

Mr. John Jeffrey  
ICANN General Counsel  
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Email: Contact Information Redacted

10 March 2019

Dear Mr. Jeffrey,

We acknowledge receipt of your letter dated March 9, 2019, which responds to Mr. Bernstein's letter of October 23, 2018, more than 4 months ago. We trust that we will be given sufficient time to respond to the substance of your letter, proportionate to the time you took to respond to the October 23, 2018 letter.

1. However, before we do that, we must first point out that your letter appears timed to coincide with ICANN64, presenting a one-sided picture to the community with preliminary conclusions based only on hearing one side of the issue, to the disadvantage of Mr. Kirikos. The timing appears calculated to cause maximum harm to Mr. Kirikos, not providing him ample opportunity to respond to the substance of the letter before that letter is paraded before GNSO Council and/or the public, who are not privy to all the facts.

According to the transcript of the November 29, 2018 GNSO Council meeting, which had an update on this issue:

"And my understanding is that the ICANN General Counsel's Office has started to have conversations with impacted parties and that they are engaged in essentially we are to stand by until further notice."<sup>1</sup>

In other words, the conversations with the co-chairs and Mr. Shatan took place many months ago, yet our side has not been approached until now, the eve of the ICANN64 meeting. We would appreciate an explanation.

2. The potential harm of hearing from only one side of a dispute before making public statements and conclusions should be obvious. But, to illustrate further, consider that ICANN CEO Goran Marby made statements at ICANN63 that were erroneous, despite claiming to be careful with his language, in his words "I have to follow a script". We refer you to the October 25, 2018 post on the GNSO Council mailing list by Paul McGrady, which quoted Phil Corwin as follows:

"Goran's statement that, "WE UNDERSTAND THAT THERE HAVE BEEN DISPUTES WITHIN THE GROUP, AND IT'S MORE OR LESS BEEN STALLED FOR THE LAST SEVEN MONTHS" is factually incorrect. Greg Shatan's ESB complaint was filed in June, so its resolution has been stalled for four months. However, the WG has made substantial progress on its work during the past few months, including the consideration, and adoption for Initial Report public comment purposes, of 34 sub-

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<sup>1</sup> <https://gns0.icann.org/en/meetings/transcript-council-29nov18-en.pdf> (page 52)

team recommendations and 33 individual proposals for URS operational and policy modifications. However, the escalation of outside counsel involvement beyond the original ESB complaint to occurrences within WG meetings does threaten its further progress absent a satisfactory resolution."<sup>2</sup>

In other words, at no time has Mr. Kirikos caused any disruption to the actual work of the RPM PDP, despite Mr. Marby's erroneous statement that the work has "been stalled for the last seven months." These reckless and false statements, which misinform the community, often arise from only hearing just one side of a dispute. We trust that you will have ICANN's CEO make a correction to his erroneous statement at the earliest opportunity, and with equal publicity.

3. Your letter refers multiple times to "the record" (e.g. "we've only heard one part of the record" (page 1), "If I were referring this matter to the GNSO Council Leadership today based on the record currently in-hand" (page 4), "any other action could be supported by the record at hand" (page 4)). Yet there have been conversations that have been held "ex parte" between yourself, the co-chairs and Mr. Shatan. The issue of ex parte communications has been raised by Mr. Shatan and Mr. Kirikos in past correspondence. However, rather than address those concerns, you appear to have further compounded the problem by holding even more ex parte meetings since October 23, 2018. Mr. Kirikos has a fundamental right to access to the entire record that is being used against him, including those ex parte meetings that have been held.

Case law exists to document Mr. Kirikos' concerns about ex parte communications. For example, *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 states:

[99] Private conversations between an arbitrator and one party to the dispute do not necessarily have to deal with the merits of the dispute or evidence in order to be disqualifying.

[100] The case of *Setlur v. Canada* (Attorney General) (2000), 2000 CanLII 16580 (FCA), 194 D.L.R. (4th) 465 (F.C.A.), concerned judicial review of a decision of the appeal board of the Public Service Commission on an appeal by an employee as to a hiring decision. The chairperson of the appeal board made efforts to separately contact the employee's counsel and the human resources person representing the employer to schedule hearing dates. The human resources person missed the call, but then returned it and had a private conversation with the chairperson. On that call, the human resources person complained about various matters, including the tone of the hearing and the manner in which the employee's allegations were being presented. The chairperson suggested it was inappropriate for those concerns to be expressed off the record and further suggested she contact senior human resources personnel for guidance. A month later, another person working for the employer also contacted the chairperson and left a voice mail message seeking some accommodation for a witness's attendance.

[101] In *Setlur*, the employee was unhappy with a decision by the chairperson that allowed an adjournment of the hearing and release of hearing tapes to new counsel for the

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<sup>2</sup> <https://mm.icann.org/pipermail/council/2018-October/021981.html>

employer, after earlier refusing to release the tapes to the employee. The employee requested that the chairperson recuse herself, and she refused.

[102] On judicial review in *Setlur*, the judge dismissed concerns about the private communications. On appeal, the Federal Court of Appeal held that the trial judge had erred in part because he focused on the degree of actual prejudice caused to the petitioner, noting that the appellant did not need to prove actual bias, and that the appellant's apprehension of bias was reasonably held: at paras. 26, 29. The court further noted that the appeal board would be well advised to "revisit its procedure of communicating with the parties on procedural matters" at para. 30.

[103] In other words, *Setlur* confirms that ex parte communications that touch on procedural matters are not exempt from the principles of procedural fairness that require the maintenance of the appearance of absolute impartiality on the part of the decision-maker.

[104] There is no question that procedural matters can have strategic importance in a dispute. Some procedural matters are on the purely administrative end of the spectrum, such as the start time of a hearing; others will be more significant, such as the right to and scope of discovery.

[105] In addition to the important issue of the number of arbitrators, Mr. Williams' private communications with the arbitrators discussed the prospects of mediation, including what the Strata's mediation proposal would be, and the implication that the rest of the owners supported the costs of arbitration. As I will touch on shortly, these were not trivial matters.

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[134] The chambers judge erred in failing to find that the four ex parte communications between the Strata's lawyer, Mr. Williams, and the arbitrators, viewed practically and reflected upon, would lead an informed person to conclude that the arbitrators would likely not decide the matter fairly. These communications created a reasonable apprehension of bias.

[135] Having said this, I have no reason to believe that the arbitrators were in fact biased and deliberately favoured the Strata over the Hunts. Suffice it to say, once there is a reasonable appearance of bias, it is unnecessary to embark on the impossible task of determining the actual state of mind of the decision-maker.

[136] By allowing ex parte communications about the arbitration proceeding to take place with Mr. Williams, the arbitrators placed themselves in an impossible position and undermined their appearance of neutrality."<sup>3</sup>

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<sup>3</sup> <https://www.canlii.org/en/bc/bcca/doc/2018/2018bccal59/2018bccal59.html>

Here in this dispute though, the ex parte communications appear to not only be limited to procedural issues (which would in itself be inappropriate), but have gone significantly further into the actual substance and merits of the dispute (and even a later and unrelated Section 3.7 appeal filed by Mr. Kirikos).

As was written in a news article commenting on that case:

"This decision underscores the importance of maintaining "appropriate professional distance" in arbitral proceedings. Despite the often flexible and informal nature of arbitral proceedings, which has the benefit of promoting the expeditious resolution of disputes, care must be taken not to slip into the realm of familiarity between arbitrator and counsel even in seemingly trivial procedural matters. The Court reminds us of the old adage: "justice must not only be done, it must be seen to be done".[5] This principle applies equally to arbitral proceedings, even where there is provision for a party's nominee on the arbitral panel.

The Court of Appeal's decision in Hunt does not mean that every private communication between a party and an arbitrator will give rise to reasonable apprehension of bias. However, this begs the practical question: why risk tainting the process?"<sup>4</sup>

The American Bar Association in the United States has similar rules prohibiting ex parte communications with adjudicators. For example, ABA Model Code of Judicial Conduct Rule 2.9 states:

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be

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<sup>4</sup> <https://www.mccarthy.ca/en/insightsblogsinternational-arbitration-blog/ex-parte-communications-arbitral-proceedings-worth-risk-hunt-v-owners-strata-plan-lms-2556>

solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.<sup>5</sup>

We are strongly concerned that these repeated patterns of ex parte communications (none of them "on the record", with no records/transcripts provided to Mr. Kirikos) have irreparably tainted the process against Mr. Kirikos. In the interest of fairness and due process, we insist upon having a full "record" so that we may fully respond to all of the statements made by Mr. Shatan and the co-chairs concerning Mr. Kirikos and this dispute.

4. Your letter calls into question Mr. Kirikos' motives in bringing a Section 3.7 appeal on February 5, 2019 (not February 5, 2018, as per your letter, page 5), claiming they were "disruptive" and for an improper purpose to "deflect from the issue of your own [Mr. Kirikos'] decorum." That complaint is entirely unrelated to Mr. Shatan's complaint, but rather raised issues of workload, timing of submission of various documents, and also capture issues that thwart consensus policymaking. Those issues are fully detailed in the complaint at: <https://mm.icann.org/pipermail/gnso-rpm-wg/2019-February/003633.html>

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[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_9expartecommunications/](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecommunications/)

and the subsequent email discussion thread. Rather than deal with those serious and legitimate concerns, the PDP co-chairs (and the GNSO Council chair) have never engaged with Mr. Kirikos, but instead falsely claimed that their processes were mere "proposals", despite having been fully acted upon, and which have already led to the suppression of more than 40 articles/data sources that would have aided the work of the PDP sub teams. Indeed, if one actually consulted the transcripts of the sub team calls, one would see that Mr. Kirikos has been the only member of the sub teams to have actually done all the weekly assigned homework in those sub teams, acting in good faith to try to advance the work of the sub teams. Mr. Kirikos previously filed a section 3.7 appeal in good faith in the IGO PDP that was meritorious and highlighted procedural irregularities by the co-chairs of that PDP, which later had to be addressed by the GNSO Council Chair. Once that procedural error was rectified, that IGO PDP went on to deliver a final report which achieved consensus on all its recommendations -- in other words, a great success. It is in that same good faith that Mr. Kirikos filed the more recent Section 3.7 appeal, in a constructive manner, to highlight unaddressed procedural concerns as discussed above. Frankly, Mr. Kirikos finds it unacceptable that you would so easily call his recent Section 3.7 appeal to not be in good faith. Rather than actually deal with the legitimate concerns raised by Mr. Kirikos, your office appears to join with the RPM PDP co-chairs in ignoring the concerns, based on a false premise that there is an ulterior motive.

5. Without going into full detail at this point as to the Expected Standards of Behaviour and how they should be interpreted, we do wish to point out that the ICANN Ombudsman, Herb Waye, has openly stated (on January 24, 2019 before GNSO Council themselves) that:

"But unfortunately the expected standards of behavior is a guideline; it's not a rule with sanction or penalty attached to it."<sup>6</sup>

We will address this in greater detail in future correspondence or discussions.

6. We find it ironic that you argue against the "formality or complexity" of counsel representation, but do so in a 6-page formal letter from yourself (a lawyer), rather than reaching out to us in the same manner that you reached out to the co-chairs and Mr. Shatan. We remind you that Mr. Kirikos offered on July 10, 2018 to speak directly with the co-chairs and Mr. Shatan, with or without the Ombudsman present to resolve this dispute constructively:

"I suggest we have a phone call to discuss a path forward to deal with these four preliminary issues ASAP.

I'd also be happy to invite Mr. Shatan to have a phone call (on or off the record, with or without the Ombudsman present) to see if we can resolve issues directly, without the further involvement of ICANN co-chairs."

Our involvement in representing our client only began when Mr. Kirikos perceived that he was being railroaded by a one-sided process that seeks to weaponize the Expected Standards of

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<sup>6</sup> <https://gns0.icann.org/sites/default/files/file/field-file-attach/transcript-council-24jan19-en.pdf> (page 11)

Behaviour to eliminate a policy opponent. Thus Mr. Bernstein and I only became involved in this dispute in order to ensure that Mr. Kirikos' due process rights were being fully respected. In other words, matters escalated despite Mr. Kirikos' clear and early efforts to de-escalate and fully resolve the matters at an early stage. (Mr. Kirikos only received notice of Mr. Shatan's complaint on July 10, 2018, and Mr. Kirikos' response was made an hour later).

7. In the spirit of moving forward constructively, we again suggest having a telephone call (with Mr. Shatan and any other concerned parties present -- we ourselves have never had any ex parte communications) to attempt to narrow the issues that are in dispute, and thereby more efficiently focus any future written communications on whichever issues remain.

Sincerely,

Robin Gross  
Attorney for George Kirikos

cc: George Kirikos  
Andrew Bernstein  
Brian Beckham  
Phil Corwin  
Keith Drazek  
Samantha Eisner  
Kathy Kleiman  
Paul McGrady  
David Olive  
Greg Shatan