

From: Edward Hasbrouck <edward@hasbrouck.org>
To: <JPAMidTermReview@ntia.doc.gov>
Date: Thu, Feb 14, 2008 6:18 AM
Subject: Lack of progress or compliance by ICANN

I am an investigative travel journalist and consumer advocate. One of my areas of particular expertise and specialization has been the use of the Internet by travellers and for travel-related purposes, which is the subject of one of my books: "The Practical Nomad Guide to the Online Travel Marketplace" (Avalon Travel Publishing, 2001). As part of my research and writing on this subject, I have attempted to cover the travel-related top-level Internet domains (".aero" and ".travel"), the applications for these TLD's, the policies for these TLD's, and ICANN's consideration of these issues.

Some of my online reports on these issues, as well as some additional background information, are archived at:

<http://hasbrouck.org/icann>

Obviously, my ability (or lack thereof) as a journalist to observe and report on ICANN decision-making has depended greatly on ICANN's transparency (or lack thereof). I have requested to observe meetings of ICANN and its subsidiary bodies, and I have requests access to ICANN documents and records.

When my requests have been ignored or denied, or access to meetings, documents, records, and other information has not been provided, I have formerly invoked and attempted to pursue -- will all possible diligence -- each of ICANN's purported accountability mechanisms: an Ombudsman, Reconsideration (by a committee of ICANN's Board of Directors), and Independent Review.

I believe that my experience is the most extensive, clearest, and best documented available case study of ICANN's transparency and accountability, or the lack thereof, and that I am uniquely qualified to assess whether ICANN is, in reality, open, transparent, or accountable.

In my considered, experienced, and expert opinion, ICANN is none of these things.

I submitted comments on this subject to NTIA during the previous USA Department of Commerce public inquiry on this topic in 2006. Those comments are available at:

http://www.ntia.doc.gov/ntiahome/domainname/dnstransition/comments/dnstrans_comment0600.htm

<http://hasbrouck.org/blog/archives/001078.html>

http://hasbrouck.org/articles/Hasbrouck_NTIA_comments-7JUL2006.pdf

Those comments continue to describe the situation today, and I reiterate them.

As of today, I can attest that (1) ICANN still does not operate in accordance with the transparency requirements of its Bylaws and its commitments on transparency in the Joint Project Agreement with the USA Department of Commerce, (2) none of ICANN's 3 purported accountability mechanisms has yet been implemented and allowed to operate in accordance with ICANN's Bylaws, (3) ICANN has made no progress towards either transparency or accountability since your last inquiry on this topic in 2006; on the contrary, ICANN has continued to move to formalize its lack of transparency and accountability.

With respect to transparency, I have received no further response whatsoever since my previous comments to any of my outstanding, unanswered requests to ICANN for documents and records. Most meetings of ICANN subsidiary bodies remain closed. Most "meetings" of ICANN's Board continue to be conducted by closed teleconference, closed to auditing or observing, and no recordings or transcripts of those meetings are disclosed -- even though it would obviously be "feasible" to allow journalists and the public to audit those meetings, and to make audio recordings of them public.

ICANN is currently considering a set of of "Accountability and Transparency Frameworks and Principles" that includes a "Documentary Information Disclosure Policy". This draft document makes no mention of the requirement in ICANN's Bylaws that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner". Instead, it includes numerous provisions for withholding of information, even when that information is specifically requested and when it would be "feasible" to disclose it.

ICANN has ignored comments pointing out the incompatibility of the draft "Documentary Information Disclosure Policy" with ICANN's Bylaws, and has made no changes to the original draft to bring it into compliance with ICANN's Bylaws:

<http://forum.icann.org/lists/draft-mop-2007/msg00001.html>

<http://forum.icann.org/lists/draft-mop-2007/msg00002.html>

The draft policy provides that, "If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial." I can attest that this draft policy does not actually describe ICANN's practice to date: I have still received no response whatsoever to most of my outstanding unanswered written requests for information from ICANN.

With respect to accountability:

(A) There is still no publicly-disclosed record of any proposal, consideration, or decision by ICANN's Board of Directors to appoint or re-appoint an Ombudsman, despite the specific requirement of ICANN's Bylaws that an Ombudsman must be appointed by the Board (in accordance, of course, with the general procedural rules in ICANN's

Bylaws for Board decision-making). ICANN has ignored formal written comments calling this to their attention:

<http://forum.icann.org/lists/transparency-2007/msg00003.html>

(B) The Committee on Reconsideration of ICANN's Board of Directors still has never held a public meeting. The Committee on Reconsideration has stated publicly that it has based its (secret) refusal even to consider one of my requests on information provided in secret by the person claiming to act as ICANN's Ombudsman -- in flagrant violation of ICANN's Bylaws, which require that the Reconsideration Committee base its actions solely on the public written record:

<http://hasbrouck.org/blog/archives/001196.html>

ICANN still has entirely ignored formal written comments calling this to its attention:

<http://forum.icann.org/lists/transparency-2007/msg00003.html>

(C) ICANN still has taken no action on my formal written request for independent review of whether certain ICANN actions and decisions were made in accordance with ICANN's Bylaws on openness and transparency:

<http://hasbrouck.org/blog/archives/000554.html>

ICANN still has not responded to any of my requests for specific information concerning ICANN's designation of an independent review provider (or lack thereof), development and approval of policies and procedures for independent review (or lack thereof), and compliance of any such designation, policies, procedures and policy development and decision-making process with the procedural, openness, and transparency requirements of ICANN's Bylaws:

<http://hasbrouck.org/blog/archives/001007.html#procedures>

<http://hasbrouck.org/blog/archives/000964.html#ICDR>

ICANN has pointed repeatedly to a report commissioned by ICANN from One World Trust, "Independent Review of ICANN's Accountability and Transparency -- Structures and Practices". ICANN has misleadingly described this report as though it were based on an "audit" of ICANN's accountability and transparency.

In fact, this report was not based on an audit. The report is limited largely to ICANN's *self-reported claims* to transparency and accountability, without opportunity for public input, reporting of problems, or opportunity for the presentation of evidence to rebut ICANN claims. The report considers ICANN's accountability and transparency in general, but makes no attempt to compare ICANN's actions and practices to the specific requirements of ICANN's Bylaws:

<http://forum.icann.org/lists/transparency-2007/msg00003.html>

In the Joint Project Agreement and elsewhere, ICANN has promised NTIA and the USA Department of Commerce that ICANN will operate in accordance with its Bylaws. Its failure to do so is a material breach of contract, as is its failure to fulfill its other commitments in the JPOA on transparency and accountability.

For all these reasons, I reiterate my specific and formal written complaint to NTIA of breach of contract by ICANN, and my specific and formal written request that NTIA initiate an investigation of these breaches of contract by ICANN and take action to terminate the Joint Project Agreement with ICANN for breach of contract by ICANN and failure of ICANN to operate in accordance with its Bylaws.

Sincerely,

Edward Hasbrouck

--

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

"The Practical Nomad: How to Travel Around the World"
(4th edition 2007)
"The Practical Nomad Guide to the Online Travel Marketplace"
<<http://www.practicalnomad.com>>

Around-the-World and multi-stop international air tickets:
<http://www.airtreks.com/tools/landing.php?ref=EH&dst=MAIN>