

## Burr, Becky

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**From:** Burr, Becky  
**Sent:** Tuesday, October 25, 2005 3:25 PM  
**To:** 'ombudsman@icann.org'  
**Subject:** RE: 05-1546

Mr. Fowlie,

None of the evaluation reports for any of the 10 applicants have been posted.

Almost all of the evaluation reports say, in one way or another, that the applicant doesn't meet at least some of the criteria.

ICANN has concluded, notwithstanding the reports, that .jobs, .mobi, .travel, .cat, and .xxx meet the RFP criteria.

ICANN is contractually obligated to use best efforts to put .jobs, .mobi, .travel, and .cat into the root.

ICANN is not yet contractually obligated to use best efforts to put .xxx into the root.

ICANN now proposes to publish ALL of the negative reports.

It is undeniable that .xxx is being treated in a manner that is not the same as all the other applicants.

In the case of .jobs, .travel, .mobi, and .cat publication occurs ONLY AFTER ICANN HAS PROMISED TO TRY TO PUT THEM IN THE ROOT.

In the case of .xxx, publication occurs BEFORE ICANN HAS PROMISED TO TRY TO PUT THEM IN THE ROOT.

Publication now can have negative consequences ONLY for .xxx.

If the public howls when they see the reports on .cat and .mobi for example, ICANN is still obligated to put those strings in the root.

If the public howls when they see the report on .xxx, ICANN can decide not to approve the contract (notwithstanding the fact that it is virtually identical to all of the others).

We are redacting documents as a precaution - but if ICANN decides to publish notwithstanding our request, that publication will be over our strong objection.

Please do call.

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-----Original Message-----

From: ICANN Ombudsman [mailto:ombudsman@icann.org]  
Sent: Tuesday, October 25, 2005 3:04 PM  
To: Burr, Becky  
Subject: RE: 05-1546

Thanks. You are right about the 2004 report, just serendipity on the report dates. I have since been informed that none of the evaluator's report have been posted on the present round of stlds.

Purely looking at this in the perspective of ADR, I know that you have prepared a summary as an alternative to a redacted posting. May I suggest, in terms of "enlarging the pie" as it comes to options, that you consider preparing a redacted version of the full report with the best advantage to ICM in mind, and then providing me with a copy for discussion purposes only

I may try to reach you by phone once I have done a bit more fact finding.

Thanks

Frank Fowlie, MACAM  
Ombudsman

The Internet Corporation for Assigned Names and Numbers (ICANN)  
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[www.icann.org/ombudsman/](http://www.icann.org/ombudsman/)

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- Excellence in Ombudsmanship;
- Professionalism;
- Confidentiality;
- Impartiality;
- and Independence.

-----Original Message-----

From: Burr, Becky [mailto:Beckwith.Burr@wilmerhale.com]  
Sent: Tuesday, October 25, 2005 2:31 PM  
To: ombudsman@icann.org  
Subject: Re: 05-1546

The report you mentioned is a report on the stLds created in 2000. ICANN has not posted the reports about ANY applicant in this round. That is what they propose to do now - for xxx and all the others at the same time. I am available to discuss at you convenience. My diect dial is 202 663 6695.  
Thanks.

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-----Original Message-----

From: ICANN Ombudsman <ombudsman@icann.org>  
To: Burr, Becky <Beckwith.Burr@wilmerhale.com>  
Sent: Tue Oct 25 13:07:28 2005  
Subject: RE: 05-1546

Thanks. I understand that the report that you sent, and the report I cited are not the same reports. My question was whether or not this as the report that the other stld applicant's were out reported to the community, as the dates are the same (31 Aug 2004). I see that ICM is not reported on in this omnibus report. The question in my mind concerns the when, where, and how other applicants had this same information posted to the outer community.

So, if ICANN posted the negative comments about the other applicants, I need to determine when in sequence, and when in relative time. If your report was provided at August 31, 2004, why has there been such a time lag? What negotiations have gone on in those 14 months to postpone that posting, and what commitments or promises have been made about the relative time for posting those by ICANN.

I can try to make some time available to discuss by phone later in the day if you wish. I would suggest after about 6...

Best regards,

Frank Fowlie

Frank Fowlie, MACAM  
Ombudsman

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-----Original Message-----

From: Burr, Becky [mailto:Beckwith.Burr@wilmerhale.com]  
Sent: Tuesday, October 25, 2005 11:03 AM  
To: ombudsman@icann.org  
Subject: RE: 05-1546  
Importance: High

no - that is NOT the report. It is NOT posted on the ICANN website. I attached the portion applicable to .xxx to my last email.

I would like to request an opportunity to discuss this with you. The inequity, simply put, is that ICANN did NOT POST the relevant, equally if not more negative comments of the sponsorship evaluation team before finally approving the other sTLDs. In our case, however, it proposes to post those damaging comments BEFORE providing final approval. By any measure, this increases the risk in our view that ICM will NEVER GET final approval.

I know this is confusing via blackberry.

Becky

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-----Original Message-----

From: ICANN Ombudsman [mailto:ombudsman@icann.org]  
Sent: Tuesday, October 25, 2005 10:44 AM  
To: Burr, Becky  
Subject: RE: 05-1546

Dear Becky,

A couple of quick things as I jump in and out of a conference to deal with this.

First, can you please confirm that the SOI evaluations that you are

referring to is this document:

<http://www.icann.org/tlds/new-gtld-eval-31aug04.pdf>

If not could you advise on where they are posted on the ICANN page? Thanks

Second, I am not going to be in New York or DC, I am actually in Boston (read rainy Boston) until late afternoon on Thursday.

It would also be helpful for me to have copies of any correspondence back and forth between you and ICANN dealing with the redaction issues.

I will be in and out of the conference all day, but if you reply to [fowlie@icann.org](mailto:fowlie@icann.org), I will be able to pick up our message on my blackberry right away.

While I understand the outcomes that you may feel aggrieved or nervous about, could you please help me in defining the inequity, or unfairness, that you want me to focus on. How is ICANN treating ICM in an manner different and apart than the other stld applicants? Is the timing or sequence different, were you unaware of the requirement to post the evaluations, is the suggested redaction not sufficient to protect confidential information, have you been given inadequate time to complete the redaction, etc?

Best regards,

Frank Fowlie

Frank Fowlie, MACAM  
Ombudsman

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-----Original Message-----

From: Burr, Becky [mailto:[Beckwith.Burr@wilmerhale.com](mailto:Beckwith.Burr@wilmerhale.com)]  
Sent: Tuesday, October 25, 2005 9:33 AM  
To: [ombudsman@icann.org](mailto:ombudsman@icann.org)  
Cc: [stuart@lawley.com](mailto:stuart@lawley.com); [stuarduncan13@mac.com](mailto:stuarduncan13@mac.com)  
Subject: RE: 05-1546  
Importance: High

Mr. Fowlie:

I have copied Stuart Lawley, President and CEO of ICM Registry LLC, as well as Stuart Duncan, COO, on this. One of them will confirm that this complaint is authorized.

Here are the relevant facts:

All applicants received the Evaluation Team reports in July/August of 2004. We understand that the vast majority received negative evaluations from the sponsorship and other issues team (S&OI ET). I personally know that to be the case as an absolute matter with respect to at least one of the other applicants.

All applicants responded to the ET reports sometime in the next few months. ICM's response was complete and in place in early October, which was earlier than at least one - but likely many - of the other applicants. Over the next many months, the ICANN Board determined that .jobs, .travel, .mobi, .cat, .xxx, and one of the .tels met the application criteria, notwithstanding the S&OI ET reports.

The ICANN Board has since given final approval to the contracts for .jobs, .travel, .mobi, and .cat. Thus, these applicants have a contract obligating ICANN to use best efforts to put them in the root. The contract for .xxx was agreed by staff in July. We were scheduled for final consideration on August 16, but were the subject of a last minute intervention by the USG. When the Board took up the contract in September, it asked for certain changes, to which ICM readily agreed. Nonetheless, the Board has not yet blessed the agreed upon contract. Thus ICM - unlike .jobs, .travel, .mobi, and .cat - does NOT have ICANN's contractual commitment to put .xxx in the authoritative Internet root.

ICANN now proposes to publish the ET reports on all applicants - including .xxx. ICANN will, in our opinion, be criticized for approving the applications over the objections of the S&OI ET. The reports are quite negative. Nonetheless, because the contracts have received the Board's final approval, the criticism can not change the fact that .jobs, .mobi, .cat, and .travel have commitments from ICANN.

ICANN proposes to post the negative S&OI ET report on .xxx BEFORE the Board approves the contract and commits itself. If ICANN is subject to significant criticism it can - WITH RESPECT TO .XXX ONLY - simply elect not to approve the contract. There can be little argument that ICM stands to lose much more than .jobs, .travel, .mobi, and .cat by publication.

I have attached both the ET report on .xxx and ICM Registry's response, which was the basis for the Board's determination that ICM met the sponsorship criteria. I think you will conclude, as the ICANN staff and Board did, that the S&OI ET report is very wide of the mark. Nonetheless, I think you will also agree that the report - though rejected by ICANN - will provide opponents with plenty of ammunition to shoot at the application. It will also likely be used by the USG to justify its eleventh hour intervention in the ICANN process - motivated purely by domestic policy and politics - which has caused months of delay and several hundred thousand dollars in additional cost. Finally, it may be taken advantage of the GAC, notwithstanding the fact that it had every opportunity to weigh in on this matter and simply elected not to do so.

If you are in the DC or New York area, please let me know. I would be most happy to answer your questions and provide the appropriate documentation in person.

Becky Burr

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-----Original Message-----

From: ICANN Ombudsman [mailto:ombudsman@icann.org]  
Sent: Monday, October 24, 2005 10:20 PM  
To: Burr, Becky  
Subject: 05-1546  
Importance: High

Dear Becky Burr,

Thank you for your complaint submission. I will review the matter concerning the posting of the evaluations.

It would be my suggestion, as you are the agent, and not the principal in this matter, that I receive a confirming email from Mr. Lawley that he wishes to proceed with this as an Ombudsman complaint. This Office does not usually take jurisdiction over complaints given on behalf of another person, as is explained in the Ombudsman Framework ( P.2 Jurisdiction of the Ombuds. <http://www.icann.org/ombudsman/documents/ombuds-frmrwk-eng-20jun05.pdf>). However, due to the time sensitive nature of this matter, I will begin my enquiry on the understanding that such a missive will be forthcoming.

It would also be beneficial for me to have your explanation of how you feel that ICM is being treated in a manner different than other applicants. i.e. Is this information being posted at a time or in a sequence which is not consistent with the RFP process, or have you not been given sufficient time to prepare the redactions as requested by the General Counsel's Office.

As I am presently in travel status on the East Coast, I would encourage you to provide me with copies of documents which you feel it would be helpful for me to review.

I look forward to hearing from you. Thank you for contacting me with the complaint form.

Best regards,

Frank Fowlie

Frank Fowlie, MACAM  
Ombudsman

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-----Original Message-----

From: beckwith.burr@wilmerhale.com [mailto:beckwith.burr@wilmerhale.com]  
Sent: Monday, October 24, 2005 9:59 PM  
To: ombudsman@icann.org  
Subject: COMPLAINT FORM SUBMISSION

ALTERNATE LANGUAGE: English

#####  
#####  
SUBMITTED BY

Name:  
Becky Burr

Email:  
beckwith.burr@wilmerhale.com

Phone:  
202 663 6695

Address:  
Wilmer Cutler Pickering et al  
2445 M Street NW  
Washington, DC

Zip:  
20037

Country:  
United States

#####  
#####  
COMPLAINT INFORMATION

Date:  
10-24-2005

Registry:  
ICM Registry LLC

Registrar:

Domain:

Complaint:  
ICM Registry applied for the sTLD - .xxx. In the summer of 2004 ICM



received the report of the independent evaluators on its application. The sponsorship and other issues (S&OI) evaluation team report was highly negative.

ICANN gave ICM the opportunity to respond, which it did, promptly. On June 1 2005 ICANN's Board determined that ICM's application met the sponsorship criteria, notwithstanding the S'&OI ET report.

Other applicants received similarly negative reports. For example, we understand that the S&OI ET report for .cat, .mobi, and .travel were negative. Nonetheless, ICANN approved those applications and, in fact, provided final approval of the contract.

ICANN has not yet considered and approved the .xxx contract, though it has appeared on a number of board agendas and though ICM has been fully and completely responsive. ICANN now proposes to post all of the evaluation team reports.

Impact:

While ICM received negative comments from the S&OI ET, so did other applicants. Inasmuch as ICANN has approved the contracts for these other applicants, publication of the negative reports will not change the fact that they have rights to proceed. ICM's contract, on the other hand, has not been approved. The negative comments of the evaluation team will be used by various groups to oppose the proposal, subject ICANN to heavy criticism, and otherwise provide fodder for those who have refused to take part in the ICANN process in a meaningful way.

Actions:

We have discussed this at great length, and proposed alternative approaches to ICANN. We have provided a summary of the evaluation team response that we consider more neutral.

Additional Information:

ICM Registry has cooperated with ICANN in every way and has been through every single step in the ICANN process. We appreciate that the application has become politically uncomfortable for ICANN, but the applicant has been determined by the ICANN board to meet the criteria. There is no reason that ICM's application should be subject to different treatment than other applicants, especially where publication of the reports in full will be used by opponents of the ICM proposal who, despite ample opportunity, simply did not participate in the ICANN process.

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WHOIS ON DOMAIN NAME
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'No Domain Name Entered'