

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.