

Office of the Ombudsman
Report to the Board of Directors File 05-1090

Office of the Ombudsman
Internet Corporation for Assigned Names and Numbers

Report to the Board of Directors

Ombudsman File 05-1090

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1 of 18

10:07:05 AM 9/15/2006

From the ICANN Ombudsman Framework:

Confidentiality

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.

This report shall not be further released by any party receiving the report without the consent of the Office of the Ombudsman.

Office of the Ombudsman
Report to the Board of Directors File 05-1090

Introduction

ICANN Bylaw V, Article 2 states:

“The Ombudsman shall serve as an objective advocate for fairness and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such a negotiation, facilitation, and “shuttle diplomacy” to achieve these results.”

The Ombudsman Framework contains the following provision:

“Where, in the conduct of an investigation of a complaint, the Ombudsman forms an opinion that there has been a serious breach of administrative fairness, or maladministration, the Ombudsman shall notify the Board of Directors of the circumstances (see key principles regarding administrative fairness in the "Code of Administrative Justice 2003" Ombudsman British Columbia).”

In the course of handling the complaint 05-1090, I have formed the opinion that there has been an unfairness, and I am advising the Board of this in accordance with the Ombudsman Framework. I am further writing to advise the Board of my recommendations for resolution.

Scenario

The Office of the Ombudsman has received a complaint from (). () was the proponent of the application for the establishment of an At-Large Structure for (), which was rejected by the At-Large Advisory Committee (ALAC).

I am informed that the same vote process rejected a total of four applications during the same ballot which was conducted from 5 July 2005 to 3 August 2005.

ALAC has 15 voting members. The ALAC's vote on the matter was eight members in favour, four members formally abstaining from the vote, and three members who did not cast a vote at all.

The At-Large Framework Foundation (<http://alac.icann.org/framework.htm>) states at Article II.4:

Decisions to certify an ALS require a 2/3 vote of all of the members of the ALAC and shall be subject to review according to procedures established by the Board. The ALAC will notify the applicant of its certification decision, and, if applicable, provide information on requesting a review of the decision.

ALAC is composed of 15 members, which means that in order to certify a new At-Large Structure ten votes must be cast in favour of the applicant. In this case the applicant was rejected; despite having no votes cast to reject, and having had a 2/3^{rds} majority of all voting members; as three members did not vote, as the total in favour was not ten.

The information I have gathered during my review indicates that the ALAC members had a period of two weeks to cast a vote electronically through the Chair, Mr. Vittorio Bertola. This provided a more than adequate time for all members to cast ballots.

STRICTLY CONFIDENTIAL AND BUSINESS PROPRIETARY

Office of the Ombudsman
Report to the Board of Directors File 05-1090

My investigation further reveals that the proponent, (), had filed his application with ALAC for certification on May 04, 2004, and that the application vetting process was deemed complete and sent forward for consideration in mid-2004.

I was informed that some ALAC members expressed concern about that () had a handful of members and little substantive activity. I also was informed that the ALAC had developed a practice of not voting on an application until the ALAC members from the applicant's region recommended it for a vote; and that after North American ALAC member, (), resigned in April 2004 ALAC members decided to wait to vote on North American applications until there were three members from that region. This vacancy was filled in February 2005.

There is no indication why the consideration of this application took almost a year and a half to be brought to a vote before ALAC.

Office of the Ombudsman
Report to the Board of Directors File 05-1090

Systemic Issues

Voting

Investigation reveals that, in the same voting round, six new ALS were considered. Of these, one was rejected by an unfavourable ballot, two were certified, and three, including the complainant's, were rejected due to a lack of total voting members, as per the existing certification procedures.

The other ALS applicants in the latter circumstance were:

()

Date of application: April 26, 2005

()

Date of application: June 23, 2004

Voting Pattern Table

Name	Votes for	Votes against	Abstained	Non voting	App. Date
()	8	0	4	3	May 4, 04
()	9	1	2	3	Jun 23, 04
()	9	0	3	3	Apr. 26, 05

Office of the Ombudsman
Report to the Board of Directors File 05-1090

My investigation reveals that the same three members of ALAC did not vote on any of the six ALS applications. Bearing in mind that the present rules require a 2/3 majority of ALL members of the committee, their non-voting greatly diminishes the possible success of any application to be certified.

I am further informed that this pattern of non-participation by these three ALAC members has been ongoing for some period of time.

Unreasonable delay

My investigation leads me to find that, except in unusual circumstances where due diligence cannot be performed, applications for certification should be ready for certification by ALAC ballot no later than three months after the completed application is received.

I am concerned that each of these proponents had their application active before ALAC for 17, 16 and five months respectively.

I am further concerned that there are other applications which far exceed the three month window. The () made its application for ALS certification on November 24, 2004, almost 11 months ago. There are several pending applications dating from winter and spring 2005. My investigation reveals that there is no substantive reason for these delays.

Outstanding applications exceeding three months include:

(>>>10 applicants)

Analysis

My colleague, Arlene Brock, the Ombudsman for Bermuda, while recently speaking at Harvard Law School made the following observation¹:

The flexibility of the Ombudsman in contrast to judicial review is illustrated by an example from Quebec. Upon obtaining a hunting permit, a person is automatically insured against accidents whilst hunting. Victims who require amputation are entitled to compensation. A milkman whose leg was paralyzed but not amputated was refused compensation. The recommendation of the Quebec Ombudsman was that the legislature would have included paralysis had they foreseen this situation. As a result of this recommendation, the hunter received both an indemnity and an amount for pain and suffering.

The parallel is not lost on this case. If the Board of Directors, and the At-large Advisory Committee had foreseen a circumstance where members of the committee did not fully participate in a democratic ballot process, but the ballot was still favourable; would they consider the vote be valid?

As the following change to the ALAC voting procedures have been approved by the ALAC and the General Counsel's Office, and will soon be sent to the Board of Directors for ratification, it is clear that this event was foreseen, and that the applicant is caught in the time lag between the formulation of the policy change and its implementation:

Section 2, paragraph 4(i):

Decisions to certify or de-certify an At-Large Structure shall require a 2/3 vote of all of the members of the ALAC and shall be subject to review according to procedures established by the Board.

¹International Human Rights: Championing The Cause: Arlene Brock LLM '91, National Ombudsman of Bermuda

Office of the Ombudsman
Report to the Board of Directors File 05-1090

Replace with:

Decisions to certify or de-certify an At-Large Structure shall require a 2/3 majority among all of the members of the ALAC who cast a vote, **provided at least 9 members of the ALAC cast a vote** according to procedures adopted by the Committee. These decisions shall be subject to review according to procedures established by the Board.

While ever bearing in mind that the members of ALAC are indeed all volunteers, who provide their time without remuneration for the betterment of the ICANN community, I note that the development and certification of At-Large Structures across the globe is an integral focus of their communal work. I also note that while these volunteers are not remunerated, ICANN does take responsibility to provide travel expenses to the ALAC to attend the three ICANN meetings yearly, as well as regional At-large meetings as required. This represents an investment of tens of thousands of dollars per year, per ALAC member, by ICANN in the operations of the committee.

Definitions

The Code of Administrative Justice (2003)² defines unreasonable delay as:

To delay is to postpone, put off or slow down³³. Delay may be part of the exigencies of the modern state. While sometimes it may be unavoidable, it should not be burdensome, infringe on rights or entitlements or unduly affect public services.

***Principle:* Delay is unreasonable whenever service to the public is postponed improperly, unnecessarily or for some irrelevant reason.**

Example: A tribunal takes three years on a case for which it would normally take six weeks. The tribunal is unable to provide an explanation for the delay. Such delay is unreasonable on its face.

³³ e.g. see Black's Law Dictionary [1999] at 437; The Dictionary of Canadian Law [1995] at 310

Black's Law Dictionary defines delay as:

To retard; obstruct; put off; postpone; defer; prolong the time of or before; hinder; interpose obstacles; as, when it is said that a conveyance was made to "hinder and delay creditors." The term does not necessarily, though it may, imply dishonesty or imply moral wrong.

The Code of Administrative Justice (2003)³ defines an unreasonable procedure as:

To be reasonable is to exercise sound judgment, to be sensible or to act with reason¹⁷. Unreasonable activity by institutions will be those actions

² Ombudsman of British Columbia, Public Report 42, March 2003

³ Ombudsman of British Columbia, Public Report 42, March 2003

taken, decisions made or standards adopted which no sensible authority or institution would do, make or adopt¹⁸.

***Principle:* An unreasonable procedure is one which fails to achieve the purpose for which it was established. This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as a synonym for an incompetent procedure on the basis that such a procedure is an absurdity and thus contrary to reason.**

¹⁷ e.g. see The New Shorter Oxford English Dictionary [1993] at 2496, ¹⁸ e.g. see The Dictionary of Canadian Law [1995], at 1026

Office of the Ombudsman
Report to the Board of Directors File 05-1090

Conclusion

Pursuant to the powers given to the Ombudsman in the Ombudsman Framework, I am advising the Board of Directors that there has been an administrative unfairness with respect to an unreasonable delay in the processing of At-Large Structure applications with ALAC; and further with respect to the certification of the (3 applicants).

Redress and Recommendations

In light of the above, I recommend that the proposed bylaw change regarding ALAC voting be actioned by the Board of Directors in the shortest possible delay.

I recommend that (), be reconsidered as At-Large structures. It would be a greater unfairness, and would also impugn the credibility of the process, if the proponents were required to resubmit an application and wait another period of time for consideration for certification. I recommend that ALAC conduct a re-vote on all three applications at the Vancouver ICANN meeting in the forthcoming weeks.

I recommend ALAC take steps to ensure that applications for certification be treated in a more expeditious fashion, both for the benefit of the applicant, and ALAC. I recommend that ALAC, in consultation with the ICANN At-Large staff member, develop a set of milestones to deal with these applications in the noted three month time frame.

I recommend that the proposed changes to the ALS certification process, noted earlier in this report, be expedited.

I recommend that the ALAC develop minimum participation standards for its members, and a procedure for replacing members who do not meet these minimum participation standards.

I recommend that all existing applications, exceeding three months past the application date, be dealt with in the shortest possible delay.

I recommend that in communicating a rejection of certification, that ALAC communicate the reasons for the denial, consistent with the Code of Administrative Justice (2003) which states:

STRICTLY CONFIDENTIAL AND BUSINESS PROPRIETARY

Reasons are the basis for judgments. Formally, “reasons” provide the rationale behind and justification for decisions or actions. They provide a summary of analysis and are a means to facilitate understanding as well as a means to allow meaningful appeal of such decisions and actions. Adequate reasons will be those which are sufficient to allow an understanding of the issues considered and the decisions reached. Appropriate reasons will be logically linked to the questions with which the decision-maker dealt.

***Principle:* In assessing the adequacy and appropriateness or reasons, three major factors are important:**

- a) Whether the person’s concerns are addressed directly and completely;**
- b) whether the reasons plainly state the rule upon which the decision proceeds and whether the rule as applied to the facts logically produces the decision reached; and**
- c) whether the reasons are comprehensible to the recipient.**

APPENDIX

ALAC Policies on ALS

On 26 June 2003, ICANN's Board of Directors approved a framework for the formation of local and regional At-Large groups to promote structured involvement and informed participation of the global individual Internet user community in ICANN.

ICANN's Interim At-Large Advisory Committee (ALAC) encourages interested, qualified groups in all geographic regions to become involved in At-Large as certified "At-Large Structures." At-Large Structures are groups throughout the world (either existing organizations or newly formed for this purpose) focusing on participation by individual Internet users at the local or issue level. Interested groups are asked to complete and submit to the ALAC a short application form (available at <http://alac.icann.org/correspondence/structures-app.htm>). Groups that meet the minimum requirements listed below are to be designated as "At-Large Structures" by the ALAC. Elements of the framework are detailed below.

I. Minimum criteria for At-Large Structures

II. Certification process for At-Large Structures (ALS)

III. Guidelines for the form of each Regional At-Large Organizations' (RALOs)

Memorandum of Understanding (MOU) to be entered into with ICANN

IV. Procedures for Board review of ALAC certification decisions

I. Minimum criteria for an At-Large Structure:

1. Commit to supporting individual Internet users' informed participation in ICANN by distributing to individual constituents/members information on relevant ICANN activities and issues, offering Internet-based mechanisms that enable discussions of one or more of these activities and issues among individual

constituents/members, and involving individual constituents/members in relevant ICANN policy development, discussions and decisions.

2. Be constituted so that participation by individual Internet users who are citizens or residents of countries within the Geographic Region in which the ALS is based will predominate in the ALS' operation. The ALS may permit additional participation by others that is compatible with the interests of the individual Internet users within the region.
3. Be self-supporting (not rely on ICANN for funding).
4. Post on the Internet (on the ALAC's website or elsewhere) publicly-accessible, current information about the ALS's goals, structure, description of constituent group(s)/membership, working mechanisms, leadership, and contact(s).
5. Assist the RALO in performing its function.

II. Certification process for At-Large Structures (ALS):

1. Submit to the ALAC, in electronic form (provided by the ALAC), a completed ALS application (in English) and provide the ALAC with any requested documentation.
2. The ALAC will conduct due diligence, reviewing the application and performing necessary tasks in an effort to ensure that the established ALS criteria has been/will be met. This could include requesting references, interviewing the applicant's contact(s), gathering/requesting additional information on the applicant, and (for existing organizations) requesting information on applicant's leadership and operations, verifying general funding sources, and requiring the applicant to demonstrate the identity of their individual constituents.
3. Upon completion of its due diligence, all ALAC members will review the application and related documentation; the ALAC will then vote on certifying the applicant an ALS, with each ALAC member voting ELIGIBLE or NOT ELIGIBLE.
4. Decisions to certify an ALS require a 2/3 vote of all of the members of the ALAC and shall be subject to review according to procedures established by the Board. The ALAC will notify the applicant of its certification decision, and, if applicable, provide information on requesting a review of the decision.

5. Decisions to de-certify an ALS require a 2/3 vote of all of the members of the ALAC and shall be subject to review according to procedures established by the Board. Reasons for the ALAC to pursue de-certification action, and to de-certify an ALS, may include persistent non-compliance with significant ALS requirements. The ALAC will provide advance notice to the ALS in question, and the ALS will have an opportunity to be heard and respond to the ALAC prior to a decision on de-certification. The ALAC will notify the ALS of its de-certification decision and provide information on requesting a review of the decision.
6. On an ongoing basis, the ALAC may give informal advice and support to organizations seeking certification. It is intended that the ALAC work informally with organizations over time to assist with their efforts to comply with the criteria and achieve the necessary standing to seek certification.
7. ALS applications, ALAC decisions on applications, and other information, as appropriate, will be publicly posted by the ALAC.

To implement the framework approved by the Board, the ALAC created the following process:

Steps for "At-Large Structure" Certification:

1. A group reviews the criteria for an At-Large Structure (ALS) and (if it believes it meets the criteria) completes and submits an ALS application.
2. The ALAC sends the group (applicant) an email confirming the application was received.
3. The ALAC conducts due diligence, checking the application and available information and performing necessary tasks in an effort to ensure that the criteria has been, or will be, met.
4. The ALAC reviews the application and related documentation.
5. The ALAC votes on certifying the applicant as an "At-Large Structure."
6. The ALAC notifies the applicant of its decision and posts ALS notices on its website.

7. The applicant (At-Large Structure) receives materials and support for information sharing and ICANN involvement.

ALS Applications

The ALAC has received 36 ALS applications as of 1 October 2005, of which two have been withdrawn, 22 have been approved, 4 have been rejected, and eight are pending.