Office of the Ombudsman
Internet Corporation for Assigned Names and Numbers

Investigation Report

Ombudsman Case File (2019)-382

Accountability and Transparency Review 3
("ATRT3")

The Office of the Ombudsman has received a complaint from Sébastien Bachollet that Mr. Bachollet was treated unfairly as a member of the newly established Accountability and Transparency Review 3 ("ATRT3"), especially as a volunteer for the ATRT3 Leadership Team, and that actions and decisions regarding the ATRT3 Leadership Team taken by the ATRT3 were not consistent with either 1) ICANN's Operating Standards for Specific Reviews, or 2) the organizational and community values of accountability, transparency and diversity.

Analysis

In reviewing Mr. Bachollet's complaint, there are three main components to my investigation.

1. Communication between members of the ATRT3 prior to the initial Welcome Call and the establishment of an ATRT3 electronic mailing list;
2. Actions and decisions to establish the ATRT3 Leadership Team (structure and composition); and
3. ICANN's Operating Standards for Specific Reviews (of which there are two online versions: 2017 and 2018 *Draft* of Operating Standards for Specific Reviews).

Commentary

Shortly following the initial ATRT3 Welcome Call facilitated by ICANN Org personnel, on January 25, 2019, Mr. Bachollet advised me that he was not pleased with the way the Review Team had come to a determination to have two co-Chairs on the Leadership Team and that an online poll was being conducted between three volunteers for co-Chair: Mr. Bachollet (ALAC, the At Large Advisory Committee), Mrs. Chery Langdon-Orr (ALAC) and Mr. Patrick Kane (GNSO, the Generic Names Supporting Organization). Mr. Bachollet cited the 2017 Draft Operating Standards for Specific Reviews ("2017 Draft Operating Standards") in this exchange. The conversation was stipulated as being for my "information only," but clearly conveyed was Mr. Bachollet's concern for the ATRT3 getting off, in his opinion, to a poor start. His contention was that the ATRT3 should have either a) followed the 2017 Draft Operating Standards for Specific Reviews in determining their leadership structure and numbers, or b) state what Standards or rule the ATRT3 was using as a reference and guideline for making such determinations, or c) in the absence of using established Standards, the group should have established their own, starting at the first meeting ("Welcome Meeting"), and not before.

I immediately contacted ICANN Org to establish and determine facts regarding the formation of the ATRT3 and whether, in their opinion, there had been anything untoward or unusual regarding the Leadership Team structure and composition. The Org advised that everything was done appropriately, and that there now existed an updated draft of Operating Standards for Review Teams (2018), and that this document was presently posted for public comment. ATRT3 did not, either in its Welcome Meeting or in the following online meeting, explicitly state that it was following the 2018 Draft Operating Standards which was put forward to the community for review and comment in December 2018.

ATRT3 was entitled, in the absence of current published standards, with one draft having superseded another draft (as the 2018 Draft Operating Standards superseded, upon publication, the 2017 Draft Operating Standards) to rely on the 2018 Draft Operating Standards in forming its Leadership. It should have stated, explicitly, both in the Welcome Meeting and in the subsequent online meeting, that the 2018 Draft Operating Standards formed the basis for determining its Leadership (assuming, indeed, that was the case).

ATRT3 may have failed to announce the Standards on which it was relying and under which it formed its new leadership—however, nothing prevented ATRT3 from following the 2018 Draft Operating Standards, or for that matter, determining on its own its leadership structure.

Transparency as a principle requires stating openly what rules or standards you are operating under. ATRT3 did this, but only after it had acted, and after the 2018 Draft of the Standards was presented to the group. I am therefore sympathetic to Mr. Bachollet's complaint, since it was unclear what ATRT3 was basing its choice of leadership models on (and, on that basis, its initial leaders). ATRT3 should have stated clearly and right up front (and again in writing during the Online Meeting) whether they were operating under the 2018 Draft Operating Standards.

But that fact that ATRT3 failed to announce which version of the Operating Standards Draft they were relying on (2018, 2017, or on none at all) does not mean that they were *not* entitled to rely on that particular version (even though it was only a draft). Like the math student who shows only the answers to the questions on the test, and not their work, ATRT3 may not get a failing grade for providing only "correct answers," but they are to be cautioned moving forward to "show their work" (and tell the community, especially the volunteers interested in the ATRT3) what Operating Standards (if in this case it was the 2018 Draft) they were basing their initial formation decisions on. This failure to cite their source is not fatal, but it should be avoided in the future—by this and other groups. The Operating Standards Draft relied on by a group in formation (or later on down the line) should be clearly stated, so all are on the same page.

I advised Mr. Bachollet that I was satisfied that the decision of the Review Team to have two co-Chairs complies with the 2018 Draft Operating Standards, and that, further to discussions with ICANN Org personnel, I was of the opinion the Review Team had the discretionary power to choose the structure of the Leadership Team and to hold a poll to elect two co-Chairs if it so desired. I also conveyed to him that there was now an updated draft Operating Standards for Specific Reviews from 2018 that contained significant changes to the Leadership Team selection process. Both 2017 and 2018 Draft Operating Standards contain ambiguity regarding leadership selection processes (to be expected as they are both "Drafts") but nonetheless leaves the Review Team with discretion to proceed as they choose.

Following the ATRT3's second online meeting (on Feb 20th, 2019), when it was announced that Mrs. Cheryl Langdon-Orr and Mr. Patrick Kane were elected to the two co-Chair positions, Mr. Bachollet filed an official complaint with the Office of the Ombudsman; subsequently, the following day, he filed a complaint with the ICANN Board of Directors. The essence of both complaints is that the ATRT3 Leadership Team should consist of three volunteers, and not just two, as decided by the ATRT3 membership, and that there should have been a two-week nomination period. He supports his complaint using language from the 2018 draft Operating Standards for Specific Reviews and mentions ICANN's promotion of diversity. Here again, an opportunity was missed, and should have been taken, to announce that the ATRT3 Leadership

Team was working under and had based itself on the 2018 Draft Operating Standards. Their failure to do so should be a warning to other teams: show your work, cite your sources, get everyone on the same page about what Operating Standards are being utilized and relied on.

Confusion was enhanced by the superseded 2017 Draft Operating Standards indicating that with three volunteers they all automatically form the Leadership Team without a poll (inferring a structure of three volunteers). The 2018 Draft gives the Review Team the discretion to determine a Leadership Team of two or three individuals with a poll being held if there are more than three volunteers or nominations. I acknowledge that the option of "two leaders" followed by "if three or more volunteer" is somewhat contradictory, but in my opinion is not an absolute for a three-member leadership team. It is typical wordsmithing when draft documents are being worked on and will hopefully be resolved with the final version. It is also worth noting that on the Feb. 20th ATRT3 call, in which I listened in as an observer, an ICANN Org employee presented the 2018 Draft Operating Standards for Specific Reviews, and it was discussed whether the ATRT3 would be bound by its contents, or, as it was not technically an official document yet, whether it should merely be taken into consideration as an unofficial document to be viewed as guidance. It was confirmed that it was then not yet an official binding document, but the ATRT3 membership had nonetheless decided to accept if for consideration, in its draft form, to be used if necessary, in guiding their proceedings. So ATRT3 got there, in terms of noting reliance on the 2018 Draft Operating Standards, but their tardiness sits at the heart of Mr. Bachollet's complaint.

In the course of my investigation I obtained email exchanges between ATRT3 membership prior to the Welcome Call and the establishment of a public electronic mailing list. I would like to mention appreciation for the willingness to share what could be considered to be private communications as a gesture of goodwill towards clarifying my inquiries. In reviewing these email exchanges (which were sent to all ATRT3 members and contained valid email addresses), I am satisfied they were within their remit with their decision to have a leadership team consisting of only two co-Chairs, and that two members of the nascent team, Cheryl Langdon-Orr and Mr. Patrick Kane, had volunteered to be considered for the roles of co-Chair. It came to light during the Welcome Call of January 25th, that Mr. Bachollet, and maybe others, had not participated in the email discussions prior to the Welcome Call, which is unfortunate, but not unfair (See Recommendation 1). I will also note that during the Welcome Call, Mr. Bachollet offered his nomination for co-Chair and this nomination was accepted. As it was clearly defined in the preparatory email exchanges that there would be two co-Chairs, ICANN Org personnel arranged for an online poll to elect two co-Chairs from among the nominees. As the clauses in the Draft Standards can only be seen as informal guidance at this time, there was no obligation for ATRT3 to apply a two-week nomination period nor to request Statements of Interest.

The use of email to discuss issues related to ATRT3, and in particular its Leadership Team, prior to the Welcome Call could be perceived (and should therefore be treated) as a matter of accountability and transparency practice. Several elements have come to my attention. There was primarily a sense of urgency to the ATRT3 process, and a By-laws imposed one-year limit to terminate the review. This was compounded by the fact that nobody seemed sure when the "clock" would start ticking on the one-year term. With confusion abounding as to whether the one-year time limit would possibly begin with the Jan. 25th Welcome Call, initial email exchanges took place to deal with housekeeping issues including leadership and timing schedules for subsequent calls. The goal was to allow for more expediency and efficiency during the 90 minutes that had been allocated for the first online meeting. In other words, two points of

confusion: 1) no one was quite sure as to what time constraints they were working under, and 2) in hindsight it seems it was unclear what Operating Standards (or Drafts thereof) were being used, if any.

In considering whether these email exchanges went against accountability and transparency practice one should ask:

- Are community members who volunteer or are nominated to working groups expected to be prepared, proactive and passionate about the work they are taking on?
- Is there an expectation that preparatory work (including initial email communication) be migrated into public record or onto an email list once it is established?
- What may have exacerbated a perception that actions taken by ATRT3 members or ICANN Org personnel went against accountability and transparency practices?

The ICANN community is best served by having its best people in these important working groups, in particular for something as critical to ICANN as an Accountability and Transparency Review. Looking at the composition of the ATRT3, one sees a vast display of ICANN experience, a representation of global diversity, and a universal commitment to ICANN and its mission. Members of ATRT3 taking the initiative, in particular with the uncertainty of when the timer starts counting down on a hard one-year deadline, to discuss administrative elements of ATRT3 prior to its initial Welcome Call, seems in tune and in keeping with the professionalism and commitment expected of this group of volunteers.

The ATRT3 got started with a properly determined Leadership Team. In the future, the steps taken should be more clearly communicated and all involved should know which, if any, Standards are being applied, whether they are Drafts, or not. Transparency requires to a degree that where there is uncertainty, "showing your work" will go a long way toward clearing it up.

A final question arises as to whether email exchanges between ATRT3 members prior to the formation of an official email list for the review team should become part of public record: this is a question that encompasses privacy, practicality, and context. These emails, up to a certain point, are private communications as opposed to being emails published to a list that were written with an understanding that they would someday become part of the public record. I believe that a balance can be struck by reporting into public record, at the first opportunity, any informal discussion that leads to decisions that have a material impact on a group or team. But one thing is clear: at the moment they knew they were going to be considering the 2018 Draft Operating Standards, they should have disseminated that information. This was only discussed, to the best of my knowledge, at the second ATRT3 meeting. Going forward, this should be Standard Operating Procedure, regardless of which Draft or adopted Operating Standards one is working (or forming) under.

There are two elements that, in my opinion, precipitated this complaint to the Ombudsman: The first unfortunate element is that Mr. Bachollet did not open and read the email exchange discussing the administrative elements prior to the Welcome Call because it was not an email he uses to conduct ICANN business. The second is that the content of prior email discussions, and in particular the decision to have two co-Chairs as a leadership team, was not clearly enough communicated, nor was it justified during the Welcome Call en route to becoming public record.

Conclusion

I have come to the conclusion that Mr. Bachollet's complaint regarding decisions taken by ATRT3 membership in structuring and staffing the Leadership Team, and the actions taken subsequent to those decisions by ATRT3 members and ICANN Org personnel were not unfair, and they did not lead to or culminate in any action that violated an established ICANN Bylaw, policy, or existing operating standard.

I also conclude informal electronic communications that took place prior to the Welcome Call were in good faith and did not disregard the extant Accountability and Transparency practices; these communications were in no way unethical nor were they demonstrations of conduct that require me to find that they are unacceptable to the community. Action taken by all review teams, or for that matter any ICANN working group, prior to the official start of the group, in the future, must be clearly and promptly incorporated into public record, either verbally or on an official public email list to ensure transparency and accountability. Such informal communication should also, with all possible effort, include all members of the group to ensure actions or decisions are based on consensus.

I do not consider "diversity" (specifically "language") to be a valid point of contention as to ATRT3 and its leadership structure. The membership of the Review Team represents the richness of diversity in ICANN, and the duly elected leadership team represents both gender and regional diversity; therefore, I am confident that if other diversity issues arise during the course of the year, they will be more than adequately addressed by ATRT3's diverse membership. It should also be noted that the Leadership Team is composed of one representative of the GNSO and one representative of ALAC.

I also conclude that ICANN Org document management led to confusion as the 2017 Draft of the Operating Standard for Specific Reviews could easily be mistaken for being the only available and current version of the document. It required serious effort to search and find the 2018 Draft Operating Standards on the ICANN web site.

Recommendations

1. I recommend that all future ICANN Review Teams and Working Groups, at the earliest possible occasion, enter into public record any preparatory actions or decisions that were taken or made prior to the official start of the initiative. Any such actions or decisions should be inclusive of all participants and use the email address used by the participant when volunteering. This email list should be shared among the participants once the volunteer list is finalized and utilized for all intra-group communication and communication between the group members and ICANN Org.

2. I recommend that ICANN Org request any ICANN Org personnel involved in document management to ensure older draft versions contain a clear indication that a newer version exists (and a link to such more recent documents).

3. I recommend that upon the formation of all future Specific Review Teams, that the Operating Standards for Specific Reviews be used as a guideline (if still in draft form) or as a policy (in a final version) to guide all participants. The Operating Standards should be communicated to all volunteers participating in the Review at the earliest opportunity in the process by ICANN Org or by the Supporting Organization / Advisory Committee leadership.