

34 Burnfield Avenue
Toronto, Ontario M6G 1Y5
Canada

Tel: (416) 588-0269 Fax: (416) 588-5641
Web: www.LEAP.com

**Leap of Faith
Financial Services Inc.**

April 5, 2019

**Mr. Keith Drazek [via email]
Mr. Rafik Dammak [via email]
Ms. Pam Little [via email]**

Subject: Response to your letter of March 29, 2019

Dear Mr. Drazek, Mr. Dammak, and Ms. Little,

1. In your March 29, 2019 letter, you state that ICANN “clarified” an escalation process. The documents supporting your statement are at:

<https://www.icann.org/en/system/files/correspondence/jeffrey-to-drazek-09mar19-en.pdf>

<https://www.icann.org/en/system/files/files/expected-standards-behavior-advice-enforcement-09mar19-en.pdf>

It’s not correct that John Jeffrey “clarified” anything. Rather, ICANN Legal unilaterally invented and imposed, in a top-down manner, a brand new process. This is inconsistent with ICANN’s bottom-up, consensus-driven multistakeholder model with policy development via open and transparent processes. See the Commitments in Section 1.2(a)(iv)-(v) of the ICANN Bylaws¹:

(iv) Employ **open, transparent and bottom-up, multistakeholder policy development processes** that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) **ensure that those entities most affected can assist in the policy development process**;

(v) **Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for**

¹ See: <https://www.icann.org/resources/pages/governance/bylaws-en>

discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); [emphasis added]

Section 1.2(c) of those Bylaws confirms that:

(c) The Commitments and Core Values are **intended to apply in the broadest possible range of circumstances**. The Commitments reflect ICANN's fundamental compact with the global Internet community and are **intended to apply consistently and comprehensively to ICANN's activities**. [emphasis added]

2. The letter to us of March 9, 2019² from John Jeffrey, replying to our letter of October 23, 2018³, was responded to by us on March 10, 2019⁴. I reiterate the points that were made in that March 10, 2019 letter. The letter to us from John Jeffrey painted a one-sided picture to the community with preliminary conclusions **based on hearing only one side of the issues**. It obviously had a prejudicial impact upon you, as you cite it. It's unclear what John Jeffrey's role in this matter is, but if he has made himself the decision-maker or "judge" of this dispute, he has not observed the principles of natural justice and procedural fairness. His letters appear to be advocacy.

3. You cite a further unrelated alleged "incident" on February 7, 2019, yet no complaint has been received by me regarding an alleged "incident."

4. It should be clear from the above documents (as well as the other documents that have not been posted by ICANN, but were referenced in our October 23, 2018 letter) that the interpretation of the Expected Standards of Behavior (ESOB) is currently in dispute.

Despite this active dispute, your March 29, 2019 letter requires that I disregard and abandon that dispute, by putting in writing a letter that acknowledges and accepts the ESOB, agrees that they're enforceable, and accepts that future "violations" may result in removal from GNSO processes. Your March 29, 2019 letter says that if I don't do this, that I will be "temporarily" removed from participation in the RPM PDP Working Group. Your April 1, 2019 email appears to go even further, saying that I will be moved to observer status within the working group with a mere

2 See: <https://www.icann.org/en/system/files/correspondence/jeffrey-to-bernstein-kirikos-09mar19-en.pdf>

3 See: <https://www.icann.org/en/system/files/correspondence/bernstein-to-eisner-23oct18-en.pdf>

4 See: <https://www.icann.org/en/system/files/correspondence/gross-to-jeffrey-10mar19-en.pdf>

“opportunity” to be re-activated, but describing the letter that you want me to send as a “necessary response” (implying that I will be removed from active participation permanently, until such time as that letter is sent by me). In summary, you've issued an **ultimatum**. I don't know if that ultimatum has the support of GNSO Council itself. You described that ultimatum as “reasonable.”

5. Your March 9, 2019 letter also claims, without evidence or citation, that I have “previously received a private warning from the Co-Chairs”. I am unaware of any such warning, nor do I agree that any past correspondence between myself and the co-chairs could be construed as a “private warning” as per Section 3.5 of the Working Group Guidelines⁵.

Section 3.5 is used to restrict the participation of someone who “seriously disrupts the Working Group”, and at no time have I done that. That member has to also be “persistently and continually obstructing the Working Group’s efforts”, and I have not done that. See point #2 of our March 10, 2019 letter, where Phil Corwin noted the substantial progress that the working group has achieved, and our past letters (e.g. our August 1, 2018 letter) which have discussed this critical aspect of the relationship between Section 3.4 and Section 3.5 of the Working Group Guidelines. Any restrictions are then supposed to happen **only for subsequent violations after both a public and a private warning** (essentially, a “three strikes and you're out” rule, with the private warning and public warning representing the first and second strikes respectively). I have not received a single “strike”, let alone three.

6. On the topic of “obstruction” and “disruption”, it is not obstruction or disruption to insist that rules and due process are faithfully observed. It is now April 5, 2019, and the emails at the heart of this complaint by Mr. Shatan were exchanged in early May 2018, nearly 11 months ago. A timeline of the correspondence from May 2018 to October 23, 2018 was documented in our October 23, 2018 letter. At least 9 of those 11 months has been taken up by a combination of delays in responses by Mr. Shatan, the RPM PDP Co-chairs, or ICANN Legal (e.g. more than 4 months from the October 23, 2018 letter from us, until we received the letter from John Jeffrey on March 9, 2019; 2 months between our letter of August 21, 2018 and Mr. Corwin’s presentation to GNSO Council on October 21, 2018; 2 months between the email exchanges between Mr. Shatan and myself of

⁵ See: <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-1-gns0-wg-guidelines-18jun18-en.pdf>

early May 2018, and receipt of a complaint on July 10, 2018 from Mr. Shatan, and so on). You should not be looking to blame our side for any obstruction or disruption, when we have responded to all communications in a timely manner.

We have repeatedly invited others to have phone calls (as noted in point #6 of our March 10, 2019 letter) to attempt to resolve matters, to narrow the issues, and to de-escalate, as early as July 10, 2018 (immediately after learning of Mr. Shatan's complaint). If anyone is to blame for disruption or obstruction of their external lives due to Mr. Shatan's complaint (as opposed to disruption or obstruction of the actual working group's work product), it's those who've been escalating matters. This latest ultimatum from you is yet another attempt to escalate the situation, rather than de-escalate.

All of this has taken place in **parallel** to the RPM PDP working group's work, and has not impacted the work itself.

7. Our October 23, 2018 letter explained why the ESOB are non-binding, and were never intended to be enforceable as law. They are "admittedly not meant to be formal policies of conduct with defined actionable consequences."

The ICANN Ombudsman, Herb Wayne, concluded the exact same thing, as we noted in our March 10, 2019 response to John Jeffrey.

But unfortunately the expected standards of behavior is a **guideline; it's not a rule with sanction or penalty attached to it.** [emphasis added]

John Jeffrey has not had any communications with us since our March 10, 2019 letter which documented this independent finding.

What are the ESOB? They are simply aspirational.

Words have meaning. When something has no "actionable consequences", that speaks for itself. It's aspirational, a goal to strive towards, but with no consequences if one fails to reach the goal. It's like a general statement in support of world peace, or against global hunger.

Further evidence exists that demonstrates the aspirational nature of the ESOB, within the Working Group Guidelines themselves. Page 8 of the current Working Group Guidelines⁶ says:

⁶ See: <https://gnso.icann.org/sites/default/files/file/field-file-attach/annex-1-gnso-wg-guidelines-18jun18-en.pdf>

ICANN's Expected Standards of Behavior are outlined in the ICANN Accountability and Transparency Framework, see <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf> for further details.² [with the "2" being a footnote]

That footnote itself is important (and has been present for many years in past versions of the Working Group Guidelines), because it says:

Other best practices that can be considered include the 'Statement on Respectful Online Communication', see http://www.odr.info/comments.php?id=A1767_0_1_0_C

Now, that currently is a broken link at odr.info, but I was able to find the original document posted on ICANN's own website at:

<https://www.icann.org/en/system/files/files/respectful-communication.pdf>

Here's the crucial part -- the Ombuds Blog covered that in a contemporaneous article⁷ in 2007 which clearly states that:

The statement is **aspirational** and encourages individuals to: ... [emphasis added]

So, that's entirely consistent with the only possible conclusion, namely that the ESOB is a **non-binding non-actionable aspirational statement**, linked directly with another non-binding non-actionable aspirational statement from another organization. That was the genesis of the ESOB. Indeed, that's the only possible interpretation, because otherwise the "Other best practices that can be considered" language of footnote 2 would mean that PDP participants are subject to not only the ESOB, but **any other** set of "best practices" that they can find anywhere in the world, and bring forth to argue as having been violated.

The principle of fundamental justice requires laws to have a clear and understandable interpretation that defines the rules or offences. They cannot be vague, undefined and informal. That principle doesn't apply to aspirational statements (like the ESOB), that can be as vague and informal as they want.

8. Strictly speaking, as noted in point #7 above, Section 3.4 of the current Working Group Guidelines links to the ESOB on page 28 of:

⁷ See: <http://ombuds-blog.blogspot.com/2007/04/statement-on-respectful-online.html>

<http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf>

as they existed in January 2008, and never references the 2016 version of the ESOB. Section 3.4 of the Working Group Guidelines states:

However, it is expected that WG members make every effort to respect the principles outlined in ICANN's Expected Standards of Behavior **as referenced above**.
[emphasis added]

"As referenced above" refers to the **2008 version**. Had the GNSO wanted a different version to apply, they would have either updated the link, or added additional language such as "or its successors." Any future changes to those Working Group Guidelines cannot have retroactive effect, of course.

Clearly, the aspirational ESOB from 2016 is not relevant. John Jeffrey's evaluation incorrectly looked at the 2016 version, as did Mr. Shatan's original complaint, without understanding that they are different.

9. Both Keith Drazek and Phil Corwin's Statements of Interest show their participation at ICANN is **not in an individual capacity**, but **on behalf of Verisign**:

<https://community.icann.org/display/gnsosoi/Keith+Drazek+SOI>
<https://community.icann.org/display/gnsosoi/Philip+S+Corwin+SOI>

Given this, Mr. Drazek should have **recused** himself on this matter. There's a reasonable apprehension of bias, given the conflicts between myself and Mr. Corwin, and furthermore my longstanding opposition to Verisign on many policy topics (e.g. WLS, Sitefinder, .com fee increases, and so on). If Verisign made a list of all the people they'd want removed from ICANN policymaking, I'd certainly be near the top of such a list.

Indeed, Mr. Drazek made numerous false statements to the rest of GNSO Council on its March 14, 2019 call⁸,

(Keith Drazek) So I think as folks were called back in Barcelona at the - during our Council meeting and during the public forum, Göran sort of flagged or highlighted the fact that there'd been some **challenging going on** in the RPM PDP Working Group with regard to some- a conflict between a couple of working group members

8 See transcript at: <https://gnsso.icann.org/en/meetings/transcript-gnsso-wrap-up-14mar19-en.pdf>

and then **some threats of potential litigation** and allegations of bias and conflict of interest of the chairs in terms of their ability to fairly deal with the situation within the group. [pp. 4-5, emphasis added]

(Keith Drazek) Following - and again as I noted, Göran, during the public forum, flagged this as an issue and indicated that ICANN was engaging and he was going to be directing ICANN Legal to get involved and to review the situation and that this was a matter of significant concern to ICANN as it relates to the ability of the multistakeholder process to engage and people to volunteer and participate in the processes under, you know, **possible thread of litigation**. [p. 5, sic, “thread” = “threat” should be the correct spelling, emphasis added]

(Keith Drazek) And at that point they indicated that they were going to be reaching out to the parties involved in this, particularly the co-chairs, to get a better understanding of the situation and that they were taking this very seriously and that they expected to be taking some action and engagement on the issue in terms of, you know, the review and the positioning around enforceability of the expected standards of behavior, questions around cochair indemnity or **protection from litigation** personally under the ICANN processes. [p. 5, emphasis added]

(Keith Drazek) And obviously that’s something that we would share with Council before sending, that that’s a notice that will be effective in, you know, eliminating the ongoing concern or the, you know, you know, the **challenges that the group is facing** because of this particular situation. **So I fully acknowledge that this has been, for the last four months, a distraction at least for the group**, and that I hope that that will no longer be the case moving forward. [p. 8, emphasis added]

There has been repeated fearmongering that there have been threats of litigation, which are completely erroneous statements. I challenge you to identify a single statement in any correspondence which makes such a threat. Furthermore, as has been noted before, there have been no “challenges” or “distraction” for the working group for the past 4 months. The work of the PDP has been ongoing, and Mr. Corwin himself noted that Mr. Goran’s similar statement was false, as we pointed out in point 2 of our March 10, 2019 letter.

We refer you to the October 25, 2018 post on the GNSO Council mailing list by Paul McGrady, which quoted Phil Corwin as follows:

"Goran’s statement that, “WE UNDERSTAND THAT THERE HAVE BEEN DISPUTES WITHIN THE GROUP, AND IT’S MORE OR LESS BEEN STALLED FOR THE LAST SEVEN MONTHS” is **factually incorrect**. Greg Shatan’s ESB complaint was filed in June, so its resolution has been stalled for four months. However, the WG has made substantial progress on its work during the past few months, including the consideration, and adoption for Initial Report public comment purposes, of 34 sub-team recommendations and 33 individual proposals for URS

operational and policy modifications. However, the escalation of outside counsel involvement beyond the original ESB complaint to occurrences within WG meetings does threaten its further progress absent a satisfactory resolution.”⁹ [emphasis added]

These repeated erroneous statements by Mr. Drazek are consistent with the reasonable apprehension of bias noted above, and further support recusal.

10. We addressed the legitimacy of the Section 3.7 appeal from February 2019 in section 4 of our March 10, 2019 letter, and I reiterate that here.

11. Your ultimatum asks me to simply ignore all of the above, and instead “bend the knee” and “swear an oath of fealty.” It asks me to agree that the ESOB are enforceable with penalties, despite all the evidence, including the Ombudsman’s own supporting conclusion, that they are not enforceable and have no penalties. **I cannot in good conscience make a statement that I believe to be false. That would be asking me to knowingly tell a lie,** to state that “2+2=5” when I know that “2+2=4”.

I cannot and will not write the letter you want me to write. Your ultimatum is unreasonable. I will not agree to the dangerous free speech restrictions you wish to impose upon me (and presumably upon others you wish to censor), expressly consenting to the weaponization of the Expected Standards of Behaviour. That is unreasonable. **What you seek is an affront to free speech and due process.**

12. To move forward constructively, we should think back to some of the discussions that took place in October 2018 at the ICANN meeting, where it was proposed sending all matters in dispute to an independent and neutral third party. See page 35 of the October 21, 2018 GNSO Working Session Part 4 at:

<https://gns0.icann.org/sites/default/files/file/field-file-attach/transcript-gns0-working-session-4-21oct18-en.pdf>

where Keith Drazek (of all people!) said: **“is there an opportunity to potentially bring in sort of some independent, third party people to help?”**

⁹ See email at: <https://mm.icann.org/pipermail/council/2018-October/021981.html>

Indeed, Facebook did the exact same thing in November 2018¹⁰:

Facebook will **create an independent oversight body to adjudicate appeals on content moderation issues**, the company said today. CEO Mark Zuckerberg said in a call with reporters that the group, which will be formed in the next year, will attempt to **balance an effort to expand the right to free speech** with the need to keep people safe around the world.

“I believe **independence is important** for a few reasons,” Zuckerberg said in a note posted to Facebook. “First, it will **prevent the concentration of too much decision-making within our teams**. **Second, it will create accountability and oversight**. **Third, it will provide assurance that these decisions are made in the best interests of our community and not for commercial reasons.**” [emphasis added]

I again suggest we all have a conference call to discuss.

13. Clearly, greater education is required about free speech. Since this dispute began, I have remained relatively silent on the topic while Mr. Shatan’s dispute has been in progress. **That changes today**. I will start writing on this dispute (and other topics) at FreeSpeech.com (and elsewhere), to ensure that important issues are brought to the public’s attention.

Sincerely,

George Kirikos

cc: Andrew Bernstein
Robin Gross

¹⁰ See: <https://www.theverge.com/2018/11/15/18097219/facebook-independent-oversight-supreme-court-content-moderation>