Response to Documentary Information Disclosure Policy Request

To: Mr. Edward Hasbrouck
Date: 3 April 2009
Re: Request No. 20090306-1

This is a response to your email dated 6 March 2009, which appears to be a forward of an email previously submitted to ICANN staff and Board members. As it was sent to didp@icann.org, we presume it was submitted pursuant to the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP). Thus we may also reference your email as a "Request for Information" or "Request" for purposes of this response.

Analysis of/Response to Summarized Points Within Your Email

As copied below, ICANN undertook a review of your email to identify the information sought, and determined that your requests for information fall under four main points:

1. Copies of ICANN policies and procedures for independent review, including any agreement(s) between ICANN and any provider(s) of independent review services;
2. Identification of various items of information relating to the Independent Review Process and the designation of the Independent Review Provider posted or provided pursuant to Article III, Section 6 of ICANN's Bylaws;
3. The identification of the URL at which the IRP designation or "policies" are posted on the ICANN website, as well as where these were located on 8 April 2005; and
4. Copies of any records of discussions by the Board of your "request for independent or of policies for independent review – whether in person, by telephone, by e-mail, or otherwise", including minutes, transcripts, audio recordings, or e-mail messages.

It is also noted that your requests are a reiteration of previous requests that you have made to ICANN, and you have received responses to many of these requests from ICANN staff and Board members in prior communications. In addition, all but two of the items of information that ICANN has identified within your email are publicly available and are thereby not proper subjects for a DIDP request, per the rules set out in ICANN Accountability & Transparency, Frameworks and Principles, available at http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf. In a good faith effort to be as responsible as possible, ICANN, however, provides a point-by-point response below.

1. Copies of ICANN policies and procedures for independent review, including any agreement(s) between ICANN and any provider(s) of independent review services.

    a. ICANN/ICDR Agreement

While ICANN strives to operate to the maximum extent feasible in an open and transparent manner, ICANN does not make public its individual vendor contracts. Further, individual contracts of this type are protected from disclosure under the balancing test outlined within the DIDP.

Here, the potential harm in adopting a practice of publicly disclosing individual vendor contracts of this type greatly outweighs the public's interest in viewing the ICANN/ICDR contract here. Allowing public disclosure will impede ICANN's ability to negotiate and enter into contracts with persons and entities not wishing to make their business dealings open to the public, which will greatly harm the organization in running its business. Moreover, it is hard to identify what public interest would be served by the disclosure of the contract. This harm/benefit analysis is sufficient justification for nondisclosure under the DIDP.

ICANN can, however, confirm the existence of an agreement with the International Centre for Dispute Resolution ("ICDR") as the Board-designated Independent Review Panel Provider.

    b. ICANN policies and procedures for independent review

To the extent that any documents exist that are responsive to this Request, they are publicly available. The specified procedures for initiating a Request for Independent Review are outlined at http://www.icann.org/en/general/accountability_review.html. The form for initiating an Independent Review is located at http://www.adr.org/si.asp?id=4588. The Independent Review process is conducted under the ICDR's International Arbitration rules and procedures, located at http://www.adr.org/sp.asp?id=33994, as augmented and supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process, located at http://www.adr.org/sp.asp?id=32197. In addition, in his letter of 17 January 2006, as referenced in your Request, ICANN's General Counsel provided you with the information then available regarding ICANN procedures for Independent Review. Further, in a letter to you on 29 November 2006, ICANN's General Counsel's office invited you to participate in a conference call with it and the ICDR to assist in clarifying for you what steps are required to initiate an Independent Review. You did not accept that invitation.

ICANN does not currently maintain any "policies" relating to the Independent Review process.

2. Identification of various items of information relating to the Independent Review Process and the designation of the Independent Review Provider posted or provided pursuant to Article III, Section 6 of ICANN's Bylaws.

To the extent that any documents exist that are responsive to this Request, they are publicly available. To be clear, since 2002, ICANN has not undertaken any policy actions nor adopted any policies pursuant to Article III, Section 6 of ICANN's Bylaws to govern the Independent Review Process or the designation of the Independent Review Panel Provider. For ease of review, you may wish to consult information located in and access additional links found at the following pages of ICANN's website regarding ICANN's historical work in this area:

- http://www.icann.org/en/committees/indreview/irac.htm
- http://www.icann.org/en/committees/indreview/policy.htm
- http://www.icann.org/en/committees/indreview/nomcom.htm
- http://www.icann.org/en/minutes/prelim-report-14mar02.htm
- http://www.icann.org/en/committees/evol-reform/links.htm

3. The identification of the URL at which the IRP designation or "policies" are posted on the ICANN website, as well as where these were located on 8 April 2005.

To the extent that any documents exist that are responsive to this Request, they are publicly available. The ICANN Board designated the ICDR as the Independent Review Provider at its 19 April 2004 meeting. The resolutions of that meeting are located at <http://www.icann.org/en/minutes/resolutions-19apr04.htm> and have been since they were originally posted in 2004. Further this was reiterated by Vinton Cerf, ICANN's former Chairman of the Board, at the March 2006 Wellington Meeting. Dr. Cerf added a citation to the record in response to a letter from you "repeat[ing] most of [your] concerns about . . . the Independent Review Process" and to put your "uncertainty to rest" over ICANN's official designation of the ICDR as the Independent Review Panel Provider. *See* http://www.icann.org/en/meetings/wellington/captioning-icann-pub-forum-ii-30mar06.htm.

As there are no policies relating to the Independent Review Procedure, no URLs exist that are responsive to this portion of your request.

4. Copies of any records of discussions by the Board of your "request for independent or of policies for independent review – whether in person, by telephone, by e-mail, or otherwise", including minutes, transcripts, audio recordings, or e-mail messages.

There are numerous publicly available links mentioning your "request for independent [review] [*sic*]" and your communications with the ICANN Staff and

Board, including some included in your email set out above Outside of links included that can be referenced through the pages identified under No. 2 above, there are no other documents responsive to your request for discussions of "policies" for independent review.

To the extent they are not publicly available, ICANN is not required to produce the emails you reference in your request. In addition to the Conditions for Nondisclosure addressed above, ICANN's DIDP also specifies the following Defined Condition for Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Your request for internal Board emails, documents and memoranda falls directly within this condition.

Additional Conditions for Nondisclosure Applicable to Your Email In Full

As you are likely aware, the DIDP identifies Defined Conditions for Nondisclosure of information, including "Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual. " Both the repetitive nature and the format of your email fall within this Defined Condition for Nondisclosure. Further, ICANN is not required to respond to requests under the DIDP seeking information that is already publicly available.

Your email entitled "pending requests for information related to independent review" is attached copied in its entirety. Notwithstanding that ICANN was not under a requirement to respond to any portion of your Request, as set forth above ICANN culled through your email in its entirety in an attempt to identify portions that could constitute a proper request under the DIDP. We have identified those items in **bold throughout the copy of your email attached.**

We hope this information is helpful.

------ Forwarded Message
From: Edward Hasbrouck <edward@hasbrouck.org>
Date: Fri, 6 Mar 2009 12:08:10 -0800
To: <didp@icann.org>
Subject: pending requests for information related to independent review

------- Forwarded message follows -------

From: "Edward Hasbrouck" edward@hasbrouck.org
To: john.jeffrey@icann.org , vint@google.com
Subject: Request for ICANN Board action on independent review
Date sent: Sun, 05 Feb 2006 11:31:12 -0800
Copies to: [ICANN Board of Directors members for whom I was able to identify e-mail addresses], twomey@icann.org , committee@alac.icann.org

Mr. Jeffrey's message to me of 17 January 2006 appears contradictory:

http://hasbrouck.org/icann/E-mail_to_Edward_Hasbrouck_17_January_2006.pdf

You refer to "ICANN's standing agreement to have your concerns reviewed by an arbitrator". But you also say that my request for independent review -- received by you [8] April 2006, 10 months ago today -- "does not meet the guidelines required by the ICDR procedures and consequently cannot be considered a formal IRP sufficient to forward to the ICDR."

There are at least three problems with your argument:

First, the "sufficiency" of a request for independent review should be determined solely by the independent review panel, not by ICANN. ICANN's obligation under its Bylaws to refer such a request to an IRP is not discretionary or conditional on ICANN's opinion of its "sufficiency".

Second, I said in my original request for independent review that, "I reserve the right to make additional written submissions to the IRP once the policies and procedures for independent review have been determined." I remain willing to comply with any applicable and duly-adopted policies for independent review.

In order to be able to satisfy any such procedural requirements, I have repeatedly requested **copies of any ICANN policies and procedures for independent review, including any agreement(s) between ICANN and any provider(s) of independent review services.**

You have ignored these requests, which I reiterate.

Third, you refer to "the policies of the International Centre for Dispute resolution, which ICANN has designated to provide independent review services in accordance with its Bylaws."

But you ignore the portion of my message to you of 11 December 2005 in which I explain in detail that, despite my diligent search of the ICANN Web site, and my repeated unanswered requests to you for copies of any IRP agreement(s), I have been unable to find any record that ICANN has, in fact, "designated" the ICDR -- or anyone else -- as the IRP, or adopted any policies or procedures for independent review, "in accordance with its Bylaws".

ICANN's Web page on independent review policies states, correctly, "New bylaws went into effect on 15 December 2002 that call for a different independent review procedure." But that Web page contains no indication that ICANN has designated an IRP or adopted any policies or procedures for independent review:

http://www.icann.org/committees/indreview/

To the best of my knowledge and belief, after diligent research and repeated, unanswered, requests to ICANN for any agreements(s) between ICANN and independent review provider(s), ICANN has not designated an IRP or adopted any policies or procedures for independent review, in accordance with the procedures required by ICANN's Bylaws for making such policy decisions.

If ICANN's Board of Directors believes that they have designated the ICDR (and/or anyone else) as the IRP, or adopted the ICDR's policies (and/or any other policies) as ICANN's policies and procedures for independent review, please identify to me:

1. The URL at which notice of the proposed decision to designate an IRP and/or adopt policies for independent review, and notice of the reasons why these decisions were being proposed, was posted on the ICANN Web site, as required by Article III, Section 6.1.a of the Bylaws.

2. The 21-day or longer period during which that notice was available to the public prior to action by the Board on the proposals, as required by Article III, Section 6.1.a of the Bylaws.

3. The manner in which "a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board" was provided, as required by Article III, Section 6.1.b of the Bylaws.

4. The manner in which ICANN "request[ed] the opinion of the Governmental Advisory Committee and [took] duly into account any advice timely presented by the

Governmental Advisory Committee" concerning these proposals, as required by Article III, Section 6.1.c of the Bylaws.

5. Whether "an in-person public forum" was held prior to any final Board action, or why it was not "practically feasible and consistent with the relevant policy development process" to do so, as required by Article III, Section 6.2 of the Bylaws.

6. The URL of the minutes including "the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement", as required by Article III, Section 6.3 of the Bylaws.

7. The URL at which that designation and/or those policies are, and were at the time of my request on [8] April 2005, posted on the ICANN Web site as required by Article IV, Section 3.13 of the Bylaws.

Most of the rest of your message of 17 January 2006 is devoted to your claims that my request for independent review does not pertain to an action of ICANN's Board of Directors, and that actions by ICANN other than decisions made directly by the Board are not subject to independent review.

These claims are both incorrect and irrelevant.

Incorrect, because the Board of Directors is legally responsible for the actions of the corporation, including those of its officers, employees, subsidiary bodies, and other agents.

Irrelevant, because my request unambiguously and directly concerns an action by ICANN's Board: "I again request, for the reasons stated in my comments to yesterday's public forum, that today's resolution of the ICANN Board of Directors to approve a ".travel" agreement be referred to an independent review panel (IRP) in accordance with Article 4, section 3 of the Bylaws."

I appreciate your efforts to advise me, in advance, of what arguments you intend to make to the IRP, if you ever refer my request to an IRP. But I would prefer that you, and ICANN, first satisfy your obligation to refer my request to an IRP.

The next necessary and required step toward fulfilling ICANN's obligations under its Bylaws -- and toward fulfilling your asserted "standing agreement to have your concerns reviewed by an arbitrator", if you are sincere in such an offer -- is to schedule a maximally open and transparent meeting of the Board of Director to consider my request for a stay pending independent review, and to initiate the process of designating an IRP and developing policies and procedures for independent review.

I also note that, according to a message to the ALAC mailing list , "a discussion is going on in the Board at this time" concerning my request and/or independent review policy:

http://forum.icann.org/lists/alac/msg01531.html

I have received no notice of any such discussion by ICANN's Board, and can find no record of it on the ICANN Web site.

I remind you of my request of [8] April 2005, which you have ignored, for "notice, as far in advance and in as much detail as is known, of the time, place, and manner of any meetings to be held by ICANN or any of its constituent bodies, and for copies of any documents to be considered by them, related to '.travel', to my requests, or to policies for independent review of ICANN actions."

And I reiterate that, as I said in my message to you of 17 May 2005 , "ICANN may be obliged (as a result of its own prior inaction and failure to have in place the policies and procedures for independent review required by its bylaws and promised in its contract with the USA Department of Commerce) to develop policies and procedures for independent review while my request and others are pending. For this reason, it is especially important for that policy development process to be conducted with the maximum extent feasible of openness and transparency. Otherwise, it will be impossible to tell whether the independent review policies and procedures may have been crafted to influence the outcome of the specific pending requests for independent review."

If there has been any discussion by the Board of my request for independent or of policies for independent review -- whether in person, by telephone, by e-mail, or otherwise -- I request copies of any records of that discussion in ICANN's possession or control, including any minutes, transcripts, audio recordings, or e-mail messages, in accordance with ICANN's obligation under Article III, section 1 of its Bylaws to "operate to the maximum extent feasible in an open and transparent manner".

I also request that this message be forwarded to each member of the Board of Directors, so that they will know that you, Messrs. Jeffrey and Cerf, have broken the promises you made to me so publicly at the Vancouver ICANN meeting, and that you have not, in fact, been willing to take the
necessary actions to be able to refer my request to an independent review panel in accordance with the procedural requirements of ICANN's Bylaws.

This matter remains in the hands of ICANN's Board of Directors, as it has been since you and they received my request [8] April 2005. I request that the Board exercise its authority, and its legal and fiduciary responsibility, to act on this matter and to bring ICANN's actions -- including those of its officers and staff -- into compliance with ICANN Bylaws.

I look forward to a maximally open and transparent meeting of the Board to consider my request for a stay pending independent review, and to initiate the process of designating an independent review provider and developing policies and procedures for independent review.

Sincerely,

Edward Hasbrouck

Edward Hasbrouck
<edward@hasbrouck.org>
<http://hasbrouck.org>
+1-415-824-0214