

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

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Ombudsman
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INTRODUCTION

In this portion of the ongoing Office of the Ombudsman evaluation, I will focus on a review of the literature. The goal of the review will be to determine if there are resources which would enable the Office of the Ombudsman to:

- find evaluation criteria;
- have logical standards in mind during the evaluation;
- And to determine, by preponderance in the literature, which criteria and standards are most likely to be critical in the conduct of Ombudsmanship.

Once the literature review is completed, I will be able to construct an evaluation of the ICANN Office of the Ombudsman with respect to the criteria, standards, and emphasis found.

This review will be focused on providing an evaluation of the structure and operations of the Office of the Ombudsman, as opposed to an evaluation of the complaints, investigations, and alternative dispute resolution processes used by the Ombudsman in dealing with the community. This will be a central component of the formative and summative evaluations which will be conducted in the future (as per the Office of the Ombudsman Results Based Management Accountability Framework).

A second step in the process will be to have a knowledgeable and qualified analyst¹ conduct a review of the findings of the Office of the Ombudsman in this

¹ In this case, Mr. John Zinsser

evaluation, and provide fact checking and commentary. This analytical review may be used to provide the ICANN Board of Directors with an independent voice about Ombudsman functions.

.1 Finding the literature

I have conducted an extensive review of the literature in an attempt to find documents which would provide information on criteria, standards, and emphasis regarding the operation of Ombudsman Offices.

My searching has revealed that there exists no documentation specific for these purposes. In fact, The Human Resource Planning Society has indicated that, “Methods for measuring the effectiveness of the Ombudsman office ... do not exist.”²

There are small a number of documents which have been identified. The three “seminal” works, on which I rely during the course of this evaluation, are:

- Standards for the Establishment and Operation of Ombuds Offices, by the American Bar Association (ABA);
- Essential Characteristics of a Classical Ombudsman, published by the United States Ombudsman Association (USOA); and
- Creating the Office of the Ombudsman, by Rick Russell, a solicitor, Ombuds, and Alternative Dispute Resolution practitioner.

I have also looked at two works by Dr. Mary Rowe, the Ombudsman at the Massachusetts, and a booklet produced by the Canadian Forces Ombudsman called “Demonstrating Your Value”. I have not included these works in the review as the latter

² Williams et al p8

deals principally with case outcomes rather than process and structure; while the former are basically fact sheets, which enable the reader to develop critical questions about evaluation.

There is also an excellent paper by Dr. John Barkat, Ombudsman at Pace University; however, it deals primarily with the design of an internal Ombuds program. Barkat looks at best practices by identifying a number of common mistakes. These include issues such as: Position is not professionalized; Ombuds does not report to the top; not adequately funded or staffed; and lack of independent counsel.³ Barkat notes that there are “Three Foundational Cornerstones: Neutrality, Confidentiality, and Independence.”⁴ These are consistent themes found in the other literature.

Well helpful for an overview, the issues covered in this work are found in positive terms in the three noted documents.

All of this leads me to the conclusion, which has also been expressed to me by colleagues, that there is a void in the field of Ombudsman evaluation in the literature.

³ Barkat pp7-12

⁴ Barkat p3

.2 What does the literature reveal?

There are a number of factors which should be discussed prior to the analysis of the criteria, standards, and emphasis found in the three noted documents. First, the USOA document is an iterative document, taking its genesis from a list developed in the ABA Standards⁵. Gottehrer et al⁶, authors of the USOA document, have relied on the initial ABA Standards in their paper, and have defined and expanded upon the characteristics found in the ABA Standards.

These two documents are primarily focused on Classical or Governmental Ombuds schemes. These are typically Ombudsman appointed by a statutory authority such as a legislature, and whose mandates relate to the provision of governmental administration in a particular jurisdiction. The ICANN Ombudsman is an Executive Ombudsman. The ABA Standards define this type of Ombudsman as:

An executive Ombudsman may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors.⁷

The Russell paper is written from the viewpoint of an “organizational Ombudsman”. The ABA Standards define this type of Ombuds as, “ordinarily

⁵ Footnote 12 ABA

⁶ Gottehrer was Secretary of the USOA

⁷ ABA p7

addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies.”⁸

For ease of comparison, it may be worthwhile to think of an Executive Ombudsman as having some features of both the classical and organizational Ombudsman. While housed within an organization, the Executive Ombudsman takes complaints from the general community the entity serves.

While Russell does concentrate on Organizational Ombudsmanship, his paper is extremely helpful as it well defines and illustrates criteria which can also be applicable for an Executive Ombudsman structure. While Russell does not comment on the principles of confidentiality, and impartiality, he does explore principles of natural justice in some depth ((3) Due Process).

Figure 1, “Summary of Evaluation Criteria and Standards”, is a composite of the criteria found in the three documents. In sum, 54 criteria and standards are nominated in the examined literature. Some of the criteria, such as (2) Independence, (4) Access to information and staff, (10) the ability to begin “Own Motion” enquiries, (40) the ability to publicly criticize the entity, and (46) that the organization is not to impede the Ombudsman in his work, are common themes in all three documents. One can state that there is emphasis on these elements as being universally characteristic of a well functioning Ombudsman program.

⁸ ABA p20

Figure 1

Summary of Evaluation Criteria and Standards

	Ombudsman Criteria	1) Agree Dispute Resolution	2) United States Ombuds. Assoc.	3) American Bar Assn Ombuds Cmte
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		√	√
24	Credibility of the review process		√	
25	Confidentiality		√	√
26	Independence established by higher jurisdiction		√	
27	Independence - Separate from the organization it reviews		√	√
28	Independence - Appointed by super majority		√	√
29	Independence - Long fixed term - reappointment possible		√	√
30	Independence – For cause removal by supermajority		√	√

31	Independence - High fixed salary		√	√
32	Independence - Appropriate budget - accountability of spending	√ (4)	√	
33	Independence - Sole authority to hire staff		√	√
34	Independence - Someone can always exercise the Ombudsman role		√	
35	Independence - Decisions not reviewable		√	
36	Impartiality and Fairness - Qualifications	√ (13)	√	
37	Impartiality and Fairness - Supermajority to hire or remove		√	
38	Impartiality and Fairness - No conflict of interest in activities		√	
39	Impartiality and Fairness - Direct access to Ombuds no fee required		√	
40	Impartiality and Fairness - Power of recommendations and public criticism	√ (8)	√	√
41	Impartiality and Fairness - Required to consult on adverse findings		√	√
42	Impartiality and Fairness - Ombuds is an advocate for fairness, not the parties		√	
43	Credible Review - Broad jurisdiction		√	√
44	Credible Review - No parties exempt from complaining		√	
45	Credible Review - Organization not permitted to impede	√ (5)	√	√
46	Credible Review - Grounds for review are broad, and focus on fairness		√	√
47	Credible Review - Reports problems and recommendations, has ability to publish		√	
48	Credible Review - Findings not reviewable		√	
49	Credible Review - Ombuds cannot make binding orders		√	√
50	Confidentiality - Ombudsman has power to decide level of information to be disclosed		√	√
51	Confidentiality - Ombudsman will resist testifying		√	
52	Broad range of enquiry available			√
53	Discretionary power to refuse complaints and to publicize			√
54	Identify complaint patterns and trends			√
	1) http://www.agreeinc.com/ombudsman.html			
	2) http://www.usombudsman.org/en/references/more_references/essential_characteristics.cfm			
	3) http://www.abanet.org/adminlaw/ombuds/115.pdf			

.3 Methodology

This evaluation will review each of the 54 indicators or criteria, and compare them to the Bylaws, Frameworks, web documents, and experiences of the ICANN Office of the Ombudsman. The purpose of the review will be to compare the standards and criteria in the literature with the formative development of the Office of the Ombudsman to determine: a) if 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.

.4 Rating the ICANN Office of the Ombudsman on the criteria

.4.1 Alignment

Russell states, "There is no use imposing an ombudsman upon an organization that is hostile to reform and change and views complaints as trouble and trouble makers respectively...The organization must decide what it values in that system and know what it wishes to accomplish with it."⁹

The institutionalization of the ICANN Office of the Ombudsman is one of the last steps in the ICANN reform process. It is a function that has been developed from inputs with both the stakeholders and community, and the organization. It reflects the values they wished to have in the Office. However, there are some members of the community who have expressed their desire that the Office have powers more consistent with an Inspector General, that is to say audit – fault finding in nature, rather than dispute resolving. This view is not consistent with the normal scope and mandate of Ombudsmanship.

The Office of the Ombudsman further aligns itself with the organization, in that ICANN is in the high tech, leading edge arena. The Office of the Ombudsman is an online Ombuds system, the only one I have found in my research. It aligns itself with

⁹ Russell para 2

the global mandate of the organization by pronouncing a respect for the diversity of the community, and the diverse manner that the community approaches conflict.¹⁰

.4.2 Autonomy - Arms length – Independence

This is a core value in any Ombuds program. To be effective an Ombudsman must have the ability to operate with an arm's length relationship with the organization.

ICANN's Bylaw V states:

The principal function of the Ombudsman shall be to provide an *independent* internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.¹¹

The Ombudsman has no reporting/supervisory relationships with the organization. There is a “dashed line” relationship with the Board of Directors. He is required to produce an annual report of his activities. A monthly report is provided to the Board of Directors on a voluntary basis. The Ombudsman is not responsible for any other duty or function in the organization, and has no authority to direct staff.

By Bylaw, the Ombudsman is empowered to develop his own budget for the operation of the Office, which is submitted to the Board without alteration by staff. While the Ombudsman is reliant on the organization for the reimbursement of expenses, etc, he is authorized to conduct business, make travel arrangements, and make purchases

¹⁰ ICANN Ombuds Value Statement

¹¹ Bylaw V, Sec 2

without organizational approval, if within the approved budget. The Ombudsman is bound by ICANN policy and procedures for the hiring of contract services, although he remains the absolute authority on selection of service providers to the Office.

The Ombudsman has office space at the ICANN head office in Marine Del Rey, California, but his primary office space is a home office in Vancouver, Canada. The Ombudsman, in addition to having an ICANN Web address, (www.icann.org/ombudsman/) also has an independent web address (www.icannombudsman.org).

.4.3 Due Process - Rules of Natural Justice applied

The Office of the Ombudsman has developed an Ombudsman Framework. This Framework is available on the website in six languages (Arabic, Chinese, English, French, German, and Spanish). The Framework sets out how the Office of the Ombudsman will conduct the business of Ombudsmanship. Inherent in the Framework is an obligation to provide services according to the International Ombudsman Association Standards of Practice.

These documents set out operating procedures consistent with the principles of natural justice, and the Office ensures that all parties are treated in respect of those principles.

.4.4 Sufficient Resources

The Office of the Ombudsman is a sole practitioner entity. An Adjunct Ombudsman has been engaged to ensure that there is always someone available to act for the Office, should the Ombudsman be absent on leave, away from duties due to sickness, or in protracted travel status. The Adjunct Ombudsman has attended two ICANN meetings to assist with the staffing of a physical Ombuds Office.

To date, these Human Resources have been sufficient to meet the requirements and demands placed on the Office. The Office relies on ICANN staff for support functions such as technology, and report production.

Budgetary resources provided to the Ombudsman have been sufficient.

.4.5 Access to documents, information and staff

The ICANN Bylaws state that the Ombudsman shall:

have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN).

This Bylaw provision provides the executive Ombudsman with a wide ranging authority to access documents, information and to take viva voce evidence from staff. To date there have been no barriers to accessing information. However, it has been noted that two separate staff members have been less than stellar in their responses to the Ombudsman on different files. The Corporate Secretary (General Counsel) acts as a buffer to ensure staff compliance with requests for information, if these are not forthcoming from staff. Thus, an enforcement mechanism exists with the organization.

Of course, the Office of the Ombudsman always retains the ability to publicly criticize the organization or staff if information is not forthcoming. There has been one report to the Board of Directors which has made this criticism.

.4.6 Community Buy-in

As the Ombudsman, this is a difficult criterion to measure with surveys, as a valuation of buy-in with necessarily is viewed through the Office's lens. It is established that the Office of the Ombudsman was the last step in the ICANN reform process, and that this reform was community or stakeholder driven. The community has had buy-in through the public comment process. As the Office is established by Bylaw, passed by the Board of Directors, which is a representation of the various stakeholder groups; one can state that the community has had buy in with its genesis.

Ongoing buy-in can be gauged, to some extent, by the relationship between the various stakeholders, and the Ombudsman, and by the cooperation given and received during Ombudsman enquiries. To date, these would indicate that there is buy-in.

To some degree, buy-in can also be measured in terms of demands for service. As this Office has had contacts and enquiries from almost 50 different nations, and from all regions of the world, one can postulate that there is community buy-in.

.4.7 Clear Mandate

Bylaw V clearly establishes the Ombudsman's mandate, which is to deal with fairness issues relating to acts, decisions, or inactions by the ICANN Board, staff, or supporting organizations. The Bylaw clearly states that the mandate does not apply to issues concerning membership on the Board of Directors, supplier relationships, or personnel matters.

With respect to personnel matters, it is clear that this is within the purview of an organizational and not an Executive Ombudsman. As the number of staff with the organization grows, (from about 30 when the Ombudsman was engaged, to a projected compliment of about 100 employees and contractors in FY 06-07) and as that staff will be distributed across several nations, it will increasingly become likely that some form (either in-house or contracted) internal Ombudsman may become a necessary structure.

The Ombudsman Framework also provides direction about jurisdiction. The Ombudsman may, at his discretion, refuse to investigate stale dated matters (over 60 days old), matters where the complainant is not the person affected, and matters of a trivial, vexatious, repetitive, or non-good faith basis.

.4.8 Recourse – Moral Suasion – Public Criticism

The Office of the Ombudsman, through a process found in the Ombudsman Framework, has the ability to use moral suasion through the power of publication, should the Ombudsman not be satisfied with steps taken by the organization to redress issues. To date, this power has not been used.

.4.9 Accessibility (Promotion – availability to the community)

The mandate of the ICANN Office of the Ombudsman is unique, in that its jurisdiction can extend to every domain name holder, or internet user on the planet, as these can be defined as stakeholders in the ICANN process. Indeed, ICANN's At – Large supporting organization exists to develop this grass roots participation. With such a vast potential client group, and limited human resources (a sole practitioner office) planning in the delivery of promotion or outreach is important. Through the first 18 months of operation outreach has been dedicated to three particular groups: ICANN staff, strategic stakeholders, and the participants at ICANN meetings.

ICANN staff members have been key, in that they will likely be the first line in the organization to hear of community dis-satisfaction or complaints of unfair treatment. The Ombudsman has briefed all staff on the operation of the Office, and all new staff receive an Ombuds orientation.

Key stakeholders would be those in the community who would act as a referral mechanism for members of the community who may wish to make complaints, but were unaware of the Office of the Ombudsman. These include governmental organizations, civil society dealing with the internet, legal and consumer protections groups, and Ombudsman colleagues. This would also include the media.

At each of the semester ICANN meetings, the Ombudsman establishes a physical office space to be able to receive complaints in person, and makes a presentation to the Public Forum.

The Ombudsman must, in accordance with Bylaw V, produce an annual report of his activities. To date, one report has been published, and the second will be due in the forthcoming months. The former was produced in English, French, and German.

The Ombudsman uses outreach or publicity material consistent with that used by other Ombudsman offices. To date these include: lapel pins, keys rings, and note pads. A six language, single sheet brochure is in the last stages of development for circulation in the community, and for use by ICANN's Regional Liaisons.

As the ICANN Ombudsman serves a “connected” community, accessibility is linked to the web presence. The Ombudsman has a web page that can be found at either www.icannombudsman.org or www.icann.org/ombudsman/. A link to the Ombudsman page is found on the front page of the ICANN site, and also on the Navigation links. The Ombudsman site offers various information about the Ombudsman, complaints, administrative fairness, etc. Importantly, the site provides for an online complaint and contact system. Complainants may contact the Ombudsman in the language of their choice, and translation is conducted by an arm’s length not-for-profit multicultural society. Complaints have been received from over 50 nations.

.4.10 Power of Own Motion

The ICANN Ombudsman finds the authority to make self generated complaints in the Ombudsman Framework, and this power has been used.

.4.11 Annual Report

The ICANN Ombudsman is obligated under Bylaw V to make an annual report to the Board of Directors. This is a public report, and was produced in six languages for the inaugural report of Fiscal Year 04-05.

.4.12 Established Terms of Reference

The Terms of Reference are established through both Bylaw V and the Ombudsman Framework. These provide a clear, public, and transparent set of operating principles for the Ombudsman.

.4.13 Qualified Knowledgeable Incumbent

While this proves to be a somewhat difficult and immodest self evaluation criteria, the community, the organization, and the media appear to have accepted the inaugural Ombudsman as being well qualified for the position (see Kieren McCarthy's The Register Article, "Meet Frank Fowlie, the Internet's physician."¹² or Gillian Shaw's Canwest News Story¹³).

The Ombudsman has become a member of the Forum of Canadian Ombudsman, the International Ombudsman Association, the United States Ombudsman Association, and the International Ombudsman Institute.

.4.14 Advisory group

A governmental ombudsman may have a relationship with an Ombudsman Committee of the legislative body, and an organizational ombudsman may have its own

¹² The Register Dec.8, 2004

¹³ In Calgary Herald Dec 2005

stakeholder and management advisory body. These groups will act as bodies to review the role, mandate, function, and budget of the ombuds. The ICANN Ombudsman relates principally with the Board of Directors' Governance and Executive Committees. The Executive Committee makes recommendations to the Board about the hiring, renewal, or dismissal of the Ombudsman, while the Governance Committee ratifies policy relating to the Ombudsman, such as the Ombudsman Framework. While the relationship between these committees and the Ombudsman is positive, it is also noted that the Governance Committee has ratified neither the Ombudsman Framework, nor its "after one year in operation" updates.

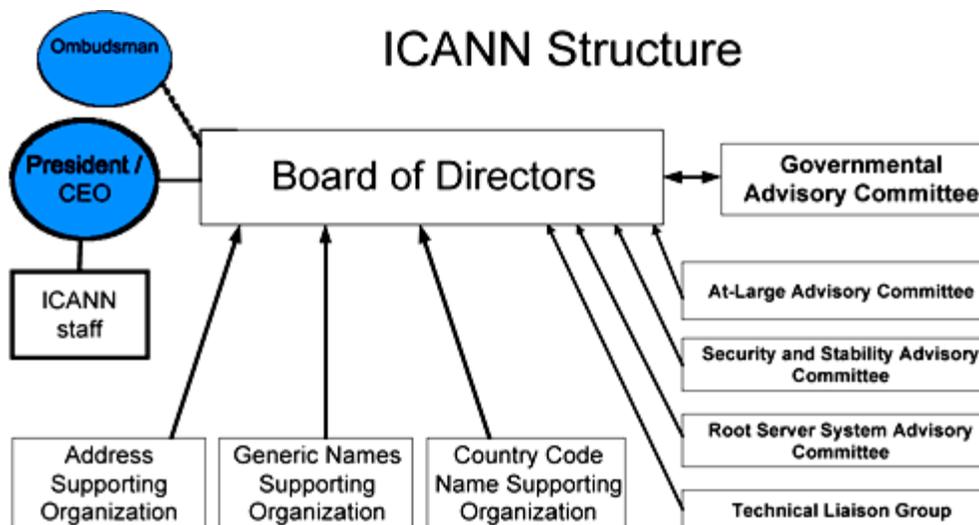
.4.15 Active Public Relations Campaign – Community Education

The Bylaws state that the Ombudsman shall, "heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN community and online availability."¹⁴ As previously noted in .4.9, the Ombudsman has an active Outreach program. In the future, the Office will work in concert with newly and soon to be appointed staff and executives to develop a more fulsome approach to strategic outreach. This will likely include such activities as a web blog. There will also be an emphasis on linkage with the Regional Liaisons to target civil society and government officials across the globe.

¹⁴ Bylaw V s.3.4

.4.16 Structural Autonomy and Accountability

Both Bylaw V and the ICANN organizational chart show that the Ombudsman is autonomous in his relationship with the entity. The ICANN Board has developed a set of “Ombudsman Management Principles”. Like the Ombudsman Framework, workable changes to this document have been stalled at the Board Governance Committee for some time.



The Ombudsman is an independent officer of ICANN, and is accountable to the Board and its several committees for his actions. This accountability is at an arm’s length, and does not permit supervision of the function.

.4.17 Filing System

As the Ombudsman is an online dispute resolver, the vast majority of correspondence is electronic. A filing system, based on the year and chronological

number of the contact or complaint is used. For filing purposes, files are stored in Outlook by year, month and file number, for ease of handling. The Outlook system is password protected.

A monthly report is provided to the Board, and this includes a statistical breakdown of complaint by roster, country of origin, and outcomes, as well as Outreach activities. This file management leads to statistical compilations for the annual report. This filing system also keeps track of the generic subject matter of the complaints (i.e. Ombuds jurisdiction, registry, registrar, WHOIS, other, etc.) and the method of closing (i.e. resolved, referral, no further action required, systemic improvement, etc.)

A simple paper file system is in place in the Marina Del Rey facility for both investigative and administrative files. Ombudsman files are kept in locked cabinets in a separate and locked office.

.4.18 Data Base

The Office of the Ombudsman has contracted for the development of a data base – case management system, designed for the specific requirements of this Office. The system has been completed, and at the time of writing is being populated with the nearly 2000 files the Office has dealt with since inception. The case management system will be interfaced with a secure ICANN server to provide for data protection and privacy. The Ombudsman will be able to allow access to certain reporting functionalities

to the Board and ICANN executives to permit individual queries on reports of non-confidential material. (i.e. a Board member will be able to search out the number of specific contacts from a specific country, or with a specific theme, in a specific time period.)

.4.19 Balanced Time Management

The Office of the Ombudsman basically conducts work in three silos: the investigation and resolution of complaints; administration; and Outreach (doing the work, writing the work up, and telling people about the work the Ombuds does). As a sole practitioner, time management can be an evasive luxury, based on the demands for service. Time management is folly to extended travel. In Fiscal Year 05-06, the Ombudsman was in travel status for 142 days.

As the Ombudsman's primary office space is a home office in British Columbia, a travel schedule to the Marina Del Rey facility has developed, which balances the need to be in the central office, with the Ombudsman's independence and fiscally responsible travel. In the present circumstance the Ombudsman uses a bulk purchase flight pass to conduct travel. The rotation will see the Ombudsman travel to California for three days – two nights two weeks in a row, with the third week at the home office. This means that the Ombudsman will have six to nine working days per month in Marina Del Rey.

The Ombudsman also travels to the semester ICANN meetings, and attends conferences and training offered by the several Ombudsman bodies previously mentioned.

.4.20 Reporting relationship with the advisory and budget group

The relationship with the Board's several committees was discussed at .4.14. The Ombudsman is required to provide an annual report, and voluntarily provides the Board with a monthly report, in order to provide quicker feedback on trend analysis and Ombudsman activities. No formal feedback loop exists between the Board and the Ombudsman, but, the newest contractual agreement will call for a performance bonus, which necessarily means that some degree of reporting back to the Ombudsman will occur.

Under Bylaw V, the Ombudsman is responsible for development and submission of an annual budget, which goes to the Board for approval without any administrative changes. While the President may make comments to the Board on the Budget, this has not occurred in the first two fiscal years. The Board, at its discretion, approves the Ombudsman Budget in the consideration of the ICANN Budget as a whole.

There is a weak feedback process from the Chief Financial Officer to the Ombudsman on budgetary performance. Except for the Year to Date expenses as

reported in the draft budget to the Board, the Ombudsman has not been provided with any financial reports.

In Fiscal Year 05-06, the Office of the Ombudsman was over - funded, due to a lack of spending in such areas as translation and investigative expenses. In Fiscal year 06-07 the Office will likely be under-funded, due to salary back pay and adjustments dating from the end of Fiscal year 04-05.

.4.21 Review of Start Up policy – TOR (Terms of Reference)

The Office of the Ombudsman has produced a Results Based Management Accountability Framework (RMAF)¹⁵. The RMAF is an evaluation and review framework for the Office based on ongoing, formative, and summative reviews. These ongoing reviews along with a specific review of the Ombudsman Framework have been completed. At the end of 2005, a thorough review of the Framework was conducted, and a number of changes and improvements were recommended to the Board Governance Committee for ratification. To date these have not yet been approved.

The ongoing and “one year out” reviews have helped to ensure that the framework documents that the Office subscribes to reflect the operational reality of the work.

¹⁵ RMAF

.4.22 Independence

A hallmark of an Ombudsman's Office is that it is independent of the entity that it serves, whether an internal Ombudsman dealing with staffing issues, or a Classical Ombudsman dealing with government operations; it is generally agreed that in order to function properly that the Ombudsman must be independent. Items 4.27 through 4.35 will review specific barometers of independence.

In sum, the ICANN Ombudsman is independent. Through provisions and declarations in the Bylaws (such as the setting of budgets, and reporting relationships) to practical matters of booking travel or selecting contractors, the Ombudsman is an independent officer of the organization.

Independence is a cited value in the Ombudsman Value Statement¹⁶, and is constantly conveyed in Ombudsman correspondence and written documentation. The Value statement states, "The Office of the Ombudsman, in order to remain an impartial officer, will remain independent of normal ICANN Structures."

.4.23 Impartiality and Fairness

The Office of the Ombudsman has developed a Value Statement, as noted in .4.22, and one of the five values found on that statement is impartiality:

¹⁶ <http://www.icann.org/ombudsman/articles/value-statement.pdf>

In each and every situation, the Office of the Ombudsman will receive information from the community with no predisposed idea as to the outcome of the Alternative Dispute Resolution process, and without favouring any party in the process.¹⁷

The Office of the Ombudsman uses the Code of Administrative Justice¹⁸, produced by the British Columbia Ombudsman as its guidelines to determine if fairness principles have been breached by the organization. This document codifies 16 common administrative issues, and defines how they are unfair. The Code is widely accepted in the Ombudsman community as a foundation document in the field. In those reports written to the Board from the Office of the Ombudsman, the relevant fairness issue has been quoted, and used as an example for the Board's reference.

Criteria 4.36 through to 42 will evaluate impartiality and fairness in more detail.

.4.24 Credibility of the Review Process

While decisions and recommendations of the Ombudsman are normally not subject to appeal or review, it is a testament to the whole body of the Ombudsman's work if the review process undertaken would have credibility in the eyes of a third party. The ICANN Ombudsman has ensured, to the extent possible, that he conducts investigations and reviews with credibility.

¹⁷ *ibid*

¹⁸ BC Ombudsman

There are a number of indicators for the criteria. First, the Office of the Ombudsman has submitted its process for evaluation by an International Standards Organization examiner, with respect to standard ISO 10002 on complaint handling. The Ombudsman was found to be compliant with the standard.

Secondly, there have been no complaints from those who have accessed the system that the review conducted by the Ombudsman was not a fair and full process. However, as previously noted, there have been a very small number of complaints that the range of the Ombudsman's mandate was not sufficient, but this is not the same as saying that the process taken within the given mandate was not full and fair.

Thirdly, there has been no commentary in the media or online community criticizing the Ombudsman in this regard.

Finally, the Office of the Ombudsman has agreed with the Audit Committee of the Board to allow a third party to conduct an independent and confidential review of a sampling of Ombudsman files to ensure quality.

Items 4.43 to 49 will review this topic in more detail.

.4.25 Confidentiality

Again, this is a hallmark of Ombudsmanship. Complaints which are brought to the attention of the Ombudsman should be dealt with in private and with the minimum of involvement from parties within the organization. ICANN as an institution and the Office of the Ombudsman have created policy concerning confidentiality.

Bylaw V, Article 4.2 states, “ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.”¹⁹

The ICANN Office of the Ombudsman expresses itself on confidentiality in two places. First, the Value Statement:

All parties, both within the community and ICANN, bringing information to the attention of the Ombudsman should feel assured that the information will be held in confidence, except where it is necessary to help resolve the complaint.²⁰

The Ombudsman Framework indicates:

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall only make enquiries or advise staff and Board members at ICANN of the existence and identity of a complainant in order to further the resolution of the complaint. ICANN staff and Board members are to hold the existence of a complaint and the identity of a complaint as confidential, except to further the resolution of a complaint.

¹⁹ ICANN Bylaw V

²⁰ Ombuds Value Statement

In general terms, due to the very nature of the work of the Office of the Ombudsman, the Ombudsman will resist testifying in any process which would reveal informal, confidential information given to the Ombudsman during the course of an investigation.²¹

Once the ADR or investigative process is complete, and the complainant has received the Ombudsman's closing correspondence, confidentiality may be fettered by the complainant; and I have noted on a small number of occasions that complainants have posted correspondence between the Ombudsman and themselves, which would have been confidential documents within ICANN. It is the practice of this Office to offer no commentary, or to even acknowledge the existence of a complaint in such circumstances.

Items 4.50 and 51 will further review confidentiality.

.4.26 Independence – established by a higher jurisdiction

The ICANN Ombudsman was established, not by policy, but by a motion of the Board of Directors to amend the Bylaws. This was the last of the ICANN reforms put into place, and is contemporary of the Independent Review Process, a formal ADR process.

.4.27 Independence - separate from the organization it reviews

²¹ Ombudsman Framework p3

Bylaw V makes a number of mentions of independence. It also allows that the Ombudsman develops his budget apart from the organization. The Ombudsman is physically housed in a home office, independent from the entity. The Ombudsman is not treated as an employee of ICANN, but rather as an independent contractor. The Ombudsman has no formal reporting or supervisory relationships with ICANN.

.4.28 Independence – Appointed by a super majority

The Ombudsman is appointed by the Board of Directors, by ballot. There is no indication in Bylaw V whether that is by a simple majority, or a super majority of the members.

.4.29 Independence - Long Fixed Term – possibility of reappointment

Bylaw V, Article 1.2 indicates that the Ombudsman will be appointed for an initial term of two years, which is renewable. That two years is now almost complete, Under the proposed contract between the Board and the incumbent, the Ombudsman would be re-appointed for a three year term, (two years fixed, one year optional), and this contract would be renewable.

.4.30 Independence – for cause removal by Super Majority

The Bylaws state that the Ombudsman can only be subject to dismissal by a 75% vote of the Board.

.4.31 Independence – High Fixed Salary

The Ombudsman has just undergone a salary review by the Board Compensation Committee with input from the Head of Human Resources. The Ombudsman is paid a high salary, fixed by contract, with the possibility of a bonus. To date, the parameters of establishing criteria for the bonus have not been established, although it would be unlikely that any negative criticism by the Ombudsman would reduce the benefit, as that in and of itself would cause further criticism.

.4.32 Independence – appropriate budget – accountability of spending

As previously noted, the Bylaws provide that the Ombudsman develop and submit his budget which cannot be altered by administrative process. The accountability for the budget resides with the Ombudsman, but, as indicated earlier, the reporting by the Chief Financial Officer to the Ombudsman has been negligible.

.4.33 Independence – sole authority to hire staff

The ICANN Ombudsman is a sole practitioner. However, staffing has taken place for an Adjunct Ombudsman, who is remunerated for one month a year to cover for absences during the Ombudsman's annual and any sick leave. The Adjunct was hired under sole authority of the Ombudsman, as were any contractors, including translators, outside counsel, or evaluators.

.4.34 Independence – someone can always exercise the Ombudsman's role

Again, as a sole practitioner, the Ombudsman exercises those authorities found in Bylaw V. The Adjunct Ombudsman may exercise those roles, when and as prescribed by the Ombudsman. With the SeeMore case management system, which will operate as a web based system, either the Ombudsman, or the Adjunct are able to conduct reviews at any time, and from any location.

.4.35 Independence – decisions not reviewable

Decisions or recommendations made by the Ombudsman are not reviewable. The initial subject matter of the complaint may become the subject of formal review processes within ICANN (either the Board Reconsideration Request or the Independent Review Process), but the Ombudsman's decisions may not.

.4.36 Impartiality and Fairness - Qualifications

The incumbent is well qualified for the position. The Ombudsman holds a Master of Arts in Conflict Analysis and Management, as well as two undergraduate degrees. The Ombudsman is pursuing a Doctorate of Dispute Resolution from LaTrobe University in Melbourne. The topic of the dissertation will be the Evaluation of Ombudsman Effectiveness. The Ombudsman has received training at the Program on Negotiation at Harvard Law School, and is a Fellow at the Centre for Information Technology and Dispute Resolution (CITDR) at the University of Massachusetts – Amherst.

The Ombudsman has previously been employed as an Ombudsman Officer, a member of the Royal Canadian Mounted Police, and as a civil affairs specialist with the United Nations Department of Peace Keeping Operations. Both the Ombudsman and the Adjunct offer bi-lingual service to the community in French.²²

.4.37 Impartiality and Fairness – Super majority to remove

The Bylaws state that the Ombudsman can only be subject to dismissal by a 75% vote of the Board.

²² Please see the Ombudsman biography at <http://www.icann.org/biog/fowlie.htm>

.4.38 Impartiality and Fairness – no conflict of interest in activities

Both the Bylaws and the Ombudsman’s contract indicate that he will follow conflict of interest policies, and not engage in activities which could create a conflict.

.4.39 Impartiality and Fairness – Direct Access to Ombudsman – no fee charged

Persons who contact the Ombudsman do so by use of a set of contacts and complaints forms, via a secure mail server. Contacts and complaints come directly to the Ombudsman and no other party. When the Ombudsman is on leave the incoming mail is copied to the Adjunct so that he can initiate action. Neither ICANN nor the Ombudsman charge a fee for lodging a complaint.

.4.40 Impartiality and Fairness – Power of Recommendations and public criticism

Both the Bylaws²³ and the Ombudsman Framework²⁴ empower the Ombudsman to make recommendations to the organization regarding complaints, suggestions to resolve them, or to report an inability to resolve them. Both documents allow for the posting of these reports on the website, and subsequently in the annual report. To date there have been a number of recommendations to the Board in both fiscal years. These have been reported on in the annual reports on a generic basis, and public criticism has not been required to resolve the issues. The recommendations have been reported on

²³ Bylaw V, Article 4.4

²⁴ Powers of the Ombudsman

generically, as the circumstances of the complaints, and the volume of complaints received to date would otherwise make it impossible to protect the confidentiality of the process and the complainants.

.4.41 Impartiality and Fairness - Required to consult on adverse findings

The Ombudsman is required to consult with the organization when there is an adverse finding through a number of vehicles. First, the revised Ombudsman Framework states:

Internal Fairness Procedure

Upon the completion of any report requiring a notification or recommendation to the Board of Directors, the Ombudsman will first provide any person who may be affected by the report an opportunity to respond to the report and provide feedback. The Ombudsman will consider feedback generated by the Internal Fairness Procedure in the preparation of a final report to the Board. Parties shall respond within 10 business days or, if necessary, request an extension from the Office of the Ombudsman, within that time period. Nil returns will be considered to be an indication of a lack of disagreement with the report.²⁵

Secondly, the Ombudsman Framework requires the Ombudsman to advise the Board of Directors as soon as he determines that there has been a serious breach of Administrative Fairness. Finally, once a formal report is filed with the Board, a period of

²⁵ Ombudsman Framework revised Oct 2005

60 days following the next Board meeting is provided to the organization to prepare a response.

.4.42 Impartiality and Fairness – Ombuds is an advocate for fairness, not the parties

Bylaw V states, “The Ombudsman shall serve as an objective advocate for fairness...”²⁶ The Ombudsman, in practice, acts as a neutral third party with a fact finding and Alternative Dispute Resolution function. The Ombudsman does not act as an advocate for either the organization or the complainant. The Ombudsman does act as an advocate for the standards of administrative fairness as found in the BC Ombudsman’s Code of Administrative Justice.

.4.43 Credible Review – Broad Jurisdiction

The Ombudsman’s mandate, as established in the Bylaws, relates to complaints of unfair or inappropriate treatment with respect to actions, decisions, or inactions by the ICANN Board, staff, or supporting organizations. This is a broad mandate and is not restricted to particular realms or silos of organizational activity. The Ombudsman’s jurisdiction does not apply to the following: internal administrative matters, personnel

²⁶ Section 2

matters, issues relating to membership on the Board, or issues related to vendor/supplier relations.²⁷

.4.44 Credible Review – no parties exempt from complaining

There is nothing in the Bylaws, the Ombudsman Framework, or the conditions of employment for ICANN limiting any person from making a complaint. The only jurisdictional issue relates to the fact that complaints must be made by the person primarily affected by the act, decision or inaction, and that the complainant has sufficient personal interest in it. There have been a small number of complaints where the Ombudsman has declined jurisdiction as the complainant was acting on behalf of another party.

.4.45 Credible Review – organization not permitted to impede

Bylaw V, Section 4.1 states, “No ICANN employee, Board member, or other participant in Supporting Organizations or Advisory Committees shall prevent or impede the Ombudsman’s contact with the ICANN community (including employees of ICANN).” Section 4.2 says, “ICANN staff and other ICANN participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.”

²⁷ Bylaw V, s 3.2

To date there have been no instances of inappropriate interference. The Ombudsman has made one report to the Board of Directors where it was alleged that an employee had failed to respond to the Ombudsman with respect to the resolving of a complaint in a reasonable time.

.4.46 Credible Review grounds for review are broad, and focus on fairness

The Ombudsman can receive and investigate complaints relating to acts, decisions, or inactions by the Board, staff, or supporting organizations. The role of the Ombudsman is to determine if there has been unfairness, and to use ADR techniques to resolve it. It is not the role of the Ombudsman to assess legality, nor to assign value to compensation for redress. It is the role of the Ombudsman to make recommendations which would prevent further unfairness in the future. The Bylaws state, “The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”²⁸

.4.47 Credible Review – reports problems and recommendations, has ability to publish

As with indicator 4.40 where the ability to act impartiality and fairly can be demonstrated by out-reporting, it is also a factor in demonstrating that the Ombudsman

²⁸ Bylaw V, s2

can credibly conduct reviews. If the Ombudsman were to never identify problems, or make recommendations based on complaints made by the community, it could be assumed that the organization was either misled in its need to have an Ombuds function, or that investigations were not conducted with depth or professionalism. There have been a number of investigations where the ICANN Ombudsman has reported problems, identified the need for systemic change, and made recommendations for redress.

.4.48 Credible Review – Findings not reviewable

Consistent with indicator 4.35, ICANN Ombudsman findings are not reviewable. At the end of an investigation, the Ombudsman must not only provide findings, but also provide reasons for the findings. Obviously the findings and the reasoning behind them will be supported by a credible review process. Applying the rules of Natural Justice, both the organization and the complainant have the ability to bring forward information at any point which could assist the decision maker (the Ombudsman) in making a finding. If the complainant believes that the findings or the reasoning used is based on incomplete facts, etc, they may transmit them to the Ombudsman for review. The Ombudsman's findings, except for his own additional review respecting the rules of Natural Justice, are not reviewable by any other structure in ICANN. However, the complainant may access formal dispute resolution processes or the courts to attempt resolution of the substantive matter only, but not the Ombudsman's findings.

.4.49 Credible Review – Ombuds cannot make binding orders

The Ombudsman is authorized to conduct investigations and to use a wide variety of Alternative Dispute Resolution techniques to provide redress if an unfairness has occurred. The Ombudsman does not have the authority to compel the Board, staff or supporting organizations to take any step, measure, or to introduce a change to bylaws or policies. At the end of an investigation or ADR process, if the Ombudsman feels it necessary, he may make recommendations to the Board. The Board is to respond with 60 days after the next Board meeting with the actions it will or will not take, and to supply reasons, as a matter of internal fairness, why it cannot act. The Ombudsman then may use the power to publicly criticize as his sole power of moral suasion in resolving issues, in order to bring the issue to the attention of the community.

.4.50 Confidentiality – Ombudsman has power to decide level of information to be disclosed

The Bylaws²⁹ indicate clearly that the Ombudsman shall determine the confidentiality of complaints. The Ombudsman Framework indicates that the Ombudsman only make enquiries, or reveal the identity of a complainant in order to further the resolution of a complaint.

.4.51 Confidentiality - Ombudsman will resist testifying

²⁹ Bylaw V s4.2

The Ombudsman Framework indicates:

In general terms, due to the very nature of the work of the Office of the Ombudsman, the Ombudsman *will resist* testifying in any process which would reveal informal, confidential information given to the Ombudsman during the course of an investigation.

The Ombudsman closely monitors the developments within both the United States Ombudsman Association, International Ombudsman Association, and the Forum of Canadian Ombudsman. There are continuing developments with both “Shield Laws”, statutory protections, and jurisprudence. At this time, I am unaware of any particular issues relating to Executive Ombudsman, although one could imagine a scenario where a complainant has entered into a lawsuit and attempted to have the Ombudsman testify. I would resist testifying.

.4.52 Broad range of enquiry available

The ICANN Ombudsman has the authority to investigate a broad range of issues. This is well discussed at indicators 4.43 and 4.46.

.4.53 Discretionary power to refuse complaints and to publicize

The ability to publicize has been well dealt with in a number of the previous indicators.

Discretionary powers to refuse complaints are found in the Bylaws and the Ombudsman Framework. The Bylaws at s. 3.2 state that the Ombudsman shall:

exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on.

The Ombudsman Framework states:

The Ombudsman may decline jurisdiction over a complaint in the following circumstances:

- The person making the complaint knew, or ought to have known of the decision, recommendation, act, or omission to which the complaint refers more than 60 days before the complaint was received by the Ombudsman;
- The subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient personal interest in it;
- The complaint is repetitive, trivial, vexatious, frivolous, non-substantive, otherwise abusive, or not made in good faith;
- Having due regard for all the circumstances, further action by the Ombudsman is not necessary to resolve the complaint;
- The complaint is abandoned; or is withdrawn in writing by the complainant;
- The complainant revokes the ADR process by engaging in either a formal review process under Article IV of the Bylaws; or engages in an outside legal process.

If the ICANN Ombudsman declines jurisdiction, or if the complaint does not relate to an ICANN act, decision, or inaction, the Office will always try to assist by acting as a single portal for complainants, and by providing appropriate referrals to persons or agencies which may be able to assist the complainant. Often referrals will be made to the ICANN Registrar Liaison team as the substantive issue is a matter of dispute between a registrar and registrant.

.4.54 Identify complaint patterns and trends

The file and case management system enable the Ombudsman to identify trends which affect not only the organization, but also issues of dispute with registrars and country code top level domains. The trend analysis points out not only business areas where complaints are received, but also the nature of complaints (i.e. unreasonable delays etc.) This trend analysis has been of assistance to Registrar Liaison team in monitoring complaints about specific registrars.

.5 Summary

This evaluation 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.

Based on the entirety of the 54 criteria, it appears that the ICANN Office of the Ombudsman is meeting the standards that would be expected by an organization or government body for an Ombudsman program. It demonstrates that, despite being in its developmental stages, it has become an Office that operates on the universal Ombudsman principles of confidentiality, impartiality, neutrality, and independence.

The evaluation reveals three issues for consideration by the organization. First, there are two items which should be ratified by the Board Governance Committee, the Ombudsman Framework (and updates), and the Ombudsman Management Principles. Secondly, the Ombudsman and the Chief Financial Officer should consult to determine the frequency of financial updating required for the Office. Third, the Ombudsman and the Chair of the Audit Committee should consult to determine a time frame for integrity audit for the Office.

The Office of the Ombudsman shows itself to be a centre of excellence in a number of ways:

- Despite being in the developmental process, it has matured into a responsive, flexible and fair online dispute resolution system;
- It has a leading edge evaluation framework in place. Research conducted at ICANN on Ombudsman review is at the forefront in the field. Unlike most Ombudsman organizations, the ICANN Ombudsman will, over time, be able to demonstrate value and program efficiency;
- It has a strong recognition of the necessity of outreach and community education;
- It has developed appropriate tools for complaint intake and resolution online;
- It is unique in its mix of Ombudsmanship and online dispute resolution;
- It has strong leadership from a well qualified incumbent;
- It promotes a strong communications and feedback loop with the organization;
- It uses data and trend analysis to promote improvement in the organization, and to advise other parties of potential issues;
- It participates in the range of Ombudsman fora; and,
- Despite being a sole practitioner office, it has established a continuity program for absences.

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