

Dear Nico,

The GNSO Council appreciates the opportunity to respond to certain questions raised by the Governmental Advisory Committee's during our bilateral meeting at ICANN 79 relating to its work on transparency within Statements of Interest. During that meeting, several GAC members had asked for the rationale provided by those that supported the current [GNSO Operating Procedures](#) language on allowing participants in a policy development working group to withhold the names of any clients it represents in that working group if "professional ethical obligations prevent you from disclosing this information".

On June 5, 2023, the Council Committee for Overseeing and Implementing Continuous Improvement (CCOICI) published its Recommendation Report for GNSO Council review. This report encompassed recommendations approved the CCOICI following its review of: (a) a previous [recommendations report](#) submitted by the GNSO Statements of Interest (SOI) Task Force examining Statements of Interest requirements as well as (b) its review of the input received in response to a [public comment forum](#) on the topic.

Although a number of recommendations from the CCOICI Report on SOI improvements did achieve full consensus, no consensus was achieved on the issue of whether there should continue be an exemption in the GNSO Operating Procedures for those prevented by professional ethical obligations to disclose who they are representing in a specific effort ("Professional Ethical Exemption.". Annex A of the original [task force Recommendations Report](#) ("Task Force Recommendations Report). includes the statements of the different GNSO Stakeholder Groups and Constituencies on this topic that should provide further insight into the different positions.¹

The GNSO Council provides this summary of Annex A but notes that this summary does not replace the positions of the applicable Constituencies and/or Stakeholder Groups which can be found in Full at Annex A of the Task Force Recommendations Report. Annex A in its entirety is provided as Appendix 1 attached hereto.

Constituencies / Stakeholder Groups in favor of keeping the Professional Ethical Exemption

¹ Annex A to the [Task Force Recommendations Report](#), entitled "Stakeholder Group / Constituency Statements" can be found on pages 13-21.

1. The Business Constituency stated it “ is not in favor of eliminating a swath of ICANN participants simply because they are ethically bound to not disclose their client relationships. There are myriad reasons – not the least of which would be the fact that disclosure of those being represented could invite even more gaming into the ICANN system. For example, an attorney representing a new gTLD applicant could be compelled to disclose his/her relationship with that applicant, inviting a competing application.” It explains that “such disclosure puts one or two individuals into a decision-making position on that person’s participation. ICANN is not in the business of appointing people who can arbitrate others’ participation.”²

2. “It is the [Intellectual Property Constituency’s] firm view that exemption for professional obligation to the requirement to disclose is necessary and, therefore, considers that the exemption should remain. . . Members of the IPC continue to have significant concerns regarding the impacts of the potential removal of the existing exemption. In particular:

- its impact on lawyer-client confidentiality; If the disclosure exemption were to be removed in its entirety, then it would force professionals to either act inconsistently with their professional rules and obligations to their clients, or bar them from participating in the multistakeholder model.
- understanding how the requirement to disclose relates to the data privacy laws, such as the GDPR; It is unclear whether the SOI Taskforce has considered the privacy impacts under the GDPR of disclosing a client’s identity in what is intended to be a public document.
- whether it is consistent with the ICANN Bylaws; and
- its impact on commercial-in-confidence opportunities for registry providers and consultants.³

Constituencies / Stakeholder Groups in favor of eliminating the Professional Ethical Exemption

1. The Non-Commercial Stakeholder Group states, “To prevent capture by powerful individuals or groups, it is crucial to be aware of whose interests are being represented. Confidentiality in SOIs jeopardizes the integrity of the policymaking process, making it more susceptible to capture. Attorney-client privilege should not apply to public policy-making. If clients are not willing to be disclosed when participating in policy processes, they should not be represented.” It pushes back on those in favor of the Professional Ethical Exemption claiming that “We need to know how our policy making groups work; we need open and transparent policy-making processes, and this is only possible when we know, with no shadow of a doubt, which parties are sitting at the table influencing policy decisions” It states that (a) Privacy and

² The full BC position can be found on pg. 13 of the [Task Force Recommendations Report](#).

³ The full IPC position can be found on pages 17-21 of the [Task Force Recommendations Report](#).

transparency are part of the very same process - they work hand in hand to make sure that no single or few powerful entities make decisions for all, and (b) in very few circumstances in the “fact of representation” considered confidential and that its the information the client discloses, the substance of the representation, that is confidential.⁴

2. The gTLD Registries Stakeholder Group states that, “It is clearly established under US Law that generally, client identities are **not** subject to Attorney-Client privilege” [emphasis in original].” It also states, “In policymaking bodies throughout the world, attorneys and lobbyists are required to disclose their client identities before participating in such processes in order to protect the transparency and integrity of those bodies for good reason. This ‘informed consent’ standard should not be a heavy lift; the client simply has to permit its identity to be known in order to participate in those policy-making activities.” The RySG believes that allowing this exemption “could create an imbalance of working group makeup, and a mistrust whereby an undisclosed client could participate in ICANN policymaking in which everyone else must disclose who they work for, and yet their client remains anonymous. What would prevent all stakeholders from simply hiring an attorney to represent them to strategically avoid disclosure?” Allowing the exemption also violates the ICANN Bylaws which require that “ICANN and its constituency bodies shall operate to the maximum extent feasible in an open and transparent manner.” Requiring full disclosure is consistent with the Organisation for Economic Co-operation and Development (OECD) guidance that notes consultants representing others’ interests or lobbyists involved in the policymaking process can “lead to undue influence, unfair competition and regulatory capture to the detriment of the public interest and effective public policies.” In order to “safeguard the integrity of the public decision-making process,” the OECD seeks “a sound framework for transparency” that requires disclosure of clients for those engaged in the public policymaking process. This is also why policymaking processes in the EU and the US require disclosure of client identities without exception.⁵

3. The Registrar Stakeholder Group does not support any exemptions from disclosure requirements. ‘Registrars maintain that transparency is an essential component of the multistakeholder model, and necessary for ICANN policy development to function effectively. . . . Rules requiring disclosure of paid advocacy relationships already exist for governments and policymaking bodies around the world, including in the United States, Europe, and other countries, and equivalent rules should be adopted by ICANN as well. Hired advocates operating under professional, ethical, or contractual rules that require them to obtain consent from their clients prior to disclosing their identities should endeavor to get this consent. If a

⁴ The full NCSG position can be found on pages 13-5 of the [Task Force Recommendations Report](#).

⁵ The full Registries statement can be found on pages 15-17 of the [Task Force Recommendations Report](#)

client refuses to consent, then they and their advocate(s) should be excluded from participating in ICANN/GNSO policy development.”⁶

We hope and trust that this document will be helpful in the community’s consideration of any future amendments or changes to the Statements of Interest not just for the GNSO, but for all of ICANN’s efforts.

Sincerely,

Greg DiBiase
GNSO Council Chair

Enclosure: Appendix 1: Annex A to the Task Force Recommendations Report

⁶ The full Registrar statement can be found on page 21 of the [Task Force Recommendations Report](#).

Appendix 1

Annex A of the Task Force Recommendations Report