

23 August 2018

RE: Response to Complaint Regarding Handling of Contractual Compliance Complaint

Brian Winterfeldt
Winterfeldt Intellectual Property
Via electronic mail

Dear Brian Winterfeldt,

Thank you for your submissions. On 8 March 2018, your firm, Winterfeldt IP Group (WIP), submitted seven complaints to the Complaints Office related to the ICANN organization's (all subsequent uses of "ICANN" refer to the ICANN organization) handling of a Public Interest Commitments report (PIC report) which you submitted, pursuant to the [Public Interest Commitments Dispute Resolution Procedure](#) (PICDRP), on 24 October 2016 regarding Public Interest Commitments (PICs) made by the .FEEDBACK Registry Operator (RO) in Specification 11 of its [Registry Agreement](#). ICANN subsequently referred your PIC report to a panel, pursuant to Section 3.3. of the PICDRP. The panel found that the RO, Top Level Spectrum, Inc., was in breach Section 3c of Specification 11 of its Registry Agreement, which led to the issuance of a [notice of breach](#) to the RO. The RO, through remediation, cured the notice of breach, however you were dissatisfied with ICANN's handling of this matter and the outcome which led to your submission the seven complaints.

I appreciate you bringing this to my attention. I've researched this issue with various departments inside ICANN and worked with the relevant teams to provide you with this response. While you submitted seven separate complaints, all seven complaints are regarding the same matter and are therefore interrelated. I am issuing one response to cover all seven complaints and have done my best to cross reference the related complaint(s) where appropriate. By issuing one response I am able to provide you, the ICANN stakeholders, and the ICANN org with a coherent response that addresses the entire scope of your experience.

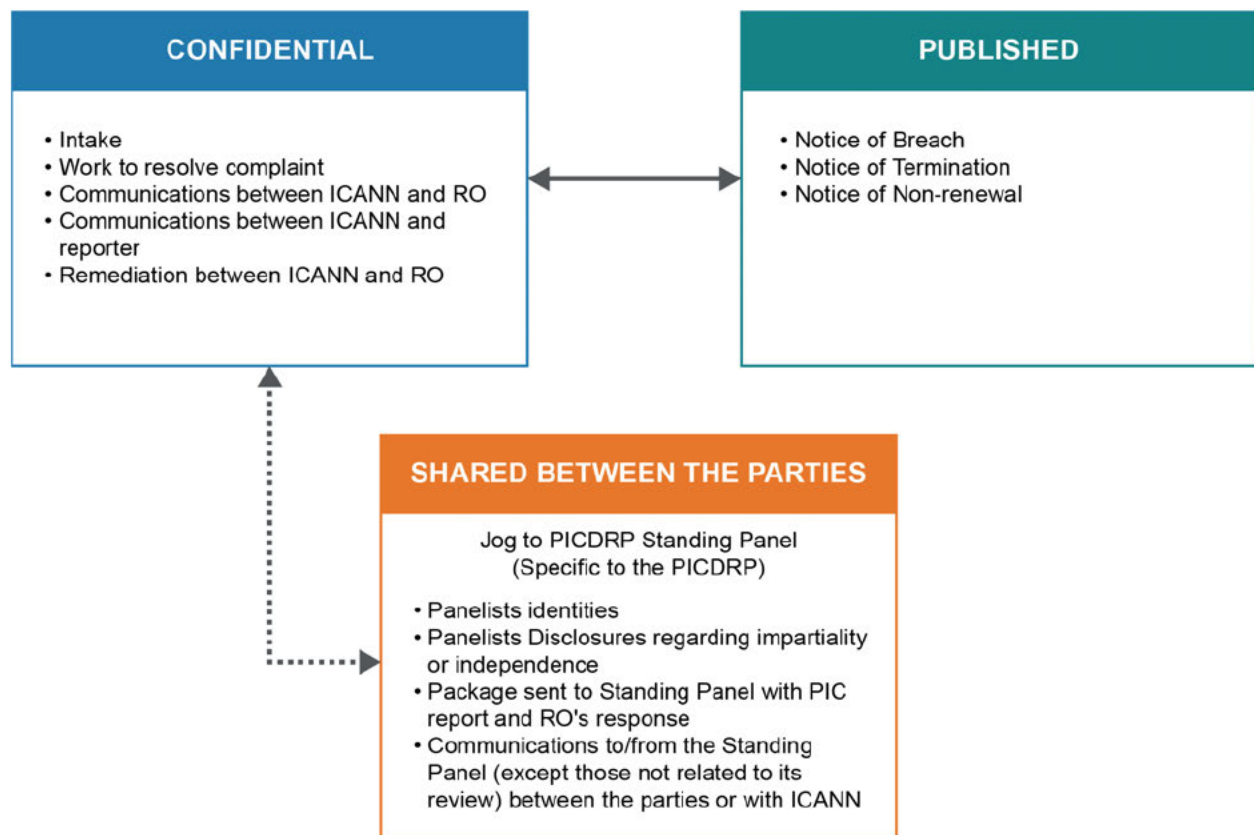
I have researched and analyzed all of the issues raised in your complaints, and they are addressed in detail below. Included in the below details, are a description of several identified opportunities for improvement that ICANN is working on. However, to summarize - ICANN is working to:

- ⦿ update its PICDRP operational process for handling PIC reports that are referred to a Standing Panel. Most of these changes revolve around implementing understood practices of information sharing with parties to an alternative dispute resolution process where a third-party panel has been invoked and will look at other aspects of the PICDRP operations process to see if additional improvements can be made.
- ⦿ provide documents to the relevant parties to your PIC report, which align with the information sharing improvements being made.
- ⦿ conduct an evaluation of a reasonable sample of domain names included in the Whois Inaccuracy complaint you submitted.

General Background:

PICs were originally voluntary which, if offered by the then new gTLD applicant, became mandatory in the ROs contract – should one be executed. Mandatory PICs, applicable to all

new gTLD ROs, were added at a later date. The PICDRP was created to address both mandatory and voluntary PICs and included the ability to “jog” to a Standing Panel. The “jog” to the Standing Panel is a sidestep from [ICANN's Contractual Compliance Approach and Process](#) as the panel is a third-party dispute resolution mechanism and not part of ICANN's established compliance process. The below graphic is a simplified depiction representing the portions of ICANN's Contractual Compliance process and activities that are confidential, published, and shared between the parties (i.e., the jog to the PICDRP Standing Panel). The graphic contains examples under each category and has been designed to focus strictly on the PICDRP in support of this response.



The PIC report you submitted was on behalf of a consortium of WIP clients and claimed the RO had violated Specification 11, Sections 3a and 3c of the .FEEDBACK Registry Agreement. After reviewing the complaint and following initial steps, ICANN referred your PIC report to a panel of three panelists. Your PIC report was the first one ICANN referred to a Standing Panel. Following its independent evaluation, the panel found the RO did violate Section 3c of Specification 11, but not Section 3a of Specification 11.

Following the issuance of the panel's evaluation results, which were provided to ICANN, your firm and the RO, ICANN issued a notice of breach to the RO and requested the RO to cure its breaches within a given timeframe, which it did.

Following the panel's evaluation results, the breach and remedial actions of the RO, you had multiple meetings with ICANN Contractual Compliance to discuss the outcome of your PIC report and ultimately submitted the seven complaints to which I am responding. All in all, your complaints express concern in three key areas:

1. ICANN's procedures for utilizing a PICDRP Standing Panel need improvement;
2. ICANN's compliance approach and process needs improvement;
3. The outcome resulting from your PIC report was insufficient.

Below I've broken out the three areas of concern that were the subject of your complaints and for each area I provide key details from your complaints, my research findings, and ICANN's response.

1. ICANN's Procedures for Utilizing a PICDRP Standing Panel Need Improvement

1a. Relevant Details from Your Complaints

Your complaints, most notably [C-2018-00005](#), [C-2018-00009](#), and [C-2018-00010](#), contend the following:

- ⊙ ICANN did not provide you with the RO's response to your PIC report.
- ⊙ ICANN did not provide disclosures regarding each assigned Panel member's impartiality or independence to you.
- ⊙ ICANN did not share the identities of the panelists selected for the panel with you prior to the issuance of the panel's evaluation results.
- ⊙ During the proceeding, the panel requested scope clarification from ICANN and received a response; however, those communications were not shared with you.
- ⊙ Your complaint states that ICANN exerted undue influence on the panel by responding to its request for scope clarification, effectively circumventing independent analysis by the panel. This action allegedly disallowed the panel from evaluating whether the RO's purported fraudulent conduct violated its PICs.
- ⊙ Your complaint contends that other ICANN new gTLD dispute resolution panels are empowered to exercise independent discretion in determining the scope of their evaluation, citing the Post Delegation Dispute Resolution Procedure ("PDDRP") contained in the Registry Agreement, and string confusion and legal rights disputes contained in the Applicant Guidebook.

1b. Research Findings:

Following my research, I found the following:

- ⊙ This was the first instance where a PIC report was referred to a Standing Panel, so use of a Standing Panel for evaluating PIC reports had not yet been operationally exercised, making it difficult to identify whether gaps may exist.
- ⊙ ICANN provided the PIC report to the RO. ICANN did not share the RO's response to the PIC report with you.
- ⊙ Once the panel was selected, documents provided to the panel by ICANN included your PIC report and the RO's response to your PIC report.
- ⊙ ICANN emailed the panelists to confirm their availability and request disclosure of any concerns regarding impartiality or independence. No concerns were disclosed. ICANN did not share the panelists' responses with you or the RO.
- ⊙ Specific to the disclosures provided by the selected panelist's regarding their impartiality or independence, PICDRP Section B.4.1 specifies that such disclosures will be provided

by ICANN to the parties. Any reference to "parties" in this response refers to you, the PIC Reporter, and the RO.

- ⦿ ICANN did not share the identities of the selected panel members with you or the RO prior to the issuance of the panel's evaluation results.
- ⦿ It is ICANN's practice to keep the informal activities of the compliance approach and process confidential in addition to the communication between the parties. The formal activities of the compliance approach and process, for example notices of breach and/or termination, are published by ICANN as are PICDRP panel reports supporting published notices of breach (see above graphic).
- ⦿ Reports relating to alternative dispute resolution proceedings handled by a third-party, such as the Uniform Domain-Name Dispute-Resolution Policy, have typically been published by the dispute resolution provider.
- ⦿ Once the PICDRP Standing Panel was invoked the informal compliance approach and process was not applicable to the panel's evaluation as the panel is part of a third-party dispute resolution mechanism.
- ⦿ There are understood practices of information sharing with those who are involved in an alternative dispute resolution process that include how communications are handled between the parties to the dispute and communications to and from the alternative dispute resolution provider.
- ⦿ During the proceeding, the panel requested scope clarification from ICANN and ICANN responded to the request. Neither the request from the panel for scope clarification nor ICANN's response were shared with you or the RO.
- ⦿ The panel's evaluation results state its findings in relation to your contention in your PIC report that there were fraudulent practices and misrepresentations by the RO, noting that there is no obligation on the RO to avoid fraudulent and deceptive practices as cited from Specification 11, Section 3a of the Registry Agreement.
- ⦿ The PDDRP and the PICDRP are post-delegation dispute resolution procedures that are included in the Registry Agreement, whereas the String Contention Objection ("SCO"), and Legal Rights Objection ("LRO") procedures are pre-contracting and pre-delegation procedures.
- ⦿ I found ICANN did respond to the panel's scope clarification questions and that neither the request or ICANN's response were shared with you or the RO.

1c. ICANN's Response:

ICANN agrees there are opportunities for improvement to the PICDRP's operational process, including clear guidelines regarding what documents should be shared amongst the parties and when, and apologizes for any frustration you experienced.

Further, ICANN agrees it should uphold ICANN's commitment to accountability and transparency, as well as understood practices of information sharing with parties to an alternative dispute resolution process where a third-party panel has been invoked, while respecting its remit and contractual authority.

Regarding ICANN's PICDRP operational process:

- ⦿ In August 2018, ICANN initiated a project to update its PICDRP operational process. The estimated timeline to complete the updates is 6-9 months, with implementation targeted to occur prior to the end of fiscal year 2019, however the timeline could be

impacted by factors that are identified during the project. Updates are expected to include:

- Clear guidance regarding what information will be shared amongst the parties and when. Information to be shared with the RO and Reporter includes the initial package that will be sent to the panel which contains the PIC report and the RO's response, the Panelists responses or disclosures regarding impartiality or independence, and the names of the appointed Panelists.
 - All communications from the panel to either party to be shared with the Reporter and the RO, except those communications not related to the panel's review, once the panel is established and through the time when the panel issues its report.
 - Should the panel communicate with ICANN while it is active and regarding the panel's review, said communication to be shared with the Reporter and the RO.
 - Procedural steps that align with upholding ICANN's commitment to transparency, as well as understood practices of information sharing with parties to an alternative dispute resolution process where a third-party panel has been invoked.
- ⊙ Based on the anticipated upcoming improvements, ICANN will provide the following documents to the parties to the .FEEDBACK PIC report; i.e., you and the RO within three months of the publication of this response.
 - The RO's response to the PIC report.
 - The selected Panelists responses or disclosures regarding impartiality or independence.
 - The scope clarification request from the panel and ICANN's subsequent response.
 - ⊙ ICANN will identify a webpage for publishing PICDRP Panel evaluation results and will publish all PICDRP Panel evaluation results, including those referenced in your complaint, at the identified webpage. The initial publication to this webpage is anticipated to occur within three months of the publication of this response.

Regarding the scope clarification from the panel and ICANN's subsequent response:

- ⊙ The panel sought clarification from ICANN regarding the work it was empaneled to do, and ICANN responded. I did not find any indication that ICANN acted inappropriately or exerted any undue influence on the panel, but instead, reiterated the language of Specification 11 and the PICDRP, and that ICANN's response did not include any other interpretation or advice. Since this communication occurred during the panel's evaluation and is related to the work of the panel, it should have also been shared with the RO and you. As sharing this information is intended to be part of the upcoming improvements to the PICDRP operational process. ICANN will provide the communication between ICANN and the panel regarding clarification of the panel's work to you and the RO within three months of the publication of this response.

Regarding your concern that ICANN exerted undue influence over the panel by responding to its request for scope clarification and that by doing so the panel was unable to evaluate the RO's purported fraudulent behavior:

- ⦿ Based on my research, I did not find any indication that ICANN acted inappropriately or exerted any undue influence on the panel as ICANN simply reiterated the language of Specification 11 and the PICDRP, and that ICANN's response did not include any other interpretation or advice.
- ⦿ Based on the panel's evaluation results, I found that the panel did consider the question of fraudulent behavior by the RO but found the RA did not contain terms prohibiting the RO from engaging in fraudulent and deceptive practices, and therefore, the panel found this allegation to be out of scope for their PIC report evaluation.
- ⦿ As such, the only improvements related to this issue are that communications with one or more of the parties and/or ICANN that occur between the time the panel is established to when it issues its evaluation results, and that are regarding the panel's review, should be provided to both the RO and the Reporter for transparency purposes.

Regarding your claim that other ICANN new gTLD dispute resolution panels are empowered to exercise independent discretion in determining the scope of their evaluation:

- ⦿ Based on my research, I found that the panel and its evaluation results were based on their understanding of the scope of the work and not on any undue influence by ICANN.
- ⦿ As noted above, the SCO and LRO are pre-delegation procedures and applicable to new gTLD applicants, whereas the PICDRP and PDDRP are post-delegation procedures and applicable to ROs. The PDDRP, SCO and LRO are narrowly tailored in scope to trademarks and related law, whereas the PICDRP PICs are broader in scope and cover a myriad of topics and related laws. The PDDRP has not yet been exercised. To compare these various procedures to one another is not an 'apples-to-apples' comparison.
- ⦿ As such, the only improvements related to this issue are that communications with one or more of the parties and/or ICANN that occur between the time the panel is established to when they issue their evaluation results, and that are regarding the panel's review, will be provided to both the RO and the Reporter for transparency purposes.

2. ICANN's Compliance Approach and Process Needs Improvement

2a. Relevant Details from Your Complaints

Your complaints, most notably [C-2018-00006](#), [C-2018-00007](#), and [C-2018-00008](#), contend the following:

- ⦿ ICANN's breach notice did not address the PICDRP panel's evaluation results regarding the RO's PIC violations.
- ⦿ ICANN failed to prescribe and disclose remedial action consistent with the panel's findings, and which is against its Bylaws commitments of transparency, accountability, and conformity with international law.
- ⦿ The PICDRP does not prohibit disclosure of remedial measures to complainants and should be interpreted to require disclosure or publication of the remedial measures.
- ⦿ ICANN did not disclose the timeline for panel appointment or the timeline for the panel's determination.

2b. Research Findings

- ⦿ [ICANN's breach notice included the panel's evaluation report.](#)
- ⦿ It is ICANN's practice to request corrective and preventive action(s), including implementation dates and milestones, from contracted parties rather than to prescribe

remedial action. This is ICANN's practice because often times remediation is related to the business operations of the contracted party and it is the contracted party that is most familiar with its business operations, whereas ICANN is often not in a position to reliably prescribe how the contracted party should correct or prevent the breached actions.

- ⦿ ICANN Contractual Compliance follows a process for overseeing remediation with contracted parties. Contractual Compliance complaints come in all varieties, so remediation will vary depending on circumstances. In general, when a contracted party provides a remediation plan – ICANN reviews the plan, follows up for clarification, requests additional information where needed, and continues this process until all non-compliance items are cured by the contracted party and accepted by ICANN.
- ⦿ Once the PICDRP panel issues its report, its work is complete, and the processing of the PIC report reverts back to the compliance approach and process.
- ⦿ If non-compliance is found, the RO may remediate its non-compliance as part of ICANN's compliance approach and process, which is confidential between ICANN and the RO, and is not shared with the Reporter or other parties.
- ⦿ There is no specific timeline in the PICDRP for selecting the panel and as this was the first panel selected for a PIC report, ICANN was unsure of the timeline and did not provide a specific date for panel selection. ICANN notified both yourself and the RO that a panel was going to be established. ICANN notified you and the RO again once the panelists were tasked with their evaluation.
- ⦿ Section 4.3 of the PICDRP states the panel will report its evaluation results to ICANN within 15 days from receipt of notice that an evaluation is required. In the case of your PIC report, the panel requested additional time, which ICANN communicated the request to the parties and ultimately granted the requested extension to the panel.

2c. ICANN's Response

In reviewing the portions of your complaints pertaining to ICANN's Compliance Approach and Process, ICANN responds with the following:

- ⦿ I found that ICANN's breach notice did address the panel's findings. The breach notice stated, "A Public Interest Commitment Dispute Resolution Procedure ("PICDRP") Standing Panel was invoked by ICANN pursuant to Section 3.3. of the PICDRP for review of this matter. Please refer to the attachment for details regarding this breach, as well as the attached report issued by the PICDRP Standing Panel" and the breach notice included the full panel report articulating the RO's PIC violations.
- ⦿ Because the remediation plan falls within the scope of the compliance approach and process, it is subject to confidentiality between ICANN and the contracted party and is therefore not shared elsewhere. This is and has been ICANN's standard approach. Additionally, doing so could put ICANN in the position of disclosing operational information that is proprietary to the contracted party and not intended for public or competitor consumption.
- ⦿ I found that ICANN was accountable for its work and did receive, review, oversee, and confirm remediation of the breached terms to the best of its ability and within scope of its contractual authority.
- ⦿ ICANN agrees that setting expectations regarding the timeline for appointing panelists should be part of the PICDRP operating process and will include this in its upcoming improvements project

- ⦿ I found that the timeline for the panel's evaluation results was provided in the PICDRP itself, and ICANN notified you and the RO of the panel's requested and granted extension.

3. The Outcome Resulting from Your PIC Report was Insufficient

3a. Relevant Details from Your Complaints

Your complaints, most notably [C-2018-00004](#), contend the following:

- ⦿ The panel's evaluation report found the RO to be in compliance with Specification 11, Section 3a, and not in compliance with Specification 11, Section 3c.
- ⦿ That you believe ICANN did not act on the panel's findings that the RO was in violation of Specification 11, Section 3c, nor did ICANN act on substantial evidence provided by you in the PIC report you submitted to ICANN.
- ⦿ That ICANN did not properly enforce its notice of breach. You further stated that ICANN's attempt to curtail the conduct of the RO was temporary and inadequate. According to your complaints, this is demonstrated by ICANN's failure to act on the panel's findings, by ICANN's failure to address what you believe to be illegal and fraudulent behavior by the RO, and the need for you to initiate an additional compliance action by submitting a Whois inaccuracy complaint type.
- ⦿ That in addition to evidence provided regarding Specification 11 violations, you also provided clear and substantial evidence that false registration data was attributed to domain names registered through the FREE.FEEDBACK website and that the false registration data deceptively misled trademark owners into believing they had registered domain names in the .FEEDBACK gTLD.
- ⦿ That ICANN did not act upon the evidence you provided regarding false FREE.FEEDBACK registration data and that subsequent Whois inaccuracy complaints had to be submitted to address these issues. You further state that the domain names listed in the subsequent Whois inaccuracy complaints were deactivated as a result of the subsequent complaints, however those names appear to have since been reactivated.

3b. Research Findings:

- ⦿ After considering the Panel's report and findings that the RO was in violation of Specification 11, Section 3c, ICANN issued a notice of breach, attaching the full Panel report to it, stating, "A Public Interest Commitment Dispute Resolution Procedure ("PICDRP") Standing Panel was invoked by ICANN pursuant to Section 3.3 of the PICDRP for review of this matter. Please refer to the attachment for details regarding this breach, as well as the attached report issued by the PICDRP Standing Panel."
- ⦿ ICANN followed its protocol, to the extent of its contractual authority, for addressing registry operator breach and requested and received documentation from the RO indicating it had remediated the violations described in the breach notice.
- ⦿ Once the breach was resolved, ICANN notified the reporter and the RO of closure of the PIC report.
- ⦿ ICANN expects its contracted parties to comply with their ICANN contracts. ICANN is not a governmental agency, but instead a private sector, non-profit with limited technical responsibility for coordinating the unique assignment of Internet domain names and IP addresses. ICANN's authority is purely contractual, and it may only act upon violations of that contract. Allegations, related to fraud and illegal activity, in WIPs PIC report are not covered in the RO's Registry Agreement.

- ⦿ Compliance complaints are either a registry complaint type or a registrar complaint type, but not both. PIC reports are registry complaints and Whois inaccuracy complaints are registrar complaints.
- ⦿ Although Whois inaccuracy is a separate complaint type that is made against registrars, in ICANN's review of the PIC report it considered the complaints of inaccurate Whois, however, the details provided by you in your PIC report did not establish inaccurate Whois.
- ⦿ ICANN explained the differences between the complaint types to you, that the PIC report did not include information establishing inaccurate Whois and advised that you could submit a Whois inaccuracy complaint type if you felt there was an issue, and if you had additional data to support this claim to include it with your submission.
- ⦿ A Whois inaccuracy complaint type was subsequently submitted and included information that was not present in the PIC report and that led to a determination that there were Whois inaccuracy issues and said issues were addressed through the informal compliance approach and process.
- ⦿ At the time of drafting this response, ICANN has not received any subsequent Whois inaccuracy complaint types related to .FEEDBACK registrations.

3c. ICANN's Response

In reviewing the portions of your complaints pertaining to your dissatisfaction with the outcome of your PIC report, ICANN responds with the following:

- ⦿ ICANN's notice of breach included the full panel report demonstrating that ICANN did act upon the panel's findings regarding the RO's lack of compliance with Specification 11, Section 3c.
- ⦿ Following the notice of breach, ICANN required, within its contractual authority, the RO to remediate issues identified in the notice of breach. ICANN followed up with the RO regarding remediation, seeking clarification and validation where appropriate. Once ICANN was able to confirm, within its contractual authority, that all violations of non-compliance in the breach notice had been cured, ICANN notified the parties of such.
- ⦿ ICANN's authority is limited to the contracts it has with accredited registries and registrars. Therefore, ICANN was unable to act on information provided by you to ICANN in its PIC report that was outside the scope of the registry agreement.
- ⦿ I did not find any indication that, based on its contractual authority, ICANN failed to enforce its notice of breach, nor did I find that ICANN's attempt to curtail the conduct of the RO was temporary or inadequate.
- ⦿ ICANN notes your allegation of illegal and fraudulent activity by the RO and considers these to be serious allegations. ICANN expects its contracted parties to operate in compliance with the law and considers such allegation to be very serious.
 - ICANN is not the only avenue for relief and encourages you to seek an opinion and/or relief from the proper authorities.
 - If, or when, you have documentation regarding the alleged activities, such as a court order, please send it to ICANN and we will address it accordingly. However, without appropriate documentation that aligns with ICANN's contracts and authority, it is unable to act.
- ⦿ ICANN did review and consider the Whois inaccuracy details provided in your PIC report, however because the details did not establish Whois inaccuracy ICANN advised was unable to act. Further, ICANN advised you to provide any additional information you had, via a Whois inaccuracy complaint, upon which ICANN was able to act.

- ⦿ ICANN notes your claim that domain names that were previously suspended for Whois inaccuracies have been reactivated with the same inaccurate Whois. Therefore, ICANN will perform an evaluation of a reasonable sample size of the domains names included in the previously submitted Whois inaccuracies complaint. In order for ICANN's review to be efficient and beneficial, ICANN asks that you please provide examples of domain name registrations that were previously suspended or deactivated for Whois inaccuracies that are believed to be reactivated and any additional related information you may have. The review will be completed within three months of receiving the information from you and following the issuance of this response. Please note that with the implementation of [ICANN's Temporary Specification for gTLD Registration Data](#) records are not fully available and ICANN's evaluation may have to be on an inquiry basis if ICANN is unable to check the Whois records itself.

Additional Information

- ⦿ As part of its PICDRP operational process improvements project, ICANN will look at other aspects of its PICDRP operational process to see if additional improvements can be made and notes that efficiency and quality are key factors in updating its operational processes.
- ⦿ Additionally, I note there is a mechanism available in the .FEEDBACK Registry Agreement to address matters where a party believes a Registry Operator may have been complicit in trademark infringement on the first or second level. For more information regarding this mechanism, the Trademark Post-Delegation Dispute Resolution Procedure, please see: <https://www.icann.org/resources/pages/pddrp-2014-01-09-en>.

In closing, in your complaints you contend that ICANN did not act in accordance with its commitments to operate in an open and transparent manner and consistent with procedures designed to ensure fairness, to be accountable to the ICANN community, and to conformity with relevant principles of international law and conventions. Based on the research findings and responses articulated above, I did not find any evidence of ICANN not acting in accordance with its commitments to be open and transparent, to be fair, and to be accountable to the ICANN community. With respect to the suggestion in your complaint that the ICANN org's actions were not in conformance with relevant principles of international law and conventions, this is something that may be a more appropriate subject for an existing complaints mechanism such as one of ICANN's Accountability Mechanisms.

I appreciate you taking the time to bring this information to my attention. ICANN is committed to always working to increase our effectiveness and to provide additional transparency and accountability, all in service of ICANN's mission. I appreciate your continued participation in the ICANN model, your contributions to helping ICANN work towards being its very best, and the opportunity to provide you with this information.

Kind regards,

Krista Papac
Complaints Officer
ICANN