

Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3

This is the first substantive evaluation of a Request for Reconsideration by the ICANN Ombudsman. In October of 2016, ICANN adopted new bylaws, expanding the role of the Ombudsman to include a new, formal role with regard to Requests for Reconsideration (Bylaws, Article 4, Section 4.2). The subsequently amended ICANN Bylaws (amended as of July 22, 2017: "Bylaws") state:

4.2(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

and

4.2(l)(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

In my new formal role under the current Bylaws, I have reviewed and considered Reconsideration Request 18-3. Previously, I have reviewed several Reconsideration Requests submitted to me for my consideration since the new bylaws went into effect; I have had to recuse myself for each under the following ICANN Bylaw:

4.2(l)(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Before turning to my substantive evaluation of the present Reconsideration Request 18-3, I want to make some observations about the Ombudsman's new dual role in the ICANN community, now that it has obligations both formal (substantive evaluations of Reconsideration Requests) and informal (evaluating complaints by members of the ICANN community about unfair treatment by ICANN staff, its Board, or a constituent body). The Bylaws obligate me to play both roles, and to balance the two; and I cannot, as I understand the Bylaws, wear both hats at once.

The Ombudsman's Charter, and principal role before the new Bylaws were passed (and now under them) is to provide an informal accountability mechanism using a "fairness" standard for issues and complaints arising within the ICANN community that relate to treatment by ICANN staff, Board members, or members of the numerous constituent bodies under the multi-stakeholder model; according to the Bylaws Article 5:

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. 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.

My principal function is to operate informally, to evaluate complaints of unfairness, and to resolve disputes. Certain challenges are presented by the addition of the new “formal” role for the ICANN Ombudsman; before providing a substantive evaluation of a Reconsideration Request (such as the present one), the Ombudsman must determine whether recusal is appropriate. The standard for my recusal is this: if I have been asked to evaluate a complaint informally (under the fairness standard and pursuant to Bylaws Article 5), then (after review of the Request) I will recuse myself whenever a Reconsideration Request appears on its face to be the same (or a reasonably related) matter. If I have done an investigation or mediated informally under my principal informal Article 5 role, then I have deemed myself to have “taken a position”—and my recusal is therefore warranted.

After review of a Reconsideration Request, the Ombudsman is required to choose between recusal (including where Ombudsman conduct itself is part of the Reconsideration Request, for example, or where I, while performing my role under the Bylaws have taken a position related to the Request), and providing to the Board Accountability Mechanisms Committee (BAMC) a substantive evaluation of the Request, as I am doing here. To be clear to the community in the future: where I have been involved informally, I will be loathe to tread formally, and I will consistently recuse myself in such situations from providing a substantive evaluation of a Reconsideration Request.

I want to stress that my formal involvement in a Reconsideration Request, when I am not obligated to recuse myself, will be done in a professional and impartial manner, with the reasonable assistance of dedicated outside counsel. And I want to stress that per the Bylaws Article 5, the Office of the Ombudsman remains open to any member of the community, whether or not they have filed a Reconsideration Request, or may have reason to become a Requestor in the future (under the Bylaws, Article 4).

In the present Reconsideration Request, 18-3, my involvement with the Requestor, Astutum Limited (“Astutum”) has been limited to advising the Requestor of the available ICANN accountability mechanisms; I have not taken any position in the matter that forms the substance of this Request. Hence, I have not recused myself here, and now offer the following substantive evaluation of Reconsideration Request 18-3.

A Requestor, under the relevant provision of the Bylaws (4.2(c)), can bring a Request concerning an action or inaction as follows:

Section 4.2. RECONSIDERATION...(c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction

("Reconsideration Request") to the extent that the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

Put succinctly, did an official action (or inaction) contradict or violate ICANN's Mission or established policy? Or, was such action taken or refused without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the BAMC a "substantive evaluation" of a Request for Reconsideration, the Ombudsman is tasked to look "substantively" at what is included in the Request itself, and of course at the actions (or inaction) the Requestor seeks Reconsideration of; and while the Bylaws are silent as to my investigative powers under Article 4, Article 5 does empower the Ombudsman, and gives me "the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies in responding to enable an informed evaluation of the complaint" (made to me by community members under Article 5). The Ombudsman shall

"(d) 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."

While a Reconsideration Request is *not* a "complaint" brought (to me) under Article 5, nothing in Article 4 purports to limit my ability to have "access" (while maintaining confidentiality) "to all necessary information and records from ICANN staff and constituent bodies" (as set forth in Article 5). Under the Bylaws, Article 4, I am also entitled (within resource constraints) to "seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task." Since it seems patently obvious (at least, to me) that the Bylaws would not obligate me to make an "uninformed" evaluation of a Request for Reconsideration, and since my formal role under Article 4 does not constrain my internal rights of access under my "charter" (set forth in Article 5), I have sought and will seek outside assistance and, where warranted, access to "necessary information and records," so that my evaluation of the substance of Reconsideration Requests may be sufficiently informed. The BAMC should not want, and the new Bylaws do not task the Ombudsman with providing, *uninformed* evaluations of Requests for Reconsideration. My substantive evaluations are constrained by reasonableness, and aided by expert advice as reasonably required.

My task is *not* to be a referee or an umpire or a judge—I cannot grant or deny a Request. I am more like a neutral network commentator observing from high above the field (in a modest broadcast booth) the action below: trying to describe it and “evaluate” it, and then to comment substantively from the unique perch granted to me by my Charter and the relevant Bylaws. From this vantage, I think it useful, at least in regard to this Request, to look closely at what the Requestor, Astutium, “ask(s) ICANN to do now.”

The Request states three things Astutium wants ICANN to do; these are to have

- 1) the RAA (Registrar Accreditation Agreement) termination cancelled;
- 2) the processes/staff which led to the termination letter reviewed; and
- 3) the libelous claims now published on your website updated with an apology/retraction.

This Reconsideration Request will be the very first such Request (as far as I know) to be addressed by the Board (and BAMC) relating to the termination of a Registrar Accreditation Agreement for Breach.

Termination of the Requestor’s RAA

Requestor executed a Registrar Accreditation Agreement (“RAA”) (the 2013 version) on October 5th, 2014.

<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>

On February 27th, 2018, a notification of breach under RAA section 5.5.4 was sent to the Registrar, following the procedure for notifications set forth in RAA 7.6.

https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf (the “Breach Notice” or “Notice of Breach”)

The breaches set forth above in the Breach Notice are, in the main, breaches of RAA contractual provisions relating to Whois data (one breach involves the obligation of the Registrar to keep an accurate physical address on file, presumably in part so that when a breach *is* noticed, physical delivery of such Notice may be made to the Registrar):

“REGISTRAR INFORMATION SPECIFICATION

Registrar shall provide to ICANN the information specified below, which shall be maintained in accordance with Section 3.17 of the Agreement. ...

7. Correspondence address for the Registrar.* This address will be used for contractual purposes, and the Registrar must be able to accept notices and service of legal process at this address. No Post Office boxes are allowed.”

Some of the breaches (relating directly to incorrect and inaccurate Whois data) set forth in the Breach Notice (Noticed Breaches) were brought to the attention of ICANN Contractual Compliance by third-parties. There is nothing set forth in Request 18-3,

which, upon review of the relevant Notices of Breach and Termination and the process whereby these were generated and sent, makes me think other than that Contractual Compliance acted according to their own published policies, and followed established procedures in terms of their investigation of the Noticed Breaches. Assuming the facts set forth in those Notices are true, Contractual Compliance acted strictly in accordance with the terms of the RAA and their well-established and clear policies and procedures.

Contractual Compliance, per its policies and procedures, examined the Requestor Registrar's Whois data, found it lacking and inaccurate, and sent notices and attempted to contact the Registrar as provided by the RAA, in an effort to get Astutium to cure. On February 27th, after review by a competent and trained Contractual Compliance team, a Breach Notice was sent to the Registrar by email (to the Registrar's contact, at an astutium.com email address), as well as by Fax and by Courier. There is nothing in the Request that suggests that the Requestor did not timely receive the Breach Notice.

The determination of breaches by, and the notification to Astutium of such, were made under agreed-upon terms of the RAA and established ICANN Contractual Compliance policies; Astutium was given 21 days to cure the breaches set forth in the Breach Notice.

Astutium could have cured the Noticed Breaches. At the very least, they could have made efforts to cure the Noticed Breaches. According to Contractual Compliance, Astutium not only made no effort to cure the Noticed Breaches, they made no effort to contact Contractual Compliance at all. In effect, they "went dark" during the 21-day cure period (set forth in the RAA). Now Astutium, per this Request, wants ICANN's Board to cancel the termination of the RAA and Astutium's Registrar rights thereunder.

According to Contractual Compliance, and this is a purely factual matter, but I have no reason to doubt their veracity, Astutium did not cure, did not respond; thus, upon completion of the 21-day cure period, after a determination made by an experienced and trained Contractual Compliance team that no timely cure had been made (or even attempted so far as they could see) a Notice of Termination was sent to Astutium on March 21st, 2018. (The counting for the 21-day cure period under the RAA, by policy, begins the day after the Breach Notice is sent—in this instance, the Breach Notice was sent February 27th, 2018, and the Notice of Termination was sent 22 days later on March 21st, 2018; it was "TRANSMITTED VIA ELECTRONIC MAIL, FACSIMILE, AND COURIER" to the addresses Contractual Compliance had on file per the RAA.)

https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf

This present Request for Reconsideration (18-3) was filed by Astutium on March 30th, 2018. The termination process of the Requestor's RAA has been suspended by ICANN pending the resolution of this Request by the BAMC and, ultimately, the Board itself.

The Processes of Contractual Compliance Staff That Led to the Termination Notice

The second action requested by Requestor is a review of "the processes/staff which led to the termination letter": neither the processes themselves, nor ICANN staff itself are *actions* or *inactions*. Compliance policies and their "approach" to enforcement are here:

<https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#31>

Those processes and procedures, up to and after the Referral to Enforcement, along with the mechanisms in the RAA itself (the “Contract” of which Compliance in this instance is responsible for) were followed rigorously and impartially. No special treatment was given to Astutium. All of its “termination breach claims” that it seeks to dispute in the Request are related directly to the Notice of Termination, which it received, as stated in the Request, on March 27th, 2018.

I was given access to ICANN’s Contractual Compliance team and discussed with them their procedures, processes and approach, including the treatment of the Requestor.

The actions taken by Contractual Compliance appear to me to be strictly in accordance with the mutually-agreed-upon terms of the RAA, and their established procedures and policies as set forth in part above. The Request for Reconsideration seems telling, to me, in that it first and foremost seeks to stop the termination of Requestor’s RAA (and reverse the termination process currently suspended owing to consideration and review of the Request itself). That action (pending termination) and the actions leading up to it (investigating a potential breach, whether brought to the attention of Contractual Compliance by third-party complaint, internal monitoring, or by audit; determining a breach; noticing a breach or breaches; and then noticing termination to the contracted party per the terms of the RAA in effect)—none of these actions “contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).”

On the contrary, it is the Mission and Commitment of ICANN and the stated policy of its (aptly named) Contractual Compliance staff, to *ensure* that ICANN agreements, here the RAA, and any contracted party to an RAA, are, in fact, *in compliance*. Enforcement of the agreements to which it is a party—and especially the RAAs, which are in some ways the life’s blood of ICANN—is a “Core Value.” ICANN lives by its contracts, and endeavors to enforce its RAAs fairly, impartially and rigorously—and has done so here.

Contractual Compliance did not make its determinations and take the actions that culminated in the Notice of Termination (and the pending termination process) without considering all material information available (other than such information, material or otherwise, that could have been—but for whatever reason was not—submitted to it by Astutium), and ICANN staff did not rely on false or inaccurate relevant information.

Contractual Compliance were made aware of a breach (breaches) of Requestor’s RAA relating to Astutium Whois data, they investigated and determined those breaches in fact existed, they timely and properly notified Astutium, they sent a Breach Notice with ample time to cure; then Astutium did not respond to duly Noticed Breaches and did not cure said Noticed Breaches; indeed Astutium did not contact ICANN Contractual Compliance *at all*, as it might have done after receiving the Breach Notice from ICANN.

Requestor, in essence, seeks Reconsideration of the (pending) Termination of its RAA, which does not seem to me to be warranted as a remedy via the Reconsideration Request process under these circumstances: relevant actions by ICANN staff were

based on the material and relevant information available and not a result of reliance on false or inaccurate relevant information.

As for review of Contractual Compliance's actions and policies: Notice of Termination was properly sent after team investigation, due diligence was then done by Contractual Compliance, and it followed its procedures and policies and the "letter(s)" of the RAA.

Allegedly Libelous Claims (Publishing of the Notices of Breach and Termination)

Finally, Requestor, perhaps because it believes itself righteously to be aggrieved by the actions/inactions of ICANN and its staff in regard to the alleged breaches and Notice of Breach, and the Notice of Termination based on the uncured breaches, seeks, in its final request, for an *updating* of "the libelous claims now published on your website...with an apology/retraction" by ICANN. While I agree in principle that libelous statements *would be* actions *not* in keeping with the "Mission, Commitments, Core Values and/or established ICANN policy(ies)" (to say nothing of the kind or quality of information considered in making such allegedly "libelous" statements), there is nothing in the published Notices of Breach or Termination that appears on its face or after inquiry to be *false*: Facts relating to the breaches were determined and vetted by experienced, well-trained teams in Contractual Compliance acting in their ordinary course per their published procedures and policies.

Since I serve the ICANN community, I will note that there were (and perhaps still are) other avenues available to Requestor other than requesting Reconsideration. First, the Requestor could have *cured* the Noticed Breaches: At the very least, they could have responded to and worked collaboratively with Contractual Compliance to make efforts towards curing some and eventually all of the breaches set forth in the Breach Notice.

Requestor could have, and could yet still, undertake the Dispute Resolution processes available in the RAA, Section 5.8: "Resolution of Disputes Under this Agreement." (<https://www.icann.org/en/system/files/files/approved-with-specs-27jun13-en.pdf>)

Requestor could have, and might perhaps still, file a Complaint with the newly established ICANN Complaints Office. [<https://www.icann.org/complaints-office>] This could lead to escalation of one or more of Requestor's issues to the ICANN CEO.¹

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- ¹ The ICANN Complaints Office is impartial and neutral; it researches, reviews and responds to unresolved operational matters regarding work delivered or promised by ICANN. The complaints office is an operational accountability mechanism for the organization and is subject to a process that is as transparent as possible so that all constituents can see what problems are being reported and how they are being addressed. "If there is disagreement regarding improvements between the Complaints Officer and relevant department executives, the issue is escalated to the Complaints Officer's supervisor and the ICANN CEO." <https://www.icann.org/complaints-office>

My substantive (and, to the degree made possible by my Charter, *informed*) evaluation of this Request, as ICANN's Bylaws require from the Ombudsman, is this: With regard to ICANN Contractual Compliance's determination, enforcement processes, the sent and published Notice of Breach of Requestor's RAA, the subsequently sent and published Notice of Termination of that RAA (following a contractual cure period during which no cure or contact with ICANN Contractual Compliance was made), along with the publishing in due course of factual information in the Breach and Termination Notices (as is ICANN's well-established, well-stated practice *and* policy, in the name of *transparency*), nothing Requestor has set forth in Request for Reconsideration 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by Requestor.

Requestor may wish to pursue other avenues, including the process of dispute resolution in the RAA, or filing a Complaint with the Complaints Office.