



4 February 2020

Oscar Robles
Chair, ASO
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Dear Oscar,

ICANN is in receipt of the ASO's Inspection Request pursuant to Section 22.7 of the ICANN Bylaws. ICANN has closely reviewed the Request and after consultation with you regarding the possibility of narrowing the Request, notes that the Request, on its face, exceeds the Permitted Scope as defined in the Bylaws, for reasons as stated below. If the ASO wishes to, in its role as a Decisional Participant, submit a new inspection request that cures the overbreadth and is appropriately stated under Section 22.7, ICANN will consider and respond to a renewed request promptly.

ICANN org recognizes the high level of interest and concern that the proposed transaction related to PIR has raised across the ICANN community. ICANN org has published updates to the community (<https://www.icann.org/news/blog/org-update> and <https://www.icann.org/news/announcement-2020-01-11-en>) regarding the process, including encouraging PIR to allow for maximum transparency in publishing documents related to PIR's request and ICANN org's subsequent request for additional information. ICANN org will continue provide updates to the ICANN community as it is able, including more information on the status of ICANN org's evaluation. The Change of Control process, as applicable to ICANN org's Registry Agreements, is discussed generally at <https://www.icann.org/resources/change-of-control>.

Continuing to strive for transparency in this process is important, as is properly respecting and understanding the powers and roles that the ICANN community took on in forming the Empowered Community. When the ICANN community, through the Cross Community Working Group on Enhancing ICANN's Accountability (CCWG-ACCT), recommended the formation of the Empowered Community and identified the powers that the Empowered Community could exercise, the CCWG-ACCT provided clear limitations on those powers. In relation to the Inspection Right, the CCWG-ACCT explicitly stated that the Inspection Right is different from the DIDP (<https://www.icann.org/resources/pages/didp-2012-02-25-en>) and has a different scope:

This inspection right is distinct from the Documentary Information disclosure Policy (DIDP). While any eligible party can file a request according to the DIDP, inspection rights are only accessible to Decisional Participants in the Empowered Community. The scopes are also different as explained below.

This inspection right would include the accounting books and records of ICANN, and the minutes of proceedings of the Board of Directors and committees of the Board of Directors.

CCWG-ACCT Report, Annex 1, Paragraphs 31-32.

Under every reading of the Bylaws, the CCWG-ACCT Report and the California Code section that the Inspection Right is based upon, it is clear that the Inspection Right is not a tool for Decisional Participants to seek documents beyond accounting records and minutes. This limitation must be respected.

The ASO's request exceeds the Permissible Scope in three different ways:

First, the Request does not actually appear to seek the limited set of books, records and minutes that is accessible through this Bylaws section. The Request seeks "[a]ny ICANN records which pertain to or provide relevant insight to the process by which ICANN will consider (and potentially approve) the assignment of the .org Registry Agreement, including the process by which input from the affected community will be obtained prior to ICANN's consideration and potential approval of the assignment." On its face, this Request for process documentation (or intent thereof) is not related to any accounting or financial ledger. Therefore, the only item this could be considered to request are minutes of the Board or committees. However, as the ICANN org has been evaluating the contractual request, there are not minutes of Board or Board committee proceedings that show Board deliberations on the intended process. Even if there were presentations on the process made to the Board, the Inspection Request does not entitle the requestor to the underlying source documentation. The Bylaws, at Section 22.7(a), makes clear: "[a]ny Inspection Request shall be limited to the accounting books and records of ICANN . . . a. and shall not extend to the underlying sources of such accounting books or records".

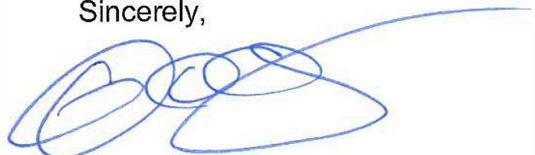
Second, this Request seeks information on a small and isolated part of ICANN's operations and management, specifically the process through which ICANN will consider a gTLD contractual assignment request. The Inspection Request right is for books and records relevant to ICANN's operation as a whole, "and shall not extend . . . to documents only relevant to a small or isolated aspect of ICANN's operations." (Bylaws, Section 22.7(a).)

Third, the Request does not identify any purpose "reasonably related to such Inspecting Decisional Participant's interest as a Decisional Participant in the EC" other than the speculative "purpose of determining whether the ASO may have need to use its empowered community powers in the near future relating to the potential assignment of the .ORG Registry Agreement." While the ASO's wish to "confirm[] the process that will be used for review of the assignment of the .org registry agreement . . . [to] enhance the transparency of the decision making and strengthen public trust in ICANN" is a goal that is aligned with ICANN's efforts on transparency in relation to this transaction, this is not a purpose reasonably related to the ASO's interest as a Decisional Participant. Through the Empowered Community, Decisional Participants exercise specific, enumerated powers. While an important vanguard for upholding ICANN as an accountable and trustworthy entity, the Empowered Community's "sole purpose . . . is to exercise its rights and perform its obligations under ICANN's Articles of Incorporation and these Bylaws, and the EC shall have no other powers or rights except as expressly provided therein.

The EC may only act as provided in these Bylaws. Any act of the EC that is not in accordance with the Bylaws shall not be effective.” (Bylaws, Article 6, Section 6.1(c).) If the ASO renews

its Request, ICANN org requests that the ASO provide more specificity as to the how such Request is related to the ASO’s interest as a Decisional Participant, and not solely as an interested member of the ICANN community.

Sincerely,



John O. Jeffrey
General Counsel and Secretary, ICANN

cc: ecadmin@icann.org