



Via Email:
correspondence@icann.org
ombudsman@icann.org
herb.waye@icann.org

September 12 2019

Mr. Herb Waye
Ombudsman
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Mr. Waye:

Re: Your Response to Reconsideration Request 19-2

The position of Ombudsman has a crucial role within an organization and requires respect for stakeholders, sound judgment, and neutrality.

On or about September 7, 2019, in your position as ICANN Ombudsman, you issued a “Substantive Evaluation” of NameCheap, Inc.’s Request for Reconsideration wherein you made ill-informed and disparaging comments about members of the ICANN community.

On Page 3 of your “Substantive Evaluation” (“SE”) at Paragraph 6, you stated that “many of the [3200+] comments are, in actuality, more akin to spam”.

You also stated therein at Paragraph 5, that “many of these comments seem clearly to be computer generated—that is to say, they may be ‘comments’ in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing.” You further stated therein that “a brief search on the Internet identified one source of recurring comments to be: <https://www.internetcommerce.org/comment-org/> (Web page accessed Sept. 7th, 2019)”.

Your disparagement of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal, is deeply concerning, particularly for an Ombudsman. Furthermore, your misrepresentation of facts demonstrates a failure to reasonably inform yourself prior to reaching an ill-advised and incorrect conclusion.

There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.

You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being “spam”. You attempted to justify your conclusion on the basis that many of the comments were, according to you, “computer generated” and were “identical, with only the email address of the comment submitter changing.” This is misleading.

As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN’s public comment procedure and who may be intimidated by what can only be construed as a user *un*-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association (“ICA”) established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.

The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; <http://input.icann.org/app/survey/response.jsp>), ICANN asks in part, “Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?”

Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of

the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.

Furthermore, contrary to your claim that these Comments “only [included] the email address”, and did not otherwise identify the sender, each Comment submitted generally included the Commenter’s name and email address, both of which are normally transmitted by a sender’s own email application as with all correspondence and Comments submitted by email in the usual course. This was not “spam” as you alleged. "Spam" is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN's decision-making process, only to find their views scorned and disregarded.

Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman’s job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as “spam” ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.

Under the circumstances, we think that it is incumbent upon you to apologize to the numerous people who submitted these Comments and to retract your ill-advised statements. The Ombudsman should seek ways to increase public participation, particularly from those who are underrepresented or unengaged in ICANN's policy development, rather than devaluing and dismissing their contributions to the policy development process.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA