



9 March 2019

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Dear Messrs. Bernstein and Kirikos:

As you are aware, my office has been reviewing the matter of the complaints issues within the Rights Protection Mechanisms PDP Working Group, as Mr. Kirikos raised questions as to the objectivity of some of the RPM Co-Chairs in reviewing his complaints as well as complaints involving Mr. Kirikos.

Along with Samantha Eisner, a Deputy General Counsel in my department, I have had conversations with each of the Co-Chairs (Brian Beckham, Phil Corwin and Kathy Kleiman) as well as with Greg Shatan, the complainant at issue. We realize that we've only heard one part of the record, and we are laying out our understanding here for Mr. Kirikos' information and to serve as the basis for further conversation. If you have other documents or input of which you believe we should be made aware, please let us know.

There are two main questions at issue:

1. Was the conduct here in violation of ICANN's Expected Standards of Behavior; and
2. If so, what types of response do we recommend the GNSO Council consider.

Violations of the Expected Standards of Behavior Are Subject to Consequences

On 23 October 2018, Mr. Bernstein writes on behalf of Mr. Kirikos that ICANN's Expected Standards of Behavior are "non-binding" and "never intended to be enforceable at law." As a result, where Mr. Kirikos uses "non-violent, non-threatening speech", and "[n]o one has been harmed [and] no one's participation rights have been curtailed," the inquiry into his behavior is a "campaign" and an "uncertain and unfair process." The basis of the argument is that the rationale for the Board's 25 June 2016 acceptance of the revised Expected Standards of Behavior states "[t]he Board notes that the Expected Standards of Behavior

are meant to be high level, and general statements about how ICANN participants should treat each other, and they are admittedly not meant to be formal policies of conduct with defined actionable consequences.”

Mr. Bernstein’s characterization, however, does not appear to take into account the Board’s clear statement that “the goal is to be broad in definition as possible to make clear that there is zero tolerance for the conduct addressed in the revised Expected Standards of Behavior.” The Board “expects any evaluation of conduct that might be challenged” to take certain aspects into account, which can only support the conclusion that the Board expects for conduct alleged to be in violation of the Expected Standards of Behavior to be challenged and evaluated. While there are not “defined” consequences, all parts of ICANN have relied on the Expected Standards of Behavior since it was first developed in 2008 as a tool to encourage participation that is appropriate in a multi-stakeholder environment. Chairs and other community leaders have imposed various consequences across the years, such as requiring apologies, muting or removing a participant from a mailing list, or removing offenders from remote participation tools where the improper conduct has occurred. Within the ICANN organization, we have an obligation to uphold these Expected Standards of Behavior to allow policy development to continue and encourage participation in our multistakeholder processes.

I do not concur with and cannot support the claim that ICANN, or any of the parts thereof, are powerless to use the Expected Standards of Behavior to address behaviors that violate those standards, even when the actor believes them to be “non-violent, non-threatening speech” or requiring harm or curtailment of participation. These are not the standards to which the ICANN community has agreed across three separate comment periods on the Expected Standards of Behavior (2008, 2012 and 2016).

Further, the GNSO has adopted Working Group Guidelines that specifically rely upon the Expected Standards of Behavior as the tool against which participant conduct is measured (Section 3.4), and Chairs are authorized to restrict Working Group participation as needed if “someone seriously disrupts the Working Group.” (Section 3.7).

Did the Conduct Here Result in Violations of the Expected Standards of Behavior?

From our review, it appears that there are points when the Expected Standards of Behavior were violated. There also appear to be times when statements, though not made with the best judgment, did not appear to be in violation. Also, my office will be flagging for the Co-Chairs and GNSO Council Leadership that there are certain statements from Mr. Shatan that could potentially be considered violations of the Expected Standards of Behavior as well.

The initial 4 May 2018 interventions raising an objection as to Mr. Beckham’s appointment as co-chair, while not fully on point to the subject matter of the working group, do not

appear to be violations of the Expected Standards of Behavior. Neither is most of Mr. Shatan's initial 6 May 2018 response to that challenge, though the need for extensive conversation of WIPO's actions does not really appear to further the work of the group. Our perceived assessment of an escalation and crossing of the Expected Standards of Behavior starts with your 6 May 2018 response to Mr. Shatan, and continues from there. As discussed below, we also note that Mr. Shatan's conduct could be perceived to violate some of the Expected Standards of Behavior.

Extensive focus on issues outside of ICANN's responsibility: One of the issues that is of concern as we review the record is the discussion of issues that are not geared towards the group's policy development work. ICANN's volunteer community has a substantial amount of projects before it, and lengthy interventions that are off topic are not aligned with ICANN's Expected Standards of Behavior. The discussion on the RPM list arguing for your preferred outcome for WIPO's publication is a matter outside of the RPM's work (see 6 May 2018 and 7 May 2018 emails) and outside of the Expected Standards of Behavior.

Unprofessional and Disrespectful Tone: In response to Mr. Shatan's intervention, it is our opinion that the tone of your responses escalate to a level that is not respectful and does not support consensus building. For example, we observe an attempt to discredit Mr. Shatan's contributions by referring to him as a loser who took a "shellacking" that needs an "Idiots Guide" and suggesting that he seeks to promote "blissful ignorance" on a matter which you do not agree upon.

This, of course, does not excuse the tone of Mr. Shatan's email to you. In particular his email of 6 May 2016 where he introduced the concept of "alternate reality," is also not in the spirit within which we expect participants to behave. However, this also does not excuse your decision to expand upon these concepts in creating what we perceive to be a detailed personal attack on Mr. Shatan. Inappropriate behavior is not overcome nor justified by other inappropriate behavior. You affirmed in your 8 May 2018 email to the co-chairs your intention to "bounce[] it right back upon you," which could be read to suggest that your full purpose for that email was to discredit Mr. Shatan. Also in that 8 May email, you went further, stating that Mr. Shatan is "superficial", and suggesting that it might be appropriate for you to bring up anything that you could find in Mr. Shatan's work record as fodder for personal attacks ("You opened the door . . . when you brought up your own history and credentials"). You refer to Mr. Shatan's "whining", and suggest that because your conduct does not match Mr. Shatan's past violations of the Expected Standards of Behavior, he shouldn't have the ability to complain.

The level of escalation and personal attacks observed in this chain have no place in ICANN's multi-stakeholder processes. This is the exactly the type of exchange that, if the Expected Standards of Behavior had been adhered to, would not have occurred. Conversations should remain on-topic. Conversations should not be about outside parties and how those

outside parties wronged someone. Participants should not be subject to personal attack, or to have their past statements and outside work mined in order to personally discredit them. Participants should not have to wade through paragraphs-long emails to see if there are items in there relevant to the work at hand. Participants should not have to worry that if they express disagreement with a particularly vocal member, that disagreement could be met with disrespectful retorts. These are the types of behaviors that are likely to drive people from participation in ICANN processes, that keep their voices silent lest they too be subject to attack. These are the types of personal interest-driven behavior that quiet meaningful conversation to consensus, and do not support good faith or ethical participation. Participants in working groups have challenging enough issues to worry about without the specter of being met with another participant's wrath if there is disagreement.

ICANN's open policy development processes are not designed for anyone to come in and make any statement they wish on any topic. While all relevant voices should have the opportunity to be heard on a topic, there is a collective responsibility to make interventions on topic, and in a respectful manner. By the terms of the Expected Standards of Behavior itself, it requires that "[t] hose who take part in the ICANN process must take responsibility for ensuring the success of the model by trying to build consensus with other participants."

As detailed above, the Expected Standards of Behavior have been violated in multiple and significant ways.

Potential Response from GNSO Leadership

I await any additional information you wish to share with me, and will consider that before providing any inputs or guidance back to the GNSO Council Leadership.

If I were referring this matter to the GNSO Council Leadership today based on the record currently in-hand, I would be recommending to the GNSO Council Leadership that it has broad leverage in how it addresses these perceived violations of the Expected Standards of Behavior. As discussed above, violations of the Expected Standards of Behavior can result in consequences ranging from an apology to removal from a group, and any variation in between. As this situation likely has moved beyond one that can be fixed by a mere apology, it is my recommendation that any other action could be supported by the record at hand. I also note, however, that when I discussed with the Co-Chairs what they each saw as potential avenues for addressing your behavior, two of the Co-Chairs were not supportive of recommending your removal from the RPM Working Group at this time. Notably, two of the Co-Chairs were also very concerned with allowing this manner of participation to continue unfettered, based on their opinions that behavior such as that reflected in the above-referenced chains could ultimately frustrate or hinder the policy development process. Under the record that exists today, if the GNSO Council Leadership were to

support your remaining a member of the RPM Working Group, I would encourage the GNSO Council to pay close attention to your continued manner of participation and provide to you the terms that could lead to a temporary or permanent removal from the RPM Working Group.

Ability of Co-Chairs to Adjudicate Complaints

Like you, many participants in working groups have been part of the ICANN community for a long time. Participants have many prior interactions and experiences, and at various time find themselves on different sides of issues. I understand that you have raised issues of potential conflicts of interest from two of the three Co-Chairs of the RPM Working Group, based mainly upon experiences from outside of their conduct on the RPM, and not in relation to the issue that served to give rise to the complaint or appeal within the RPM. This served to make the Co-Chairs reluctant to address the complaint and reach any resolution, and turned a relatively straightforward issue of behavior into a matter for the GNSO Council Leadership to solve.

I also understand that on 5 February 2018, you raised a new appeal under Section 3.7 of the GNSO Working Group Guidelines directly to the GNSO Council chair.

These actions themselves could be considered disruptive, and designed more to deflect from the issue of your own decorum and to instead raise questions of whether the Co-Chairs behaved ethically. These challenges are not focused on resolving the issues challenging the work of the RPM. In my view, this in itself does not appear to be a good-faith usage of ICANN processes, and implicates multiple areas of the Expected Standards of Behavior.

For example, I understand that your dissatisfaction with Brian Beckham relates to a dispute you have with his employer and the criteria his employer used to identify UDRP-related matters that it would post on its site. You did not support Mr. Beckham to serve as a co-chair of the group, and spent significant time on the RPM list discussing his employer's publication practices. For Mr. Corwin, the conflict appears to be based upon the fact that you were involved in a dispute with him in a separate PDP Working Group. Neither of these challenges, however, are based on facts of why there would be a conflict of interest in considering the claims raised by Mr. Shatan, and instead raise what appear to be inapt and unfounded questions of the professional ability of the Co-Chairs to focus on the issue at hand. This is not the type of behavior to which volunteers within the ICANN community should be subject.

Role of Attorneys in Procedural Appeals

One of the issues that arose during the conduct of the RPM investigation and appeal is the role of attorneys and whether participants are allowed to use the services of attorneys when participating in complaints/appeals arising from participation in GNSO working groups. While there is nothing within any documented rules or procedures that cover this question, as a general practice I encourage all participants to allow the processes to move forward without introducing the formality or complexity of counsel representation. As ICANN's bottom-up, multistakeholder process relies heavily on volunteers, the thought that participants must resort to counsel representation in informal processes could be a high deterrent against participation. Of course, I understand that many who participate are themselves attorneys, or are otherwise skilled advocates, and getting into a dispute involving such a participant might be daunting. I would first encourage efforts to escalate a dispute, either to chairs, or Council leadership, or to the ICANN Ombudsman, prior to involving external legal counsel.

Next Steps

Prior to completing a recommendation to the GNSO Council Leadership, I am interested in whether there is any further information from the record that you would like us to consider.

Thank you,



John Jeffrey
General Counsel and Secretary, ICANN

cc: Brian Beckham
Phil Corwin
Keith Drazek
Samantha Eisner
Robin Gross
Kathy Kleiman
Paul McGrady
David Olive
Greg Shatan