

**SUMMARY DISMISSAL
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 22-1
16 MAY 2022**

I. Introduction and Summary

The Requestor, Michael D. Palage, seeks reconsideration of alleged ICANN Board and staff action and inaction regarding the redaction of certain information from Resolutions 2022.01.16.01 – 2022.2016.04 that the ICANN Board approved on 16 January 2022 (Resolutions). The Resolutions authorized the ICANN President and CEO, or his designee(s), to renew the contracts with two vendors to provide support services to augment ICANN organization Engineering and Information Technology’s (E&IT) capacity (Request 22-1).¹ The Requestor alleges that the redactions violate Article 3.1 of the ICANN Bylaws on openness and transparency and preclude the public from determining whether the requirements for the direct contracting selection process under Section 3.3 of the ICANN Procurement Guidelines were met.² The Requestor explicitly states, however, that he is not challenging the Board’s underlying decision to approve the renewal of the contracts.³

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, ICANN’s Board Accountability Mechanisms Committee (BAMC) is to review the request “to determine if it is sufficiently stated.”⁴ As discussed below, the BAMC concludes that Request 22-1 does not meet this standard because the Requestor has not

¹ Request 22-1, 16 February 2022, <https://www.icann.org/resources/pages/reconsideration-22-1-palage-request-2022-02-24-en>.

² *Id.* § 6 at Pg. 3; *id.* § 8 at Pg. 5; *see also* ICANN Procurement Guidelines, § 3.3, <https://www.icann.org/en/system/files/files/procurement-guidelines-21feb10-en.pdf>.

³ Request 22-1, § 8 at Pg. 5.

⁴ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(k).

sufficiently alleged that he has been materially and adversely affected by the challenged conduct. The BAMC therefore summarily dismisses Request 22-1.⁵

II. Factual Background

On 16 January 2022, the Board adopted the Resolutions authorizing ICANN organization's President and CEO, or his designee(s), to renew E&IT outsource contracts with two vendors that have been providing development, quality assurance, and content management support to augment E&IT's capacity over the last several years.⁶ For negotiation purposes, certain confidential information was redacted from the resolutions pursuant to Article 3, Section 3.5(b) of the Bylaws until the ICANN President and CEO, or his designee(s), determines that the confidential information may be released.⁷ Specifically, as the contract renewals are still under negotiation, confidential information such as the vendors names, contract renewal terms, and pricing information were redacted from the resolutions and their rationales. For purposes of this procedural evaluation, the vendors with whom the Board authorized the contract renewal under the Resolutions shall be referred to as vendors A and B, respectively.

As resolutions 2022.01.16.01 – 2022.01.16.02 and the supporting rationale explained, an extensive request for proposal (RFP) was conducted in 2014 to provide services in software engineering, quality assurance, and content management to augment ICANN E&IT's services and vendor A was determined to be the most cost-effective and efficient vendor for the contemplated services.⁸ Upon Board approval, in 2015, ICANN org engaged vendor A to

⁵ A substantive review of the merits of the Requestor's claims is beyond the scope of the BAMC's procedural evaluation. The BAMC's conclusion is limited to the preliminary procedural assessment of whether the Requestor has sufficiently stated a reconsideration request.

⁶ Resolutions 2022.01.16.01 – 2022.01.16.02 and Resolutions 2022.01.16.03 – 2022.01.16.04, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#1.a>.

⁷ *See id.*

⁸ Resolutions 2022.01.16.01 – 2022.01.16.02, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#1.a>; *see also* Resolutions 2015.04.26.18 – 2015.04.26.19, 26 April 2015, <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.d> (stating that an extensive RFP was

augment E&IT's services.⁹ Before the contract expired in 2018, ICANN org conducted a second RFP for the same services, which led ICANN org and the Board to determine that vendor A was still the preferred vendor because it provided the most efficient and cost-effective services.¹⁰ Upon Board approval, in April 2018, the contract was renewed for 24 months.¹¹ In Resolutions 2019.11.07.04 – 2019.11.07.05, the contract with vendor A was renewed for a third time from April 2020 through March 2022 with Board approval.¹² ICANN org considered pursuing another RFP for the 2020 and the current renewal cycles but decided not to pursue one due to the cost of doing an RFP and the fact that the prior RFP concluded that vendor A is still the preferred vendor.¹³

Resolutions 2022.01.16.03 – 2022.01.16.04 authorized the ICANN President and CEO, or his designee(s), to reengage the services of vendor B to provide the development, quality assurance, and content management support services to augment E&IT services.¹⁴ The resolutions and supporting rationale note that ICANN org has previously engaged vendor B to provide third party ad-hoc support of E&IT projects on a smaller scale and that ICANN org's relationship with vendor B "has been beneficial to ICANN org and has been a success overall."¹⁵ The supporting rationale further provides that "ICANN org considered the cost and efficiency of either issuing a request for proposal (RFP) for ad hoc outsourced IT capacity or further renewing

conducted, that 28 proposals were received, that in-depth interviews were conducted, and deep-dive analyses of shortlisted vendors were performed).

⁹ *See id.*; *see also* Resolutions 2015.04.26.18 – 2015.04.26.19, 26 April 2015, <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.d>.

¹⁰ *See* Resolutions 2018.03.15.02 – 2018.03.15.03, 15 March 2018, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#1.b>.

¹¹ *See id.*

¹² Resolutions 2019.11.07.04 – 2019.11.07.05, 7 November 2019, <https://www.icann.org/resources/board-material/resolutions-2019-11-07-en#1.c>.

¹³ Rationale for Resolution 2022.01.16.01 – 2022.01.16.02, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#1.a>.

¹⁴ Resolutions 2022.01.16.03 – 2022.01.16.04, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#1.a>.

¹⁵ *See id.*

[vendor B’s] contract and determined that it was more efficient and cost effective to renew [vendor B’s] contract.”¹⁶

On 18 January 2022, the Approved Resolutions of the 16 January 2022 Board meeting were published.¹⁷

On 16 February 2022, the Requestor filed Request 22-1, seeking reconsideration of these redactions.

III. Standard of Review

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that “any *person or entity materially affected* by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”¹⁸

The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.¹⁹ The BAMC may summarily dismiss a reconsideration request if the BAMC

¹⁶ Rationale for Resolutions 2022.01.16.03 – 2022.01.16.04, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#1.a>.

¹⁷ See Approved Board Resolutions, Special Meeting of the ICANN Board, 16 January 2022, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en> (stating “[p]ublished on 18 January 2022”).

¹⁸ ICANN Bylaws, 28 November 2019, Art. 4, §§ 4.2(a) and (c) (emphasis added).

¹⁹ *Id.* § 4.2(k).

determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.²⁰

IV. Analysis

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) has the requestor met the requirements for bringing a reconsideration request? The BAMC concludes that Request 22-1 is not sufficiently stated. Although it was timely filed and identifies the Bylaws provisions and established ICANN policies that the Board and staff allegedly violated, the Requestor has insufficiently asserted that he has been materially and adversely affected by the challenged conduct.

A. Request 22-1 Is Timely.

A reconsideration request challenging Board action must be filed “within 30 days after the date on which information about the challenged Board action is first published in a resolution,” if the posting of the resolution is accompanied by a rationale.²¹ Challenges of staff action must be filed “within 30 days after the date on which the Requestor became aware or, or reasonably should have become aware of, the challenged Staff action.”²² Challenges of Board or staff inaction must be filed “within 30 days after the date on which the Requestor reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.”²³ The Board approved the Resolutions on 16 January 2022, and ICANN staff then applied the redactions to the approved resolutions before their publication on 18 January 2022. The Requestor timely filed Request 22-1 within 30 days, on 16 February 2022.

²⁰ *Id.*

²¹ *Id.* § 4.2(g)(i)(A).

²² *Id.* § 4.2(g)(i)(B).

²³ *Id.* § 4.2(g)(i)(C).

B. The Requestor Does Not Sufficiently Allege a Harm for Bringing a Reconsideration Request.

The standard of review for a reconsideration request is set forth in the Bylaws, which prescribe that *requestors be “adversely affected” by the challenged action or inaction.*²⁴ This Bylaws-mandated criterion requires that a requestor must have suffered an actual injury from the challenged conduct in order to have standing to bring a reconsideration request. This criterion is not satisfied by claims by an individual requester of potential future injury to that requester or potential injury incurred by others, such as the general public, but not by that requester. In Request 21-1, the Requestor failed to sufficiently satisfy this standing requirement because he has not, and cannot, allege that he has been adversely affected by the challenged action as required by the Bylaws. The Requestor states that he has long been “a strong public advocate of Article 3.1 of the ICANN Bylaws.”²⁵ But a general interest in a Bylaws provision does not establish that the particular alleged violation of that provision has harmed the Requestor in any personal or individual way. If it were otherwise, then merely identifying a Bylaws provision or established ICANN policy that the challenged conduct allegedly violated would suffice to establish standing to bring a reconsideration request, and the separate “adversely affected” requirement would be rendered meaningless.

The Requestor also expresses concern about sustaining the ICANN multistakeholder model.²⁶ Sustaining the multistakeholder model is undoubtedly important. Through the multistakeholder model, individuals, non-commercial stakeholder groups, industry, and governments play important roles in ICANN’s community-based, consensus-driven, policy-making approach. But an alleged injury to the multistakeholder model does not satisfy the

²⁴ *Id.* § 4.2(a).

²⁵ Request 22-1, § 6, at Pg. 3; *id.* § 10, at Pgs. 6.

²⁶ *Id.* § 10, at Pgs. 6–7.

standing requirement set forth in the Bylaws that the Requestor was personally or individually harmed. Article 4, Section 4.2 of the Bylaws does not provide for a right of action on behalf of the general public.

The Requestor next asserts that a company he partially owns has a “potential material financial interest” in the challenged conduct, although not related in any way to the Resolutions at issue.²⁷ Specifically, he alleges that his company recently participated in a different RFP, and that “[i]f ICANN issues a future RFP, Requestor would like to have confidence that ICANN will operate in an open and transparent manner and that any vendor selection will be in accordance with the stated ICANN Procurement Guidelines.”²⁸ This alleged interest does not support a reconsideration request because the Requestor does not even suggest that *he* would be harmed or even how he could be harmed if the same conduct being challenged in Request 22-1 occurred in a potential future RFP. Further, even if these allegations could be considered to suggest future harm, speculation about any such future harm is not “directly and causally connected to the alleged violation” at issue now.²⁹ Thus, the Requestor has not been “adversely affected” by the challenged conduct, but instead merely speculates that he *might* be affected by allegedly similar ICANN conduct *in the future*. Speculative future harm does not support reconsideration. Also, as discussed in detail above, the Resolutions and their supporting rationales discussed the due diligence, which included two prior RFPs that ICANN org performed for the outsourced E&IT services, and the natural continuation of previous work carried out by the vendors, indicating that the Procurement Guidelines were followed.

²⁷ *Id.* § 10, at Pg. 7.

²⁸ *Id.* § 6, at Pg. 3.

²⁹ ICANN Bylaws, 28 November 2019, Art. 4, § 4.3(b) (defining “materially affected,” in the related context of the Independent Review Process, to refer to suffering “an injury or harm that is directly and causally connected to the alleged violation”).

Finally, the Requestor alleges a “dangerous trend” of redactions by the Board and staff.³⁰ But that allegation, too, does not establish that he has suffered harm from the redactions in the Resolutions at issue.

In any event, the BAMC underscores that these Resolutions authorize the redactions only so long as the President and CEO determines that the information should be kept confidential for negotiation purposes. In response to recommendations from Work Stream 2 (WS2) of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-ACCT), ICANN org has implemented a process for reviewing annually whether redactions of Board materials should be removed and the previously withheld information should be disclosed. If not, the materials will be reproduced in unredacted form. The ICANN Redaction Register and a description of ICANN org’s practice in performing this annual review are available online.³¹ Moreover, while certain confidential information was redacted for negotiation purposes in the interim, the resolutions and their supporting rationales explain the vetting history with respect to vendors A and B.

V. Conclusion

A substantive review of the merits of the Requestor’s claims is beyond the scope of this procedural evaluation. The BAMC’s conclusion is limited to the preliminary procedural assessment of whether the Requestor has sufficiently stated a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 22-1 does not meet the requirements for bringing a reconsideration request and therefore it is summarily dismissed. The BAMC notes that if the Requestor believes that the challenged conduct is unfair, the Requestor may file a

³⁰ Request 22-1, § 6, at Pg. 3.

³¹ ICANN Redaction Register, 20 December 2019, <https://www.icann.org/resources/pages/redaction-register-2019-12-20-en>; Guidelines for the Posting of Board Briefing Materials, 20 December 2019, <https://www.icann.org/resources/board-material/briefing-materials-guidelines-2019-12-20-en>.

complaint with the Ombudsman under Article 5 of the Bylaws.³² In addition, if the Requestor seeks to challenge the redaction process, the Requestor may file a complaint with the ICANN Complaints Officer. The ICANN Complaints Office handles complaints regarding ICANN org that are not otherwise subject to existing accountability mechanisms, including, but not limited to, complaints about how a request has been handled, a process that appears to be broken, insufficient handling of an issue, or something that may be an indication of a systemic issue, among other things.³³

³² See ICANN Bylaws, 28 November 2019, Art. 5, § 5.3(a).

³³ See ICANN Complaints Office, <https://www.icann.org/complaints-office>.