

08 April 2024

TO: Nicolas Caballero

Chair, Governmental Advisory Committee (GAC)

Dear Nico,

The GNSO Council appreciates the opportunity to respond to questions raised by the Governmental Advisory Committee during our bilateral meeting at ICANN 79 relating to its work on GNSO Statements of Interest (SOI). 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 GNSO policy development activities 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 by the CCOICI following its review of: (a) a previous [recommendations report](#) submitted by the GNSO SOI Task Force examining Statements of Interest requirements as well as (b) its review of the input received in response to a [public comment proceeding](#) on the topic.

All recommendations in the CCOICI Report on SOI improvements achieved full consensus aside from the issue of whether there should be an exemption in the SOI 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. Annex A to the [Task Force Recommendations Report](#), entitled “Stakeholder Group / Constituency Statements” can be found on pages 13-21.
2. The BC position can be found on pg. 13 of the Task Force Recommendations Report.
3. The NCSG position can be found on pages 13-15 of the Task Force Recommendations Report.
4. The Registries statement can be found on pages 15-17 of the Task Force Recommendations Report
5. The IPC position can be found on pages 17-21 of the Task Force Recommendations Report.
6. The Registrar statement can be found on page 21 of the Task Force Recommendations Report

We hope this 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

Annex A – Stakeholder Group/Constituency Statements

- [Business Constituency](#)
- [Non-Commercial Stakeholder Group](#)
- [Registry Stakeholder Group](#)
- [Intellectual Property Constituency](#)
- [Registrar Stakeholder Group](#)

(Note, these statements specifically relate to the language highlighted in yellow in section 2 on which the Task Force did not achieve full consensus)

BUSINESS CONSTITUENCY (BC)

The BC is strongly opposed to this proposal. Reasoning:

- Contracted parties and their allies are positioning this as a transparency issue. That calls for some skepticism.
- The BC 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. That's just one example.
- Proponents of the rule change have suggested as a compromise that, should a participant be in this position, he/she could just disclose the identity of the client relationship to ICANN Org or the working group chair. That, frankly, is preposterous – ICANN is a sieve of information leakage in the first place, and – further – 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.
- Interesting that the NCSG – which is a vociferous proponent of privacy – is beating the drum for revealing representation. They can't have it both ways – protect identities when they want and don't when they find it convenient.

NON-COMMERCIAL STAKEHOLDER GROUP (NCSG)

The ICANN Statement of Interest (SOI) is integral to the transparency and accountability of healthy policymaking processes. ICANN policymaking processes are open to the public, encouraging participation from all. 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.

As the response from the BC specifically mentions NCSG, we would like to address the misunderstanding that BC seems to have about privacy and transparency supposedly not being compatible. Privacy and transparency are not adverse to each other, and the NCSG charter specifically mentions transparency as one of the Principles for both Members and Leaders. Public interest and noncommercial groups regularly advocate for appropriate privacy AND appropriate transparency. The same people who are most ardent advocates for privacy are also the leaders of Freedom of Information legislation and initiatives around the world that protect it. Public processes benefit from knowing who is representing who and then balancing the interests of the many different participants in a proceeding.

Conflating invasion of privacy with Statement of Interest in public policy-making is disingenuous, if not dangerous. 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.

Privacy and 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.

Finally, NCSG must respectfully contest the underlying proposition by the BC that attorneys cannot disclose their clients in policymaking proceedings. In very few circumstances is the "fact of the representation" considered confidential; it's the information the client discloses, the substance of the representation, that is confidential.

We provide a few examples:

[1] See Cal. Formal Op. 2011-182 (2011). "In most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client's consent." Citing to Los Angeles County Bar Association Professional Responsibility and Ethics Committee Op. 456 (1989).

[https://urldefense.com/v3/https://www.hklaw.com/en/insights/publications/2018/03/aba-clarifies-lawyers-confidentiality-obligations_!!PtGJab4!5gVvn_XQeKXKt-CKB3coK2lahy2Z-OIVKZa6Kba6NnA4Eb9B75v-IAMR5axKOorM398GBcYXsoUf4Przdm5ySA\\$](https://urldefense.com/v3/https://www.hklaw.com/en/insights/publications/2018/03/aba-clarifies-lawyers-confidentiality-obligations_!!PtGJab4!5gVvn_XQeKXKt-CKB3coK2lahy2Z-OIVKZa6Kba6NnA4Eb9B75v-IAMR5axKOorM398GBcYXsoUf4Przdm5ySA$) [hklaw[.]com]

[2] Supreme Court of Pennsylvania, The Rules of Professional Conduct.

3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

https://urldefense.com/v3/https://www.padisciplinaryboard.org/Storage/media/pdfs/20210920/140616-rpc2021-08-25amended.pdf_!!PtGJab4!5gVvn_XQeKXKt-

[CKB3coK2lahy2Z-OIVKZa6Kba6NnA4Eb9B75v-IAMR5axKOorM398GBcYXsoUf4Poe3IHnew\\$\[padisciplinaryboard\[.\]org\]](https://www.icann.org/padisciplinaryboard)

We look forward to a rapid completion of this important discussion and to full and fair disclosure in the future!

REGISTRY STAKEHOLDER GROUP (RySG)

Position of the RySG on the issue of exemptions from transparency in the SOI Task Force Final Report
7 April 2023

Registries Stakeholder Position Statement

The Registries Stakeholder Group (RySG) appreciates that the Task Force has considered the concerns submitted via the November 2022 public comment process, and the comments shared by the RySG with the Task Force earlier in 2023. However, we believe that the major concern flagged in several comments, including those from the RySG, remains unaddressed. The RySG feels very strongly about this issue and its importance to transparency in ICANN policymaking on par with similar globally-respected organizations.

Retaining the following language in SOI Task Force's recommendation neutralizes the requirements of the new, well-crafted Activity Specific SOI: *"If professional ethical obligations prevent you from disclosing this information, you must provide specific details on which ethical obligations prevent you from disclosing and must provide a high level description of the entity that you are representing without disclosing its name, as well as declare whether, to the best of your knowledge, that entity is actively participating in other GNSO SG/Cs/SO/ACs, for example "I represent a gTLD Registry client who is also actively participating in the RySG" "I am representing a governmental entity, who is also actively participating in the GAC" or "I represent a large brand holder in the entertainment sector who, to the best of my knowledge, is not actively participating or being represented in other ICANN groups"*.

The SOI language makes an erroneous assumption by stating "if professional ethical obligations prevent you from disclosing this information, please provide specific details on which ethical obligations prevent you from disclosing." Presumably this relates to the attorney-client relationship. It is [clearly established](#) under US Law that generally, client identities are **not** subject to Attorney-Client privilege. To the extent it relates to the Rules of Professional Conduct for Attorneys (Rule 1.6 in particular), such reference is also misguided as that rule specifically contemplates obtaining informed consent of the client in order to disclose its identity. 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.

This loophole isn't rooted in professional or ethical obligations; it simply seeks to create

anonymity for the client's convenience or preference (either through a claim of privilege, confidentiality, or through over-application of Nondisclosure Agreements). This 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?

In addition, the requirement as currently formulated would hide the essential information on whether participants in a working group or PDP identifying as representatives of a large brand holder represent a different or the same entity. This opens the door for one party to manipulate efforts toward consensus building and instead stack the deck and/or kill any progress the client doesn't like.

In ICANN's policy environment, it is relevant to know whether the government representatives in the room are represented in the GAC, or not. It is similarly relevant to know whether the brands being represented already run a gTLD Registry or not, and/or whether they are potential applicants for a subsequent round. Furthermore, the SOI requirement does not oblige disclosure of all clients for which one is providing or has provided services in the wider DNS or ICANN context (registries, registrars, brands, etc.), but solely for the client(s) that is (are) paying to participate in the specific activity. As many have pointed out, this is not protected by the Attorney-Client privilege.

Frankly, the pushback against having to disclose client identities borders on shocking.

As noted in the RySG's previous submission, it certainly flies in the face of ICANN's bylaws, which require that *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner"*.

This ICANN requirement is also 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. These disclosures regimes have become normative, and failure to require them here would necessarily not be *"transparent to the maximum extent feasible,"* because we know these processes work in other policymaking settings. ICANN is a global organization that operates under a distinct and important multistakeholder policy making process. If the ICANN community wants to ensure its contributions to global Internet policy remain above reproach, transparency on par with other global bodies is required.

If closing this loophole means that certain clients would have to withdraw from participating in ICANN processes to avoid disclosure of their identities, this is a positive outcome and the correct result. The ICANN policymaking process is a voluntary process; any client that values its anonymity over its participation in these processes should simply choose not to participate.

We should not allow anonymous bodies/individuals/organizations to influence the multistakeholder model and policy making in a way that violates the transparency obligations in ICANN's bylaws. This is a fight worth having for the benefit of the multistakeholder model; we should not compromise on such a fundamentally important question.

The RySG is supportive of increased transparency in the ICANN policymaking process as we believe that only serves to strengthen community outputs, and therefore trust, in the multistakeholder model. To that end we encourage the GNSO to strongly consider closing this loophole.

INTELLECTUAL PROPERTY CONSTITUENCY (IPC)

7 April 2023

Dear Statement of Interest Task Force

Introduction and Background

Thank you for the opportunity to provide a submission in relation to the proposed recommendations of the GNSO Statement of Interest Task Force (**SOI Taskforce**). In particular, we understand that you are seeking feedback in relation to the current exemption in the Statement of Interest (**SOI**), being:

Do you believe you are participating in the GNSO policy process as a representative of any individual or entity, whether paid or unpaid? Please answer "yes" or "no". If the answer is "yes", please provide the name of the represented individual or entity. If professional ethical obligations prevent you from disclosing this information, please state so.

(Existing Disclosure Requirement and Exemption)

In response to feedback received during the public comment period and by SOI Taskforce members from their relevant stakeholder groups, we understand that the SOI Taskforce is considering the following amended wording to the Existing Disclosure Requirement and Exemption:

Are you participating in this GNSO policy process as a represented individual or entity, whether paid or unpaid? The term "representative" in this context means that you are acting on behalf of a third party, whether it is a legal person or a natural person (the 'Represented Party'), by whom you have been appointed, specifically for this activity, to represent and/or advocate for the Represented Party's interests, views and positions. If the answer is "yes", please provide the name of the represented individual or entity. (If professional ethical obligations prevent you from disclosing this information, you must provide specific details on which ethical obligations prevent you from disclosing and must provide a high level description of the entity that you are representing without disclosing its name as well as declare

whether, to the best of your knowledge, that entity is actively participating or being represented in other GNSO/SG/Cs/SO/ACs, for example “I represent a gTLD Registry client who is also actively participating in the RySG”, “I am representing a governmental entity, who is also actively participating in the GAC” or “I represent a large-multinational brand holder in the entertainment sector who, to the best of my knowledge, is not actively participating or being represented in other ICANN groups”).

Response:

- Yes: [provide name of represented individual or entity]:
- The following professional ethical obligations prevent me from disclosing this information: [specific details required to be provided if this box is ticked]
- [Required response if previous box is ticked]: Please provide a high level description of the entity that you are representing as well as declare, to the best of your knowledge, whether that entity is actively participating or being represented in other GNSO SG/Cs/SO/ACs],

(the **Amended Exemption**)

The IPC’s current position

It is the IPC’s firm view that exemption for professional obligation to the requirement to disclose is necessary and, therefore, considers that the exemption should remain. Despite the Amended Exemption wording, 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;
- understanding how the requirement to disclose relates to the data privacy laws, such as the GDPR;
- whether it is consistent with the ICANN Bylaws; and
- its impact on commercial-in-confidence opportunities for registry providers and consultants.

Comments on the drafting of the Amended Exemption

The IPC welcomes the efforts taken to date to reach consensus on this issue and acknowledge issues raised in feedback regarding transparency. However, the IPC remains concerned that the Amended Exemption raises issues on how some participants will be able to comply. When considering future edits, the IPC would like the following points to be taken into consideration:

- The requirement to disclose a high level description of your client may still be considered inconsistent with professional obligations. In particular, lawyer-client confidentiality requires that lawyers keep all client information confidential and this obligation extends to disclosures which do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third party.

- The IPC welcomes the definition of “representative” as this provides clarity to what is intended to be achieved by the disclosure and avoids ambiguity. It is the IPC’s view that this definition should remain as is, but if additional changes are made, care should be taken to avoid broad phrases such as “been appointed as part of a larger engagement”. This is because it can be interpreted as requiring full disclosure of client lists, even if clients are not partaking in ICANN activities. It would be unacceptable if a representative was required to disclose full client lists in order to participate in ICANN.

The IPC recommends the following amended language to address this concern for those with professional responsibilities:

...

*[Required response if previous box is ticked]: **To the extent that is consistent with professional obligations**, please provide a high level description of the entity that you are representing as well as declare to the best of your knowledge, whether that entity is actively participating or being represented in other GNSO SG / Cs / SO / ACs].*

We understand that the Task Force has received feedback that the disclosure exemption for those with professional ethical obligations allows certain individuals to “hide” behind professional rules and discourages transparency. There are views held by some that the disclosure exemption should be removed in its entirety. At ICANN 76, there were calls by some to exclude those with professional ethical obligations from the multistakeholder model. It is the IPC’s view that to exclude anyone from participation in the multistakeholder model is an unacceptable outcome.

Prevents compliance with professional rules or contractual obligations

If the disclosure exemption were to be removed in its entirety or not amended as suggested by the IPC above, 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. This results in a situation which unfairly discriminates against those with professional obligations and prevents many individuals and entities from participating in clear violation of the ICANN Bylaws, specifically, Section 1.2(a)(v) which states

“(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without **singling out any particular party for discriminatory treatment** (i.e., making an unjustified prejudicial distinction between or among different parties)” (our **emphasis**)

For example, if a client does not give consent to disclose their representation, then the lawyer will be ethically prohibited from doing so if the Rules of Professional Conduct governing them prohibits them from doing so. Furthermore, many countries have general ethical prohibitions on disclosing representation of a client without the client’s consent, see for reference, Rule 1.6 of the American Bar Association Model Rules of Professional Conduct:

“...A fundamental principle in the client-lawyer relationship is that, in absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

While it is possible for a client to consent to the disclosure of their identity, this cannot be forced or compelled by the lawyer as it is a right to which clients are entitled and cannot be forced to waive. It would be inconsistent with the public interest and its own Bylaws if ICANN conditioned a stakeholder’s participation in a multistakeholder process on a third-party consenting to waive their rights. In addition, the consequences for disclosure without consent are severe, including findings of professional misconduct or being disbarred/struck from the roll, which is potentially career ending for the person involved.

We understand that there has been a suggestion that, rather than publicly disclosing the client’s identity, the client’s identity is only disclosed to the “working group chair”. This suggestion is unacceptable, as this would still result in a disclosure inconsistent with professional rules.

The requirement of confidentiality is a fundamental principle underpinning the lawyer-client relationship. It contributes to the trust that must be had between client and lawyer and encourages clients to seek legal assistance and communicate fully and frankly with their lawyer regardless of the content.

GDPR and privacy concerns

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. As part of the consideration of next steps, ICANN should formally submit a letter to the European Data Protection Board requesting clarification on whether or not disclosure of client personally identifiable information is subject to the GDPR and whether or not ICANN would be subjecting itself to potential liability by adopting a policy that compels such disclosure.

Inconsistency with ICANN Bylaws

As set forth above, a compelled disclosure of confidential client information as a gatekeeper to participation in the ICANN multistakeholder model seems to us to be inconsistent with ICANN Bylaws. As part of the consideration of next steps, ICANN should request an opinion letter from their outside counsel on this issue.

Enforceability

It is our understanding that if a person failed to disclose, they would be barred from participating in the working group. However, it is unclear how ICANN will monitor compliance with this exemption or determine whether full and truthful information has been provided. It is also unclear that if a complaint arises, who and how will it be adjudicated?

Summary

As noted above, the removal of the exemption which would result in compulsory disclosure without exception is unacceptable given its inconsistency with professional obligations and the ICANN Bylaws. In addition, the IPC continues to have concerns in relation to the wording of the Amended Exemption.

The IPC welcomes further, respectful dialogue on this topic within the Task Force and thanks the Task Force for the opportunity to provide this statement.

REGISTRAR STAKEHOLDER GROUP (RrSG)

Registrars support the draft recommendations, and do not support any exemptions from disclosure requirements for designated individuals, groups, or categories of participants (Recommendation 5(a)).

Registrars maintain that transparency is an essential component of the multistakeholder model, and necessary for ICANN policy development to function effectively. And that this commitment and obligation should be shared equally by all stakeholder participants. Rules requiring disclosure of paid advocacy relationships already exist for governments and policy-making 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 client refuses to consent, then they and their advocate(s) should be excluded from participating in ICANN/GNSO policy development. This scenario is not a problem to be solved; rather it is the policy working as intended. Just as ICANN and the GNSO would not accept anonymous submissions to a public comment, it should not permit anonymous participation in policy development.