

GNSO Statement of Interest Task Force

Review of Statement of Interest (SOI) Requirements

Status of This Document

This is the Recommendations Report of the GNSO Statement of Interest Task Force following its review of the GNSO Statement of Interest (SOI) Requirements as well as its review of the input received in response to the [public comment forum](#). This Recommendations Report will be submitted for review to the Council Committee for Overseeing and Implementing Continuous Improvement (CCOICI) who tasked this effort.

Preamble

The objective of this Recommendations Report is to document the GNSO Statement of Interest Task Force deliberations and recommendations following its review of the existing GNSO Statement of Interest requirements as outlined in its [assignment](#) as well as its review of the input received in response to the public comment forum.

Please note that this document contains redlines to highlight proposed changes to existing documents.

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1. Introduction & TF Approach

The GNSO Statement of Interest (SOI) Task Force was [assigned](#) to address the following questions:

1. Is the original objective of the SOI, as stated in the BGC WG Report¹, still valid? If not, why not and what should the current objective be?
2. Based on the response to question 1), is the requested information to be provided as part of the SOI still fit for purpose? If not, why not, and what would need to be changed to make it fit for purpose?
3. Are there any further measures that should be considered from an enforcement / escalation perspective, in addition or instead of those already included in the requirements?

The TF was also assigned to conduct community outreach: “As part of this process, the Task Force is expected to solicit input from the ICANN community on the current use and experience with SOIs as well as suggestions for possible improvements at an early stage of the process”.

1.1 TF Approach & Findings

The TF commenced its deliberations on 7 February 2022 and solicited initial input from its members through this [google doc](#). In relation to the first assignment question, is the original objective still valid, the TF concluded early on that:

The original objective of the Statement of Interest (SOI), namely allowing for the interests of participants to be declared publicly, remains valid. The TF also confirmed that a traditional conflict of interest policy does not pertain to GNSO policy development activities, similar to how this is described in the GNSO Operating Procedures Section 4.0 for Council members as well as the BCG Report. There are, however, some improvements that the SOI Task Force will consider to address some of the issues that have been identified with the current way in which the SOI is implemented such as:

¹ The BGC WG Report noted that “People who take part in the GNSO Council, and GNSO policy development in particular, often do so because they have an interest in the outcome. These interests can be based on principles or financial gain (either directly in the sense that the person conducts business which could be affected by GNSO policy decisions or indirectly as a representative of a group that could be affected). The traditional concept of conflict of interest test may be difficult to apply in some of these circumstances. Rather than a conflict of interest policy (which might preclude an individual from taking part in a policy process because they stand to gain from the outcome – which is exactly the reason why most participants in the GNSO policy development process do take part), what is needed is a “Statement of Interest” approach that allows the interests of participants to be declared publicly. Consideration should be given to supplementing “Statements of Interest,” with “Declarations of Interest” in which participants are asked to state whether they or their employer have issues that are material and specific to “work under consideration” or where a person’s or company’s “interest” might be a material factor to such work”.

- Information provided is typically not sufficient to be able to assess interests and/or objectives of a participant;
- Reality of community members participating in multiple ICANN fora and groups - more details should be provided on their role in these different groups (for example, member, voting member, observer);
- Lack of updates to reflect specific interest in a particular effort (SOI is considered a general introduction to a community member's role & interests);
- SOI does not reflect if/how a potential outcome may affect a member and/or their employer / client;
- No requirement for consultants or lawyers to disclose their clients (or at a minimum provide a general description of clients and their interests).

Based on these findings, as well as the input that was received in response to the [community outreach survey](#) it conducted as well as bi-weekly meetings, the GNSO SOI TF developed the recommendations that can be found in the next section of this report.

1.2 Public Comment Forum

The proposed changes to the GNSO Operating Procedures (GOP) as well as the SOI TF Recommendations report were published for [public comment](#) in conjunction with changes to the GOP recommended by the Council Committee for Overseeing and Implementing Continuous Improvement (CCOICI) in relation to the GNSO Working Group Self-Assessment requirements on 9 September 2022. Following the closing of the public comment forum, the SOI TF [reviewed](#) the input received and updated this report accordingly.

1.3 Consensus Designation

With regards to decision-making methodology, the TF assignment foresees that

“The Task Force should aim to make recommendations by full consensus. However, in those cases where this is not possible, consensus designations must factor in the Council's make up and voting thresholds. For example, when assessing the level of support, the chair should factor in the support across stakeholder groups instead of counting the number of individuals in support or against. Where full consensus is not achieved, the report/recommendations to the GNSO Committee and/or GNSO Council should clearly outline the efforts that were undertaken to try and achieve full consensus and the reasons for why this was not achieved.”

The TF achieved full consensus on the recommendations in this report, apart from one essential element which has been highlighted in yellow in the following chapter. Despite multiple conversations, both virtually as well as in person during ICANN76, the TF has not reached consensus on whether there should be an exemption for those prevented by professional ethical obligations to disclose who they are representing in a specific effort. Annex A to this report includes the statements of the different GNSO Stakeholder Groups and Constituencies on this topic that should provide further insight into the different positions.

As the TF considers whether or not an exemption should be allowed an essential part of the revised Statement of Interest requirements, the TF is of the view that these recommendations cannot be adopted without agreement on how to address this specific issue. The language highlighted in yellow in the next chapter does include updates that were made in response to public comments received and suggested compromise language, but it is important to emphasise that this language did not receive the full consensus support of the TF.

As the TF is of the view that it has exhausted its discussions on this particular issue, the TF recommends that the CCOICI takes on the responsibility for resolving this specific issue so that the report and recommendations can be considered by the GNSO Council.

1.4 TF Membership & Mailing List Archives

The TF consists of members appointed by each GNSO Stakeholder Group and/or Constituency (“Each Stakeholder Group or Constituency can appoint a maximum of 2 representatives and up to 2 alternates. For clarity, a Stakeholder Group may decide to assign representatives at the Stakeholder Group level OR the constituency level, if applicable, but not both.”) The names of the members and their affiliation can be found [here](#).

The mailing list archives can be found [here](#). Further information and materials are available on the TF [workspace](#).

2. SOI Recommendations

The GNSO Statement of Interest Task Force recommends that:

1. The current Statement of Interest template is divided into two parts, namely:
 1. General Statement of Interest which contains general information about a participant to understand their background and motivation for participating in GNSO activities.
 2. Activity Specific Statement of Interest which is information that is provided specific to the activity a participant has requested to participate in. For example, what is their motivation for participation in that activity as well as possible impact on the individual and/or their employer of the outcomes of the process.
2. The General Statement of Interest would consist of the following questions (note, some of these have been updated compared to the current questions to provide further guidance and/or specificity):
 - a. Your name;
 - b. GNSO Stakeholder Group – note, you are expected to indicate all GNSO Stakeholder Groups you participate in and provide details on your level of participation (for example, voting member, non-voting member, observer);
 - c. GNSO Constituency – you are expected to indicate all GNSO Constituencies you participate and provide details on your participation (for example, voting member, non-voting member, observer);
 - d. Affiliation (if not covered by b or c) – if you are affiliated with multiple organizations or entities, please list these all and include a link to their web-site(s).
 - e. Please identify your current employer(s);
 - f. Please identify any other ICANN activities in which your employer(s) participates, if applicable;
 - g. Please identify your current position(s);
 - h. Please identify the type(s) of work performed;
 - i. Please identify your declared country of primary residence (e.g., country to which you pay taxes);
 - j. Please list any financial relationship beyond de minimis stock ownership you may have with any company that to your knowledge has a financial relationship or contract with ICANN.
 - k. Please identify any Working Groups or other chartered teams in which you are participating (include acronyms, if applicable);
 - l. Additional information (optional – any other declarations or disclosures that are relevant to your participation)
3. The information contained in the General Statement of Interest is required to be updated in a timely manner when changes have occurred that require an update to these questions. In addition, a yearly reminder [should/must] be sent to those with an SOI on file with the request to review their information and make sure it is still up to date. If a person with an SOI on file is no longer active in any ICANN activities, they should also be able to request a deletion of their SOI on file and have that request reviewed.

4. The Activity Specific Statement of Interest is to be completed for each GNSO activity a participant signs up for. As part of the introductory meeting, each participant is expected to introduce their activity specific statement of interest and address any questions other participants may have.
5. The Activity Specific Statement of Interest consists of the following (existing questions):
 - a. Are you participating in the GNSO policy process as a representative of any 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 or a natural person (the ‘Represented Party’) by whom you have been appointed, specifically for this activity or to a role that encompasses 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 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 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”).

 - 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:²
 - b. Please identify any other relevant arrangements, interests, or benefits as requested in the following two questions:
 - i. Do you, your employer or your client have any type of material interest in this GNSO policy process and its outcome? If the answer is “yes,” please describe the material interest:
 - ii. Are there any arrangements/agreements between you and any other group, constituency, client or person(s) regarding your participation as a team member? If the answer is “yes,” please describe the arrangements/agreements and the name of the group, constituency, or person(s):
 - c. Additional information (optional)
6. The information contained in the Activity Specific Statement of Interest is required to be updated in a timely manner when changes have occurred that require an update to

² Note, the text highlighted in yellow represents language that the TF has not reached full consensus on.

these questions, if the activity for which the statement has been provided is still ongoing.

7. From a display perspective, the General Statement of Interest is the “parent” while any Activity Specific Statement of Interests are organized as its “children”.
8. A number of use cases should be developed to serve as an example / instructions for those completing the templates to provide the appropriate level of detail / information.

Enforcement and Escalation

The GNSO Statement of Interest Task Force recommends that:

1. An annual reminder is sent to those with a GNSO SOI on file to request the SOI holder to review their information and update it as necessary. If no response is received, or the SOI holder confirms they are no longer actively engaged in GNSO activities, a disclaimer, or similar, is added to the SOI in question to clearly mark that the SOI is ‘inactive’ and may no longer be up to date. Should the SOI holder at a future point in time decide that they want to be allowed to activate their SOI, instructions should be made available for how to do this.
2. This annual reminder will also include information about the applicable enforcement and escalation requirements.

Implementation Guidance

1. ICANN org is expected to explore the technical options for implementing these recommendations and report back to the TF and/or GNSO Council on the available options as well as any possible limitations that may exist. As part of this reporting back, ICANN org is also expected to share details of how the transition is expected to be managed between existing active GNSO SOIs and new GNSO SOIs.
2. ICANN org will also review what, if any, safeguards need to be implemented, including appropriate disclaimers and retention policies to make sure that the implementation of these new SOI requirements is consistent with applicable data protection laws.

3. Proposed Updates to GNSO Operating Procedures

As a result of the proposed recommendations in the previous section, the SOI TF recommends that the following updates are made to the GNSO Operating Procedures:

ANNEX A – Chapter 6.0: Statements of Interest

6.1 Definitions

Generic Names Supporting Organization (GNSO) Group:

- a. the GNSO Council, or
- b. a work team, working group, committee or other such policy development body formed by and under the supervision of the GNSO Council.

Relevant Party: An individual who participates as a member of a GNSO Group.

General Statement of Interest: A written statement made by a Relevant Party that provides general information about a participant to understand their background and motivation for participating in GNSO activities. ~~A declaration of interests that may affect the Relevant Party's judgment, on any matters to be considered by the GNSO Group.~~

Activity Specific Statement of Interest: A written statement made by a Relevant Party that provides a declaration of interests that may affect the Relevant Party's judgment, on matters to be considered by a specific GNSO Group.

Material Interest: A material interest is an important interest and is generally, but not always, financial in nature. However, in the legal sense, the interest needs to be substantial or of consequence.

6.2 Policy

6.2.1 Purpose

The purpose of this policy is to set forth responsibilities and procedures pertaining to the content, creation, timely update, accuracy, completeness, and compliance of Statements of Interest as defined in [Section 6.1](#).

6.2.2 Compliance

Each Relevant Party is responsible for ensuring that he or she complies with this policy. Failure to comply with these procedures is covered in [Section 6.5](#). This policy is administered by ICANN Staff. Administration includes informing new members of groups of the policies, posting all Statements of Interest, and following up on any requests from the Chairs of GNSO Groups pertaining to this procedure.

6.2.3 Exemptions

Full time ICANN Staff members are exempt from the individual responsibility of completing a Statement of Interest by virtue of ICANN posting a global Statement of Interest confirming that all employees and individuals who have an exclusive contract with ICANN are representing the interests of ICANN, and no others, at all times. The exemption does not extend to Staff who do not have an exclusive contract with ICANN.

6.3 Statement of Interest Procedures

6.3.1 Timeliness

Relevant Parties are required to provide to the GNSO Secretariat a Statement of Interest, updated not less frequently than once a year or whenever there is a material change, setting forth those specified interests, relationships, arrangements, and affiliations that may affect the judgments of Relevant Parties in the conduct of their participation within the GNSO. A completed Statement of Interest, updated at least annually, is a precondition for Relevant Parties to participate in a GNSO Group.

When technically feasible, the GNSO Secretariat will send Relevant Parties an annual reminder of the requirement to review the applicable Statement of Interest and ensure that any applicable updates are made. If no response is received, or the Relevant Party confirms they are no longer actively engaged in GNSO activities, a disclaimer, or similar, is added to the SOI in question to clearly mark that the SOI is 'inactive' and may no longer be up to date. Should the Relevant Party at a future point in time decide that they want to activate their SOI, instructions should be made available for how to do this.

At the beginning of each meeting the GNSO Secretariat and/or the Chair of the GNSO Group shall ask all Relevant Parties whether they have updates to their Statements of Interest.

6.3.2 Electronic Form and Publication

To ensure consistency, ICANN Staff shall develop, maintain, and provide to Relevant Parties an electronic Statement of Interest form including procedures and instructions pertaining to its completion online. ICANN Staff shall make available an alternative arrangement (e.g., email) in the event that a Relevant Party does not have the necessary Internet access or capability to complete the form online. ICANN Staff shall post the completed Statements of Interest in the relevant section of the GNSO web site prior to Relevant Parties undertaking any activity.

6.3.3 Content

Relevant Parties shall complete all ~~six~~ sections of the Statement of Interest form. ~~As specified below:~~

The General Statement of Interest shall request information such as name; stakeholder group / constituency; current employer; financial relationships, and; any other Working Groups or other chartered teams in which the Relevant Party is participating.

The Activity Specific Statement of Interest shall request information such as whether the Relevant Party is participating as a representative of any individual or entity; identify any other relevant arrangements, interests, or benefits, including whether the Relevant Party's employer or client has any type of material interest in activity and outcomes; any arrangements / agreements between the Relevant Party and any other group, constituency or client.

The detailed questions will be made publicly available and may be reviewed and revised by the GNSO Council from time to time using its relevant processes.

- ~~1. Please identify your current employer(s) and position(s).~~
- ~~2. Please identify your declared country of primary residence (which may be the country to which you pay taxes).~~
- ~~3. Please identify the type(s) of work performed at #1 above.~~
- ~~4. Please list any financial relationship beyond *de minimus* stock ownership you may have with any company that to your knowledge has a financial relationship or contract with ICANN.~~
- ~~5. 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 so state.~~
- ~~6. Please identify any other relevant arrangements, interests, or benefits as requested in the following two questions:~~
 - ~~-~~
 - ~~i. Do you have any type of material interest in ICANN GNSO policy development processes and outcomes? Please answer "yes" or "no." If the answer is "yes," please describe the material interest in ICANN GNSO policy development processes and outcomes.~~
 - ~~ii. Are there any arrangements/agreements between you and any other group, constituency or person(s) regarding your participation as a work team member? Please answer "yes" or "no." If the answer is "yes," please describe the arrangements/agreements and the name of the group, constituency, or person(s).~~

6.3.4 Timing of Updates and Recordation

A Relevant Party shall provide any changes/and or updates to his or her Statement of Interest within ten business days of any material change in any information appearing in the statement of interest form. Such changes shall also be recorded in the minutes of the meeting at which the Relevant Party advises of such change and should be posted as soon as possible.

6.4 Completeness and Accuracy

6.4.1 Completeness

ICANN Staff shall review each Relevant Party's Statement of Interest to ensure completeness. If ICANN Staff has reason to believe that a Relevant Party's documentation is not complete, ICANN Staff shall notify the Relevant Party and request that the omitted or missing information be provided or, if there are extenuating circumstances, explanation as to why the document is incomplete. If the matter cannot be satisfactorily resolved with the Relevant Party after a reasonable period, Staff shall raise the matter with the applicable Chair pursuant to [Paragraph 65.4.3](#).

6.4.2 Accuracy

Concerns raised by ICANN Staff or a member of the ICANN community about the accuracy of a Relevant Party's Statement of Interest, including whether an interest that may affect the Relevant Party's judgment with respect to a pending matter has been disclosed, shall be brought to the attention of the applicable Chair and handled pursuant to [Paragraph 65.4.3](#).

6.4.3 Appeal Process

If concerns about the completeness and/or accuracy of a Statement of Interest persist after reasonable attempts are made to resolve them with the Relevant Party, the matter shall be brought to the attention of the applicable Chair and handled according to decision-making methodology and appeal process as prescribed in the GNSO Working Group Guidelines ([ANNEX 1](#), Sections 3.6 and 3.7). At each step of the appeal process, every effort should be made to resolve the completeness and/or accuracy concerns by working cooperatively with the Relevant Party.

6.5 Failure to Comply

6.5.1 Requirement to Participate

A Statement of Interest form must be submitted by each Relevant Party in accordance with these procedures. If a Relevant Party fails to provide a Statement of Interest once a year or whenever there is a material change, the Chair may temporarily suspend that Relevant Party's participation until the Statement of Interest is provided. Participation shall not be suspended if a Statement of Interest is subject to the Appeals process of [Paragraph 65.4.3](#) until a final determination is made under that process.

6.5.2 Suspension

Pursuant to the appeal provisions referenced in [Paragraph 65.4.3](#), if it is determined that a Relevant Party has not complied with these procedures, the GNSO Council Chair, in consultation with the Vice-Chairs, may suspend that Relevant Party's participation in a GNSO group until the failure to comply has been remedied. The ICANN General Counsel and GNSO Council will be notified when such actions are taken as a matter of protocol and the decision to take this step will be recorded in the GNSO Council minutes. If the failure to comply pertains to a Chair, the applicable Vice-Chairs shall act pending completion of the appeal process. If the failure to comply pertains to the GNSO Council Chair, the Vice-Chairs shall act after consulting with the ICANN Vice President - Policy Development.

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/ab-a-clarifies-lawyers-confidentiality-obligations_!!PtGJab4!5gVvn_XQeKXKt-CKB3coK2Iahy2Z-OIVKZa6Kba6NnA4Eb9B75v-IAMR5axKOOrM398GBcYXsoUf4Przdm5ySA\\$ \[hklaw\[.\]com\]](https://urldefense.com/v3/https://www.hklaw.com/en/insights/publications/2018/03/ab-a-clarifies-lawyers-confidentiality-obligations_!!PtGJab4!5gVvn_XQeKXKt-CKB3coK2Iahy2Z-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.padisiplinaryboard.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 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.