the Ombudsman shall determine the confidentiality of complaints." Earlier on page 34, in a discussion of this core trait we read, "The confidentiality is owned by the complainant."

While an ombuds can never control the action of a member of the public regarding what information they make public or not, most ombuds assert that confidentiality belongs to the function, not the user. In this manner the ombuds may better maintain control of their most salient characteristic and assert privilege if asked to testify. If a complainant "owns" the privilege, they may "waive" the privilege, insisting the ombuds engage in behavior derogatory to the function, possibly impacting performance. This phrasing needs revision.

Full Performance Consideration

No program is better positioned to demonstrate activity, value and effectiveness than the ICANN Office. For the good of the Program, the organization and the field, I strongly encourage all involved to continue with the courageous and creative activity to date to measure, evaluate and demonstrate impact.

Appropriate involvement of external parties in this effort is also advisable.

Conclusion

The ICANN Office of the Ombudsman has developed and initiated the single most complete, deliberate, and meaningful assessment process deployed in the ombuds field to date. This process allows the Office to accurately declare it is structured to, and appears to function as, an ideal executive ombuds on behalf of the ICANN community.

Page 49 declares the Report,

...set out with a view to determine three things:

- a) Whether the Office resembles what an ideal Ombudsman institution should look like;
- b) To determine (and identify) if there are gaps in the Ombudsman program, or in the institution relating to the Ombudsman; and
- c) To acknowledge if there are standards of practice which enable the Office of the Ombudsman to be considered a centre of excellence in the field.

Each of these three questions may be answered with a strong, "YES."

As to a), the Office was thoughtfully designed and appears to have been deployed and managed with exceptional rigor and professionalism. While demonstrating the criteria needed to resemble an ideal program, perhaps more importantly the Office embodies the needed elements to achieve its intention – expanding fair treatment of those with issues regarding ICANN decisions, actions or inactions. Specific effectiveness measures need to be deployed to ensure this perception is accurate.

While the gaps intoned in b) do indeed exist, none are so dramatic as to lead the author to feel they will significantly damage program performance. As the Office evolves (it is neither mature nor fixed), easy opportunities to close what gaps exist, such as the contradiction of models raised earlier, will present

themselves. This is especially true given the number of assessment activities both already executed and planned for the future, as well as the demonstrated commitment to involve external expertise, and communicate assessment findings to ICANN and the public.

However, profoundly more concerning is the degree of integration with, and quality of communication between the Office, the ICANN Board and certain line staff. While better than some other programs, room for improvement exists. Failure by Board Committees to ratify submitted Ombudsman Policies, most notably the Ombudsman Framework, and the full Board to respond within time limits to Office recommendations risk creating the appearance that the Ombudsman is aligned with ICANN but not integrated in such a way as to impact it. While maintaining boundaries, ensuring independence and neutrality the Board, staff, and the Office of the Ombudsman must continue to develop effective and appropriate communications

Especially as concerns both internal and external assessment of the function, the Office of the Ombudsman at ICANN already is a centre, perhaps even THE centre of excellence. Thus the yes to query c) above.

In summation, the Report engaged a reasonable methodology that led to factual accurate findings that well represented the reality of the Office structure. Certain adjustments likely to result in program enhancement, if enacted, were discovered through this Report and Commentary.

ICANN, the community it regulates, and the ombuds field in its widest definition do benefit from the Office. There is every reason to believe this will continue. Further, it appears likely the benefits to each of these groups will grow.

Author

John W. Zinsser, co-founder of Pacifica Human Communications, LLC., designs and executes mechanisms to determine the value return and effectiveness of conflict management systems, especially ombuds programs. Having conducted the three largest ever external assessments of ombuds programs, and written on the subject for more than a decade (beginning with his 1995 Masters of Conflict Resolution thesis "Perceived Value of Considered Approaches to Internal Conflict in Business Organizations,") he was also awarded the Office of Personnel Management's President's Award for Outstanding Federal ADR program for what the judges described as exceptional accountability initiatives.

Guidance

The information herein is of a general nature and not intended to address any particular individual or entity's situation. No one should act upon such information without appropriate professional advice until after a thorough examination of their actual situation. These concepts have not been vetted for accordance with any applicable law. As with any guidance potentially impacting rights, all are encouraged to confer with legal counsel.

While Pacifica Human Communications, LLC., endeavors to provide accurate and timely information, there can be no guarantee that information remains accurate as of the date received or reviewed, and may not continue to be accurate in the future. The estimates and opinions offered here are based on Pacifica's research, emerging best practices, and information in the public domain.

Appendix

Summary of Evaluation Criteria and Standards

| | Ombudsman Criteria | 1) Agree Dispute Resolution | 2) United States Ombuds. Assoc. | 3) American Bar Assn Ombuds Cntr |
|----|---|-----------------------------|---------------------------------|----------------------------------|
| 1 | Alignment | √ | | |
| 2 | Autonomy - Arm's length - Independence | √ | √ | √ |
| 3 | Due process - Natural Justice Principles applied | √ | | |
| 4 | Sufficient Resources | √ | √ (32) | |
| 5 | Access to Information, documents, staff | √ | √ (46) | √ |
| 6 | Community buy-in | √ | | |
| 7 | Clear mandate | √ | | √ |
| 8 | Recourse – Moral Suasion - Public Criticism | √ | √ (40) | |
| 9 | Accessibility (promotion - availability to the community) | √ | | |
| 10 | Power of Own Motion | √ | √ (45) | √ |
| 11 | Annual Report | √ | | |
| 12 | Established Terms of Reference (TOR) | √ | | |
| 13 | Qualified - Knowledgeable Incumbent | √ | √ (36) | |
| 14 | Advisory group | √ | | |
| 15 | Active Public Relations Campaign - community education | √ | | √ |
| 16 | Structural Autonomy and Accountability | √ | | |
| 17 | Filing system | √ | | |
| 18 | Data base | √ | | |
| 19 | Balanced time management | √ | | |
| 20 | Reporting relationship with advisory and budget group | √ | | |
| 21 | Review of start up policy - TOR | √ | | |
| 22 | Independence | | √ | √ |
| 23 | Impartiality and Fairness | | √ | √ |

