

1 James S. Tyre, State Bar Number 083117  
LAW OFFICES OF JAMES S. TYRE  
2 10736 Jefferson Blvd., #512  
Culver City, CA 90230-4969  
3 310-839-4114 (Phone)  
310-839-4602 (Fax)  
4

5 Cindy A. Cohn, State Bar Number 145997  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
6 San Francisco, CA 94110  
415-436-9333 x 108 (Phone)  
7 415-436-9993 (Fax)

8 Attorneys for Petitioner Karl Auerbach

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF LOS ANGELES

11 KARL AUERBACH, an )  
individual, )  
12 )  
Petitioner, )  
13 )  
v. )  
14 )  
INTERNET CORPORATION )  
15 FOR ASSIGNED NAMES AND )  
NUMBERS, a California Nonprofit )  
16 Public Benefit Corporation, )  
17 Respondent. )  
18 \_\_\_\_\_ )

Case No. BS 074771

DECLARATION OF PETITIONER  
KARL AUERBACH IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

[THE HONORABLE DZINTRA JANAVS]

DATE: June 21, 2002  
TIME: 9:30 a.m.  
DEPT: 85

19 I, KARL AUERBACH, hereby declare:

20 1. I am the Petitioner in this Action. Except as otherwise specifically indicated, I state  
21 all facts herein of my own first hand personal knowledge, and if called as a witness, I could and would  
22 competently testify thereto.

23 2. I am a member of the Board of Directors of Respondent INTERNET  
24 CORPORATION FOR ASSIGNED NAMES AND NUMBERS ("ICANN"). My term as an ICANN  
25 Director commenced immediately after ICANN's annual meeting in November 2000, and will  
26 continue at least through ICANN's annual meeting this year, presently scheduled for October 31,  
27  
28

1 2002 in Shanghai. In an online election held in 2000, I was selected to be the At Large Director for  
2 the North America region, garnering more votes than the six other candidates for that seat.

3 3. I wish to perform my duties as Director of ICANN to the best of my abilities. I wish  
4 to make informed decisions. To that end, I wish to examine ICANN's corporate records so that I may  
5 see the unvarnished basic facts and add them up for myself. I have requested to inspect selected  
6 ICANN corporate records and to copy them so that I may review and analyze their contents for the  
7 purpose of making better decisions in the exercise of my duties as a Director of ICANN.

8 4. ICANN is a California Nonprofit Public Benefit Corporation. A true and complete  
9 copy of ICANN's Articles of Incorporation is attached hereto as Exhibit 1 and incorporated herein  
10 by this reference. There is no single governing body for all of the Internet, but ICANN bears  
11 responsibility for certain key functions of the Internet. According to the "About ICANN" page on  
12 ICANN's web site, <<http://www.icann.org/general/abouticann.htm>>, ICANN is:

13 the non-profit corporation that was formed to assume responsibility for the IP  
14 [Internet Protocol] address space allocation, protocol parameter assignment, domain  
15 name system management, and root server system management functions previously  
16 performed under U.S. Government contract by IANA and other entities.

17 5. ICANN adopted its first set of Bylaws on November 6, 1998, archived on ICANN's  
18 web site at <<http://www.icann.org/general/archive-bylaws/bylaws-06nov98.htm>>. Periodically,  
19 ICANN has amended, revised or restated its Bylaws, the most current revision having been adopted  
20 as of February 12, 2002. A true and complete copy of the current Bylaws is available on ICANN's  
21 web site at <<http://www.icann.org/general/bylaws.htm>>. Each provision of the Bylaws that I will  
22 mention in this Declaration has remained unchanged from the initial Bylaws through the current  
23 Bylaws. As all such provisions are in Article V of the Bylaws, attached hereto as Exhibit 2 and  
24 incorporated herein by this reference is a true and complete copy of Article V of ICANN's current  
25 Bylaws. (For the Court's convenience, exhibit and page numbers have been added in footers to all  
26 exhibits.)  
27  
28

1           6. Both the law of California and ICANN's Bylaws recognize that, as a Director of  
2 ICANN, I have the right to inspect and copy all ICANN corporate records. California Corporations  
3 Code § 6334 provides:

4           Every director shall have the absolute right at any reasonable time to inspect and copy  
5 all books, records and documents of every kind and to inspect the physical properties  
6 of the corporation of which such person is a director.

6 Similarly, Article V, Section 21 of ICANN's Bylaws states:

7           Section 21. RIGHTS OF INSPECTION

8           Every Director shall have the right at any reasonable time to inspect and copy all  
9 books, records and documents of every kind, and to inspect the physical properties  
10 of the Corporation. The Corporation shall establish reasonable procedures to protect  
11 against the inappropriate disclosure of confidential information. (Emphasis added.)

10           7. At the time I became a Director of ICANN, the President and CEO of ICANN was  
11 Michael Roberts ("Roberts"), who also was a Director of ICANN.

12           8. Shortly after the conclusion of ICANN's November 2000 annual meeting, I made an  
13 oral request of Roberts to inspect and copy certain ICANN records. On December 3, 2000, I  
14 confirmed that oral request in writing by e-mailing a letter to Roberts, in which I requested inspection  
15 and copying of ICANN's General Ledger. A true and complete copy of that letter is attached hereto  
16 as Exhibit 3 and incorporated herein by reference.

17           9. I should note that ICANN has 18 Directors (19 prior to the recent resignation of Philip  
18 Davidson) who are located around the world, not just across the United States. As such, it is  
19 customary and usual ICANN business practice for Directors to communicate with each other and  
20 with ICANN staff by e-mail. Article V, Section 20 of ICANN's Bylaws expressly provides for e-mail  
21 communications, as follows:

22           If permitted under applicable law, communication by electronic mail shall be  
23 considered equivalent to any communication otherwise required to be in writing. The  
24 Corporation shall take such steps as it deems appropriate under the circumstances to  
25 assure itself that communications by electronic mail are authentic.

25           10. On December 6, 2000, Roberts e-mailed me a note acknowledging my December 3  
26 letter. He stated:

27           Thanks for your reminder note about access to financial records. Because we haven't  
28 had this type of Director access request before, and because there are legal interests

1 involved, both the corporation's and yours as a serving Director, we need to establish  
2 a written procedure and related agreement. As you note, there are other things on our  
3 plate at the moment, but Louis [Touton, ICANN's General Counsel] will be in touch  
4 sometime in the next couple of weeks. Since financial records are involved, I've also  
discussed your verbal request to me at the annual meeting with Linda Wilson, Chair  
of the Audit Committee, which has oversight responsibility for financial matters, and  
will include her in future correspondence on your request.

5 A true and complete copy of Roberts' e-mail is attached hereto as Exhibit 4 and incorporated herein  
6 by reference.

7 11. Roberts may be correct that my request was the first request by a Board member to  
8 see corporate records over the two years that ICANN had then been in existence as a California  
9 corporation. However, that is difficult to believe. As Roberts alluded to in his e-mail, the Board had  
10 (and still has) an Audit Committee. A true and complete copy of the Audit Committee Charter, at  
11 <http://www.icann.org/committees/audit/charter-10mar00.htm>, is attached hereto as Exhibit 5 and  
12 incorporated herein by reference. I do not know how Board members who are on the Audit  
13 Committee could adequately perform their duties without access to ICANN's financial records,  
14 including those that I requested.

15 12. Roberts in essence conceded that as of December 6, 2000 there was no written access  
16 procedure. (Nor would there be until September 2001, as I detail below.) He claimed that this was  
17 the reason for delaying my access to the corporate records, yet the Audit Committee presumably  
18 functioned without a written procedure.

19 13. I am unaware of any law, or of any provision in the ICANN governing documents,  
20 that allows access to ICANN financial records without a written procedure to Board members who  
21 are members of ICANN's Audit Committee, while simultaneously limiting, conditioning or denying  
22 access to those same records when requested by other Directors. Given the ultimate responsibility  
23 of the Board and of each Director for the conduct of ICANN's business, such disparate treatment  
24 makes no sense. As I understand it, all Directors are permitted to look at the underlying records and  
25 documents for themselves and make their own analysis and reach their own conclusions. If the Audit  
26 Committee may examine records while I am denied that right of examination then I am being denied  
27  
28

1 the ability to reach my own conclusions and am forced to rely solely on the conclusions of that  
2 committee.

3 14. Despite the promises made in Roberts' e-mail, Louis Touton ("Touton"), ICANN's  
4 Vice President, Secretary and General Counsel, did not contact me about my request, nor did any  
5 other ICANN representative. Nothing happened with respect to my request until three months later,  
6 in early March, 2001. On or about March 3, 2001, Roberts sent an e-mail to the Board e-mail list  
7 <[icann-board@icann.org](mailto:icann-board@icann.org)> concerning ICANN's financial statements. Responding to a particular item  
8 mentioned by Roberts, I replied by e-mail on March 3, stating in part that "I, for one, would like to  
9 see the detailed statements of account for all financial matters related to the DNSO. Consider this  
10 a request for that material." A true and complete copy of my March 3, 2001 e-mail is attached  
11 hereto as Exhibit 6 and incorporated herein by reference. (The DNSO is one of ICANN's core  
12 functions, mentioned in paragraph 4 above.)

13 15. A series of e-mails related to my document request ensued, between Roberts, Touton  
14 and Dr. Vinton Cerf ("Cerf"), the Chairman of the Board of Directors of ICANN and me. Attached  
15 hereto as Exhibits 7 through 15, respectively, are true and complete copies of the following e-mails:  
16 Roberts' March 3, 2001 response to my e-mail (Exhibit 7); my March 4, 2001 response to Roberts  
17 (Exhibit 8); Cerf's March 4, 2001 e-mail to me (Exhibit 9); my March 4, 2001 response to Cerf  
18 (Exhibit 10); Cerf's March 4, 2001 response to my e-mail (Exhibit 11); Roberts' March 4, 2001  
19 response to my March 4 e-mail (Exhibit 12); my March 5, 2001 response to Roberts (Exhibit 13);  
20 Touton's March 6, 2001 e-mail to me (Exhibit 14); and my March 6, 2001 response to Touton  
21 (Exhibit 15). All of those e-mails either were addressed to or copied to the Board's e-mail list, so that  
22 all Board members, and others allowed access to that e-mail list, could read the exchanges.

23 16. In Exhibit 7, Roberts suggested that I take up the matter of access to corporate  
24 records with Phil Davidson ("Davidson"), who had succeeded Linda Wilson as Chair of the Board's  
25 Audit Committee, thus implying that at least Davidson, and possibly the whole Audit Committee, had  
26 access to the information I sought. In Exhibit 8, I again requested the DNSO financial records, and  
27 reminded Roberts that I had not dropped my earlier request for the ICANN General Ledger. In  
28

1 Exhibit 10, responding to an e-mail from Cerf about the DNSO funds, I wrote that I had a right to  
2 see the records, that I had been patient, but that Roberts' response the previous day had made me  
3 impatient. In Exhibit 11, Cerf wrote to me that "i agree that you have a right to see financial records -  
4 and I will advise Mike (or perhaps more appropriately, Stuart) that this is the case." (Mike Roberts  
5 was departing ICANN, and was scheduled to be replaced as President and CEO later in March by M.  
6 Stuart Lynn ("Lynn")).

7 17. In Exhibit 12, Roberts wrote, in part:

8 For the record, at no time have I ever told you that you could not have access to the  
9 records of the corporation. I said to you that if you felt this was necessary, I would  
10 discuss the matter with General Counsel, with the Chair of the Board, and with the  
11 Chair of the Audit Committee, with the intention to establish a written procedure for  
the finance staff to follow, which hasn't been necessary in the past because the other  
Directors have felt that their responsibilities on financial matters were fulfilled by the  
work of the Audit Committee and the external auditors.

12 Again, Roberts implies that the Board members who were also members of the Audit Committee had  
13 access to the records I was seeking, even though a written procedure had not yet been established.  
14 In my response to Roberts, Exhibit 13, I reminded him that my initial records request already had  
15 been pending for three months, but that neither Roberts nor Touton nor the Audit Committee had  
16 done anything to advance my request. Roberts had insisted that there be written procedures and a  
17 related agreement, but I was aware of no progress towards producing either of those documents. In  
18 Exhibit 14, Touton responded to some of my statements about what I believed to be the rights and  
19 duties of a Director of a corporation such as ICANN. He did not state any disagreement with my  
20 right to inspect the corporate records. Knowing that Touton, unlike Roberts, would be continuing  
21 with ICANN, I made certain in my response, Exhibit 15, that Touton understood that I was still  
22 seeking access to the General Ledger.

23 18. Shortly after the early March e-mail exchanges, Roberts did in fact depart ICANN,  
24 and was replaced as President, CEO and Board member by Lynn. As Lynn was new to ICANN, it  
25 was appropriate to give him a settling-in period before pursuing my records request with him,  
26 particularly since my impression was that the March exchange of e-mails had gotten things moving  
27 on the creation of the procedures which Roberts required. On June 22, 2001, roughly three months  
28

1 after Lynn's tenure with ICANN began, I e-mailed him a short note saying that I was still interested  
2 in looking at the General Ledger and inquiring how best to arrange it. A true and complete copy of  
3 my June 22, 2001 e-mail is attached hereto as Exhibit 16 and incorporated herein by reference. Lynn  
4 responded by e-mail dated June 26, 2001, a true and complete copy of which is attached hereto as  
5 Exhibit 17 and incorporated herein by reference. Lynn indicated that the Audit Committee had some  
6 changes it wanted made to the "governing document", but that he expected to have it approved within  
7 the next few weeks, depending on schedules. I was uncertain what exactly this "governing  
8 document" might be, but at least I was encouraged that, apparently, progress was being made. On  
9 August 6, 2001, Lynn e-mailed me an update, a true and complete copy of which is attached as  
10 Exhibit 18 and incorporated herein by this reference.

11 19. Finally, on September 2, 2001, almost nine months to the day after my initial written  
12 request, more than five months after Lynn took office and more than two months after Lynn wrote  
13 (Exhibit 17) that he expected the document to be ready within two to three weeks, depending on  
14 schedules, Lynn sent e-mails to the Board and to me saying that the procedures for directors to  
15 inspect corporate records had been released, and attaching a two page document entitled "Procedures  
16 Concerning Director Inspection of Records and Properties" (hereinafter simply the "Inspection  
17 Procedures"). A true and complete copy of Lynn's e-mail to me is attached as Exhibit 19 and  
18 incorporated herein by this reference, and a true and complete copy of the Inspection Procedures is  
19 attached as Exhibit 20 and incorporated herein by this reference.

20 20. Of the seven paragraphs in the Inspection Procedures, the most critical are paragraphs  
21 3, 5 and 6, which provide as follows:

22 **3. Responses to Requests for Inspection of Records.**

23 Within 10 business days of receipt of a Director request for inspection of records the  
24 Chief Executive Officer will advise the Director as to the time and place at which the  
25 records will be available for inspection and any restrictions on access to requested  
26 records. Records shall be made available during normal business hours of the  
27 Corporation and at a location in the Corporation's offices which is convenient to the  
28 conduct of the Corporation's business. Except in the case of a burdensome request  
for records, records shall be available for inspection not more than 20 days from the  
request; provided that the actual inspection may occur on a date that is convenient to  
the Director.

1 [...]
2

3 **5. Restrictions on Access or Use.**

4 To the extent that the Chief Executive Officer, in consultation with the General
5 Counsel of the Corporation, determines that compliance with any request for records
6 necessarily involves issues of confidentiality, privilege, or privacy of a nature which
7 require limitation of or conditions on the Director's access or use of the requested
8 records, the Chief Executive Officer shall advise the requesting Director of the issues
9 which require the restrictions and the nature of any proposed restrictions on access
10 or use. Similarly, if permitting an inspection of the Corporation's properties
11 necessarily involves such issues, the Chief Executive Officer shall advise the
12 requesting Director in writing of any restrictions on access to the Corporation's
13 properties. If the Director accepts the restrictions by countersigning the statement
14 concerning limitations, the records shall be made available to the Director or the
15 inspection scheduled as soon as possible.

16 **6. Appeal of Restrictions.**

17 If the Director believes that any restrictions proposed by the Chief Executive Officer
18 are unreasonable, the Chief Executive Officer shall submit the request to the Audit
19 Committee of the Board of Directors of the Corporation for resolution. The Audit
20 Committee shall consider the request and respond to the Director not more than 20
21 days following submission of the request by the Chief Executive Officer. If the
22 Director disagrees with the resolution of the issue by the Audit Committee, the
23 Director may appeal this decision by notice to the Chairman of the Board of the
24 Corporation, and the entire Board (other than the requesting Director) shall make a
25 final and binding decision concerning the production of the records involved or the
26 timing of any inspection of the Corporation's properties.

27 21. Paragraph 3 of the Inspection Procedures specifically states that it includes "...
28 restrictions on access to requested records," even though both Corporations Code § 6334 and Article
V, Section 21 of ICANN's Bylaws (quoted in paragraph 1 of the Inspection Procedures) are explicit
that a Director has a right of access to "all books, records and documents of every kind ..." subject
only to reasonable time limitations. Both the title and text of paragraph 5 of the Inspection
Procedures make the conflict between the statute and the Inspection Procedures even more clear.
Paragraph 5, entitled "Restrictions on Access or Use," provides in part that "[to] the extent that the
Chief Executive Officer, in consultation with the General Counsel of the Corporation, determines that
compliance with any request for records necessarily involves issues of confidentiality, privilege, or
privacy of a nature which require limitation of or conditions on the Director's access or use of the
requested records, the Chief Executive Officer shall advise the requesting Director of the issues which
require the restrictions and the nature of any proposed restrictions on access or use."

1           22.     Paragraph 6 of the Inspection Procedures provides for a referral of the matter to the  
2 Board's Audit Committee if there is a disagreement between the CEO and the requesting Director,  
3 but gives the requesting Director no right to appear before the Audit Committee to present his or her  
4 case, nor even notice of when the Audit Committee will consider the matter. Finally, paragraph 6  
5 permits (but does not require) an appeal to the full Board if the requesting Director disagrees with  
6 the Audit Committee's decision, and the Board "... shall make a final and binding decision concerning  
7 the production of records involved ...." In other words, at least as I interpret it, that phrase would  
8 preclude the requesting Director from seeking judicial relief should the decision of the Board be  
9 adverse to the requesting Director.

10           23.     The Inspection Procedures were neither adopted nor approved by the ICANN Board  
11 as of September 2, 2001, and have neither been adopted nor approved by the ICANN Board through  
12 the present date.

13           24.     By e-mail on September 2, 2001 to Lynn and the Board list, I thanked Lynn for having  
14 the Inspection Procedures prepared. Without regard to whether I agreed with them (I did not), at  
15 least I finally had something tangible to work with, nine months after Roberts mentioned that  
16 procedures of some sort had to be prepared. In that e-mail, a true and complete copy of which is  
17 attached hereto as Exhibit 21 and incorporated herein by reference, I stated that the Inspection  
18 Procedures appeared to be at variance with California law. It is interesting to note, however, that  
19 paragraph 3 of the Inspection Procedures sets twenty days as the maximum time to make records  
20 available after a Director request, a rather stark contrast to the nine months I had been forced to wait  
21 so far.

22           25.     On September 3, 2001, Touton and I exchanged e-mails through the Board e-mail list.  
23 Acknowledging my background in the law (I am not engaged actively in the practice of law, but I  
24 have been a member in good standing of the California Bar since 1978), Touton presented his  
25 interpretation of the Inspection Procedures, and why he thought they were reasonable. I responded  
26 by stating that I was happy that the long awaited procedures had finally come into existence. That  
27 statement did not imply that those procedures lacked flaws. In fact, in that very same e-mail I pointed  
28

1 out some of those flaws. I recognized, as I always have done, the fiduciary duties imposed on me as  
2 a Director of ICANN, including the duty of confidence, but I was concerned, among other things,  
3 that the Inspection Procedures could result in a conflict between those procedures and the law, to the  
4 detriment of both ICANN and myself (or any other Director). True and complete copies of Touton's  
5 September 3, 2001 e-mail to me and of my response are attached hereto as Exhibits 22 and 23,  
6 respectively, and are incorporated herein by this reference.

7 26. Subsequently, Lynn and I exchanged a series of e-mailed letters, each sent only or  
8 primarily one to the other, rather than through the Board e-mail list to the entire Board. On  
9 September 23, 2001, I e-mailed to Lynn a letter, which included another copy of my December 3,  
10 2000 letter to Roberts (Exhibit 3), and stated the following, among other things:

11 Please make available the following materials for my inspection and copying:

- 12 1. ICANN's General Ledger reports (chart of accounts, transaction journal, and  
13 account balances) from corporate inception to the present (or as close to  
14 present as is reasonably feasible.)
  - 15 a. These reports should include, at a minimum, the following standard  
16 accounting reports.
    - 17 i. Chart of Accounts
    - 18 ii. The daily transaction journal showing for each account in the  
19 chart of accounts all amounts and transactions that have been  
20 debited or credited to that account.
  - 21 b. In order to save time and cost and to facilitate my analysis, I'd prefer  
22 to get these reports in two distinct forms:
    - 23 i. An electronic image capture of each of the above described  
24 reports. This electronic image capture would, for example,  
25 use something like Adobe Acrobat.
    - 26 ii. Some format that can be loaded into Microsoft Excel.
- 27 2. Any supplemental accounting ledgers showing all funds or financial  
28 obligations held by ICANN but not listed in the General Ledger. This would  
include, but is not limited to, accounting ledgers pertaining to entities such as  
IANA, the Domain Name Supporting Organization (DNSO), and the  
Government Advisory Committee (GAC).
3. With regard to employee hiring and employee policies:
  - a. The corporate employee handbook, if any.
  - b. All materials, if any, that an employee of ICANN is expected to enter  
into when he or she is hired. These would include, for example, offer  
letter forms that are typically used, employment agreements,  
intellectual property agreements, non-disclosure agreements, and the  
like.
4. With regard to ICANN's law firm:
  - a. Engagement letters
  - b. Conflict notices and requests for waivers that have been received from  
the law firm.

- 1 c. Waivers granted by ICANN to the law firm.  
2 d. Detailed invoices from the law firm since the inception of the  
3 corporation.  
4 5. Logs of all international travel not directly associated with one of the regular  
5 public meetings made by ICANN officers other than the President from  
6 January 1, 2001 until the present (or as close to present as is reasonably  
7 feasible.)

8 Toward the end of the letter, I specifically stated that "It is my intention to exercise my right to make  
9 copies and to take them to my offices for examination." A true and complete copy of my September  
10 23, 2001 letter e-mailed to Lynn is attached hereto as Exhibit 24 and incorporated herein by this  
11 reference.

12 27. Lynn responded by e-mailed letter dated October 5, 2001, a true and complete copy  
13 of which is attached hereto as Exhibit 25 and incorporated herein by this reference. Lynn proposed  
14 dates when I could inspect the requested materials at ICANN's office, but he also imposed additional  
15 restrictions that are beyond both the law and the Inspection Procedures (Exhibit 20).

16 ! Lynn required that, to the extent there were any concerns about the confidentiality of  
17 a document, I make a written inquiry to Lynn about same, and that I maintain the  
18 utmost confidentiality until Lynn responded. In other words, Lynn was reserving to  
19 himself the right to determine if any particular document, or even all the requested  
20 documents, were confidential;

21 ! Lynn allowed me to be accompanied by my attorney or other advisor, but reserved  
22 to himself the right to veto the person(s) selected by me;

23 ! Lynn determined that, though I would be allowed to inspect paper copies of the  
24 records requested, I would not be given electronic copies as requested of at least  
25 some of them;

26 ! Lynn required me to sign and return a copy of his letter as a prior condition of my  
27 inspection;

28 ! Finally, only after I had inspected the records could I designate those for which I  
wanted copies made. My "request" for copies then would be considered by Lynn,  
with the advice of Touton and in consultation with the Audit Committee, at which

1 point copies of the records might or might not be provided to me; this despite the  
2 clear statement in my September 23 letter that I wanted copies of everything.

3 Lynn concluded the letter by stating that my refusal to countersign the letter would be "inconsistent  
4 with the Procedures endorsed by the Board's Audit Committee" and that if I believed that anything  
5 in Lynn's letter was unreasonable, I should refer the matter to the Audit Committee.

6 28. It should be apparent why I requested copies of all documents. I live in Santa Cruz  
7 and work near my home. ICANN is located in Marina Del Rey, more than 300 miles away. The  
8 records I requested were fairly extensive, and it would be difficult, if not impossible, to do anything  
9 more than a cursory review of them at ICANN's headquarters. It is not unreasonable for me to want  
10 to actually study the records, rather than to just skim through them.

11 29. Without my conceding that the Inspection Procedures (Exhibit 20) are valid, Lynn's  
12 October 5 letter, or his subsequent conduct, failed to comply with those procedures in two other  
13 material respects. First, paragraph 5 of the Inspection Procedures requires that:

14 To the extent that the Chief Executive Officer, in consultation with the General  
15 Counsel of the Corporation, determines that compliance with any request for records  
16 necessarily involves issues of confidentiality, privilege, or privacy of a nature which  
17 require limitation of or conditions on the Director's access or use of the requested  
18 records, the Chief Executive Officer shall advise the requesting Director of the issues  
19 which require the restrictions and the nature of any proposed restrictions on access  
20 or use.

21 There is no indication that Lynn consulted with Touton before sending his October 5 letter. But more  
22 important, I interpret the language to require a reasonably detailed statement of why any particular  
23 item "necessarily involves issues of confidentiality, privilege or privacy," even for access, let alone  
24 use. In his letter, Lynn simply makes conclusory statements about confidentiality, giving no details  
25 in support of his position. Part of my request, for example, was for financial records, and as Lynn  
26 acknowledges in paragraph 4 of his letter, part of that request was for the Chart of Accounts. It may  
27 be that some of the financial records I requested are confidential, but it is difficult to understand,  
28 particularly with the lack of any explanation from Lynn, why the Chart of Accounts necessarily is  
confidential. (A Chart of Accounts simply is a descriptive list of the categories of entries that a  
company uses in its financial statements, such as cash on hand, long-term receivables, current portion

1 of long-term receivables and the like. The Chart of Accounts contains no detail of any kind as to  
2 specific entries, if any, that may be in such accounts. It would tell me, for example, whether ICANN  
3 has a category for petty cash, but not how much petty cash ICANN had.)

4         30. The second way in which Lynn's actions failed to follow the Inspection Procedures  
5 is that those procedures (paragraph 3) require that inspections occur at ICANN's office. However,  
6 in November 2001, having determined that one of my requests (certain international travel logs) did  
7 not involve issues of confidentiality (see paragraph 7 of Lynn's October 5 letter, Exhibit 25, in which  
8 he does not invoke confidentiality as to this item), Lynn simply sent me the requested records by e-  
9 mail. Certainly I do not object to his having sent me those records, but I note that, in paragraph 5  
10 of his October 5 letter, Lynn also did not invoke confidentiality with respect to my requests for  
11 employee policies and general forms. Yet, those records never have been sent to me, nor has there  
12 ever been an indication that I could obtain those records without agreeing to all of the terms of Lynn's  
13 October 5 letter. I do not know why the treatment has been inconsistent.

14         31. By letter e-mailed to Lynn on October 15, 2001, a true and complete copy of which  
15 is attached as Exhibit 26 and incorporated herein by reference, I responded to Lynn's October 5 letter.  
16 I declined to sign Lynn's letter for the reasons stated there and here. On October 21, 2001, Lynn  
17 responded by e-mailing me a four-page letter, including multiple case citations, setting forth "the  
18 corporation's legal position on these points." A true and complete copy of that e-mailed letter is  
19 attached as Exhibit 27 and incorporated herein by reference. I responded by letter e-mailed on  
20 October 27, 2001, a true and complete copy of which is attached as Exhibit 28 and incorporated  
21 herein by reference. Lynn responded by letter e-mailed on October 31, 2001, a true and complete  
22 copy of which is attached as Exhibit 29 and incorporated herein by reference.

23         32. It is clear from reading those letters that there were (and are) fundamental  
24 disagreements between Lynn and myself. Yet, in an attempt to go forward, I was willing to  
25 compromise on some (but not all) of my positions. Lynn stresses, for example, the duties which a  
26 Director owes to a corporation. I have always acknowledged those duties. Lynn says that ICANN  
27 never refused to permit my inspection. However the simple fact is that for more than nine months  
28

1 I was blocked from inspection because ICANN claimed it had no procedures for me to make an  
2 inspection and that I had to wait for ICANN to create such procedures. And after nine months of  
3 waiting, and once those procedures were revealed to me, I discovered that my ability to inspect was  
4 made dependent on me signing an agreement with ICANN in which Lynn imposed substantive  
5 limitations and restrictions as set forth in his October 5 letter (Exhibit 25). As far as compromises,  
6 I do not believe that ICANN may force me to disclose the names of my advisors and obtain ICANN's  
7 approval of those advisors (one of the additional terms imposed by Lynn's October 5 letter), yet I did  
8 so anyway in my October 27 letter (Exhibit 28). In his October 31 response (Exhibit 29), Lynn stated  
9 that he had no objections to those I named. Most importantly, though I have stated repeatedly to  
10 Lynn and others that it is not my intent to publicly disclose the corporate records, Lynn remains  
11 fearful, without foundation, that I will do so. Consequently, in my October 27 letter, I suggested the  
12 following compromise, that I do not believe is required by law:

13 I will undertake the following as a matter of courtesy: I am willing to give ICANN  
14 seven calendar days advance written or e-mail notice of any disclosure of data that I  
15 learn solely from the corporate materials I have inspected to parties beyond my inner  
16 circle of advisors. (My inner circle consists of my attorney, Curtis Karnow of  
17 Sonnenschein Nath & Rosenthal, Sheila Joyce Kellerman, CPA, and the members and  
18 employees of their respective firms.) This will give you ample opportunity to suggest  
19 alternatives, to offer constructive advice, or, to take other actions if you feel that I am  
20 violating my rights and duties as a Director.

21 Lynn dismissed my offer in his October 31 letter, even though, in that same letter, he wrote that  
22 "[y]ou have stated that your actions are governed by your duty of loyalty to the corporation, and of  
23 course we accept your representation of this at face value."

24 33. I must correct here a mistake in my Petition. In Lynn's October 31, 2001 letter, he  
25 stated that he was referring the matter to the Audit Committee, which would have until November  
26 12 to act. Paragraph 21 of the Petition, which I verified, states in part that "[i]t is now March 2002,  
27 but either the Audit Committee never has acted, or if it has, ICANN management never bothered to  
28 inform Auerbach of the action." The truth is that I overlooked that, in mid-November, I did exchange  
e-mail with Phil Davidson, at the time the Chair of the Audit Committee. On November 17, 2001,  
he sent me an e-mail, copied to Lynn and to the Audit Committee members, in which he stated that

1 the committee met on November 15 and considered the e-mail and letter attachments sent by Lynn  
2 on October 22 (meaning that the Committee did not have the full record, including my October 27  
3 letter, Exhibit 28, in which I offered to give seven days advance notice of any disclosure I might  
4 consider). Davidson stated that the committee considered the safeguards set forth in Lynn's October  
5 5 letter to be reasonable, and that the committee urged me to reconsider my unwillingness to agree  
6 to Lynn's October 5 letter. A true and complete copy of Davidson's e-mail is attached as Exhibit 30  
7 and incorporated here by this reference. Thereafter, Davidson and I exchanged some additional e-  
8 mails on the subject, though they do not add to the discussion so I have not attached them.

9 34. Presumably, the Audit Committee met in Marina Del Rey, in conjunction with  
10 ICANN's annual meeting. I attended the annual meeting, but I was neither informed that the  
11 committee would be taking up the matter nor afforded an opportunity to attend to present my case.  
12 I have been unable to locate any minutes of the meeting, so I cannot confirm who attended, whether  
13 there was a quorum, and similar matters. (That said, I have no basis on which to question Davidson's  
14 statement that the meeting occurred.)

15 35. I have included a substantial number of exhibits to put the documentary record before  
16 the Court, but the Petition and this motion boil down to a few fundamental questions.

17 **!** First, what are the nature and extent of my rights, as a Director of a California  
18 Nonprofit Public Benefit Corporation, to inspect and copy the records of that  
19 corporation?

20 **!** Second, if the corporation has the right to impose restrictions on my right (other than  
21 reasonable time restrictions, about which the parties do not disagree), would ICANN's  
22 Inspection Procedures (Exhibit 20) be in accordance with the law, assuming that they  
23 had been adopted or approved by the Board?

24 **!** Third, given that the Inspection Procedures have not been adopted or approved by the  
25 Board, are they valid nonetheless?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

! Fourth and finally, are the additional restrictions set forth in Lynn's October 5, 2001 letter (Exhibit 25) lawful and binding on me?

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this Declaration in Santa Cruz, California on May 17, 2002.

---

KARL AUERBACH

# ICANN

---

---

## Articles of Incorporation (As Revised)

---

---

### ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As Revised November 21, 1998

1. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the "Corporation").
2. The name of the Corporation's initial agent for service of process in the State of California, United States of America is C T Corporation System.
3. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any further United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).
4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
5. Notwithstanding any other provision (other than Article 8) of these Articles:
  - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501 (c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170 (c)(2) of the Code.
  - b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.
  - c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
  - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its members, directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable

compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 3 hereof.

e. In no event shall the Corporation be controlled directly or indirectly by one or more "disqualified persons" (as defined in § 4946 of the Code) other than foundation managers and other than one or more organizations described in paragraph (1) or (2) of § 509 (a) of the Code.

6. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation or its members, should the Corporation elect to have members in the future, for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article 6 shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.

7. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article 3 hereof and, if possible, to a § 501 (c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.

8. Notwithstanding anything to the contrary in these Articles, if the Corporation determines that it will not be treated as a corporation exempt from federal income tax under § 501(c)(3) of the Code, all references herein to § 501(c)(3) of the Code shall be deemed to refer to § 501(c)(6) of the Code and Article 5(a)(ii), (b), (c) and (e) shall be deemed not to be a part of these Articles.

9. These Articles may be amended by the affirmative vote of at least two-thirds of the directors of the Corporation. When the Corporation has members, any such amendment must be ratified by a two-thirds (2/3) majority of the members voting on any proposed amendment.

Please send comments on this web site to: [webmaster@icann.org](mailto:webmaster@icann.org)

Page Updated 23-November-98.

---

(c) 1998 The Internet Corporation for Assigned Names and Numbers  
All rights reserved.

## **ARTICLE V: STRUCTURE OF THE BOARD OF DIRECTORS**

### **Section 1. INITIAL BOARD**

The initial Board of Directors of the Corporation ("Initial Board") shall be the Board that exists prior to the time of the seating of Directors that have been selected in accordance with these bylaws by any Supporting Organization(s) that exists under Section 3(a) of Article VI, and shall consist of nine At Large members and the President. Five of the "At Large" members of the Initial Board, to be determined by the "At Large" members of the Initial Board, shall serve until the conclusion of the Annual Meeting of the Corporation in 2000. The remaining four "At Large" members of the Initial Board shall serve until the conclusion of the Annual Meeting of the Corporation in 2002. No At Large member of the Initial Board shall be eligible for additional service on the Board until two years have elapsed following the end of his or her term on the Board.

### **Section 2. ORIGINAL BOARD MEMBERS SELECTED BY THE SUPPORTING ORGANIZATIONS**

As soon as feasible after formation of a Supporting Organization pursuant to Section 3(a) of Article VI, the Supporting Organization shall select three persons to be the Original Directors selected by that Supporting Organization and shall designate which of these persons shall serve each of the staggered terms for such Original Directors specified in Section 9(c) of this Article. The Supporting Organization shall notify the Board and Secretary of the Corporation in writing of the selections and designations. The selected persons shall take office seven days after the notification is received by the Secretary. The Supporting Organization Council may by a two-thirds vote revise its designation of which of the selected persons shall serve which of the staggered terms; such revision shall become effective upon the Secretary's receipt, within 180 days of the original notification, of the written consents of each Original Director whose term is affected by the revision.

### **Section 3. NUMBER OF DIRECTORS AND ELECTION OF CHAIRMAN**

(a) The authorized number of Directors shall be no less than nine (9) and no more than nineteen (19).

(b) The Board shall annually elect a Chairman and a Vice-Chairman from among the Directors, not including the President.

### **Section 4. QUALIFICATION OF DIRECTORS AFTER THE INITIAL BOARD**

Each Board after the Initial Board shall be comprised as follows:

(i) Three (3) Directors selected by the Address Supporting Organization, as defined in Article VI;

(ii) Three (3) Directors selected by the Domain Name Supporting Organization, as defined in Article VI;

(iii) Three (3) Directors selected by the Protocol Supporting Organization, as defined in Article VI;

(iv) Nine (9) "At Large" members of the Initial Board during their terms of office prescribed in Section 1 of this Article, and any successors; and

(v) The person who shall be, from time to time, the President of the Corporation.

### **Section 5. ADDITIONAL QUALIFICATIONS**

Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (a) who holds an elective governmental office or (b) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.

### **Section 6. INTERNATIONAL REPRESENTATION**

In order to ensure broad international representation on the Board: (1) at least one citizen of a country located in each of the geographic regions listed in this Section 6 shall serve as an At Large Director on the Board (other than the Initial Board) at all times; and (2) no more than one-half (1/2) of the total number of At Large Directors serving at any given time shall be citizens of countries located in any one Geographic Region. The selection of Directors by each Supporting Organization shall comply with all applicable geographic diversity provisions of these Bylaws or of any Memorandum of Understanding referred to in these Bylaws concerning the Supporting Organization. As used herein, each of the following shall be a "Geographic Region": Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; North America. The specific countries included in each Geographic Region shall be determined by the Board, and this Section shall be reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet.

### **Section 7. CONFLICT OF INTEREST**

The Board, through a committee designated for that purpose, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations which relate in any way to the business and other affiliations of the Corporation. Each Director shall be responsible for disclosing to the Corporation any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law ("CNPBCL"). In addition, each Director shall disclose to the Corporation any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the

CNPBCL. The Board shall adopt policies specifically addressing Director, Officer and Supporting Organization conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct interest that will be affected by the outcome of the vote.

### **Section 8. DUTIES OF DIRECTORS**

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of the Corporation and not as representatives of the subordinate entity that selected them, their employers, or any other organizations or constituencies.

### **Section 9. SELECTION AND TERM**

(a) "At Large" Directors shall be selected pursuant to the provisions of Article II of these Bylaws.

(b) Prior to October 1 of each year, each Supporting Organization entitled to select a Director (other than an Original Director selected by the Supporting Organization under Section 2 of this Article) shall make its selection according to the procedures specified by Article VI (including Articles VI-A, VI-B, and VI-C). The Supporting Organization shall give the Secretary of the Corporation written notice of the selection within fifteen days after that selection.

(c) The regular term of office of a Director shall be as follows:

1. The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President;

2. The term of "At Large" members of the Initial Board shall expire as stated in Section 1 of this Article;

3. The term of the five At Large Directors seated pursuant to Article II, Section 2 of these Bylaws shall expire as stated in Article II, Section 3; and

4. The staggered terms of the Original Directors selected by any Supporting Organization as provided by Section 2 of this Article shall extend until the conclusion of the second, third, and fourth Annual Meeting of the Corporation, respectively, after the Supporting Organization's notification of their selections and designations is received by the Secretary.

5. The term of a Director selected by any Supporting Organization to succeed a Director previously selected by it (other than a Director selected to fill a vacancy) shall expire at the conclusion of the third Annual Meeting of the Corporation after the one at the conclusion of which the term of the Director's predecessor expired.

Each Director, including a Director selected to fill a vacancy or selected at a special meeting, shall hold office until expiration of the term for which selected and qualified and until a successor has been selected and qualified or until that Director resigns or is removed in accordance with these bylaws, provided that no "At Large" Director selected pursuant to Article II of these Bylaws

shall continue to hold office after the expiration of his or her term even if a successor has not been selected and qualified. No Director may serve more than two (2) terms.

(d) Resources of the Corporation will not be expended in support of any campaign of any person seeking to be selected as a member of the Board.

### **Section 10. RESIGNATION**

Subject to Section 5226 of the CNPBCL, any Director may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of the Corporation) or by giving written notice thereof to the President or the Secretary of the Corporation. Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective. The successor shall be selected pursuant to Section 12 of this Article.

### **Section 11. REMOVAL OF A DIRECTOR**

Any Director may be removed following notice and a three-fourths (3/4) majority vote of all members of the Board; provided, however, that the Director who is the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required three-fourths (3/4) vote; and provided further, that each vote to remove a Director shall be a separate vote on the sole question of the removal of that particular Director. A Director selected by a Supporting Organization can be recommended for removal by that Supporting Organization through procedures adopted by that Supporting Organization and ratified by the Board. Upon such recommendation for removal, the Board shall vote to remove such Director. If the Board, without a recommendation by the Supporting Organization, seeks to remove more than one Director selected by a Supporting Organization within a four-month period, the Board must show reasonable cause for its action.

### **Section 12. VACANCIES**

A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation or removal of any Director, if the authorized number of Directors is increased, or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors involving an "At Large" Director, whether from the Initial Board or seated under Article II, Section 2 of these Bylaws, shall be filled by a vote of the remaining Directors. Any vacancy occurring on the Board of Directors involving a Director selected by a Supporting Organization shall be filled by the Supporting Organization selecting that Director according to the procedures specified by Article VI (including Articles VI-A, VI-B, and VI-C). A Director selected to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been selected and qualified. The replacement need not hold the office, if any, of the removed Director. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the

expiration of the Director's term of office.

### **Section 13. ANNUAL MEETING OF THE CORPORATION**

Annual meetings of the Corporation will be held for the purpose of electing Officers and for the transaction of such other business as may come before the meeting. The first annual meeting will be held the last week of September 1999 or on such other date as may be set by the Board. Subsequent annual meetings shall be held as set by the Board not less than ten (10) nor more than thirteen (13) months after the annual meeting held the prior year. In the absence of designation, the annual meeting will be held at the principal office of the Corporation. The annual meeting will be open to the public. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

### **Section 14. REGULAR MEETINGS**

Regular meetings of the Board will be held on dates to be determined by the Board. To the extent practicable, regular meetings should be held in different locations around the world on a regular basis. In the absence of other designation, regular meetings will be held at the principal office of the Corporation.

### **Section 15. SPECIAL MEETINGS**

Special meetings of the Board may be called by or at the request of one-quarter (1/4) of the members of the Board or by the Chairman of the Board or the President. A call for a special meeting will be made by the Secretary of the Corporation. In the absence of designation, special meetings will be held at the principal office of the Corporation.

### **Section 16. NOTICE OF MEETINGS**

Notice of time and place of all meetings will be delivered personally or by telephone or by electronic mail to each Director, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director at the Director's address as it is shown on the records of the Corporation. In case the notice is mailed, it will be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it will be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48) hours before the time of the holding of the meeting. Notwithstanding anything in this Section 16 to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

### **Section 17. QUORUM**

At all annual, regular and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

#### **Section 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT**

Members of the Board or any Committee of the Board may participate in a meeting of the Board or Committee of the Board through use of (i) conference telephone or similar communications equipment, provided that all Directors participating in such a meeting can speak to and hear one another or (ii) electronic video screen communication or other communication equipment; provided, that (a) all Directors participating in such a meeting can speak to and hear one another, (b) all Directors are provided the means of fully participating in all matters before the Board and (c) the Corporation adopts and implements means of verifying that (x) a person participating in such a meeting is a Director or other person entitled to participate in the meeting and (y) all actions of, or votes by, the Board are taken or cast only by the Directors and not persons who are not Directors. Participation in a meeting pursuant to this Section constitutes presence in person at such meeting. The Corporation shall be required to make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

#### **Section 19. ACTION WITHOUT MEETING**

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

#### **Section 20. ELECTRONIC MAIL**

If permitted under applicable law, communication by electronic mail shall be considered equivalent to any communication otherwise required to be in writing. The Corporation shall take such steps as it deems appropriate under the circumstances to assure itself that communications by electronic mail are authentic.

#### **Section 21. RIGHTS OF INSPECTION**

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of the Corporation. The Corporation shall establish reasonable procedures to protect against the inappropriate disclosure

of confidential information.

## **Section 22. COMPENSATION**

The Directors shall receive no compensation for their services as Directors. The Board may, however, authorize the reimbursement of actual and necessary reasonable expenses incurred by Directors performing duties as Directors.

## **Section 23. PRESUMPTION OF ASSENT**

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary of the Corporation immediately after the adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

K A R L A U E R B A C H  
*Member, Board of Directors*  
*Internet Corporation for Assigned Names And Numbers*  
*(ICANN)*

December 3, 2000

Michael M. Roberts  
Corporation for Assigned Names and Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292  
USA

Dear Michael:

In the performance of my role as a Director, I am interested in better understanding the financial aspects of ICANN's operation. As such I will be making various requests for information.

I will endeavor to do this with minimal impact on ICANN's staff. There will, of course, be some, hopefully small, work involved. Please do feel free to make suggestions if you see a way to get me the same information with less effort.

I would like to obtain copies of the following items:

1. IANN's general ledger from November 1998 through the present (or as close to present as is reasonably feasible.) If possible, I'd prefer to get it in two distinct forms:
  - a. An electronic capture of a general ledger report (i.e. something like an Adobe Acrobat capture of a general ledger report.)
  - b. Some format that can be loaded into Microsoft Excel.

I'd like to get these reasonably soon – Hopefully before Christmas. However, I recognize that this is holiday season and there are probably various end-of-year chores that ought to take priority.

I'd like to arrange so that in the future I can get a copy of the general ledger report as it is generated every month.

Thinking of the holidays – Let me take this opportunity to wish everyone down in Marina del Rey the best of wishes for the holidays.

Thank you, Sincerely,

Karl Auerbach  
Member, Board of Directors  
ICANN

Date: Wed, 6 Dec 2000 15:50:10 -0800  
To: Karl@cavebear.com  
From: Mike Roberts <roberts@icann.org>  
Subject: Your 12/3 ltr  
Cc: touton@icann.org, schroeder@icann.org, lswilson@free.midcoast.com  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"

Karl -

Thanks for your reminder note about access to financial records. Because we haven't had this type of Director access request before, and because there are legal interests involved, both the corporation's and yours as a serving Director, we need to establish a written procedure and related agreement. As you note, there are other things on our plate at the moment, but Louis will be in touch sometime in the next couple of weeks. Since financial records are involved, I've also discussed your verbal request to me at the annual meeting with Linda Wilson, Chair of the Audit Committee, which has oversight responsibility for financial matters, and will include her in future correspondence on your request.

Regards,

-Mike



## Audit Committee Charter

(Adopted by ICANN Board 10 March 2000)

---

### **I. Purpose**

The Audit Committee of the ICANN Board is responsible for recommending the selection of external auditors to the Board; receiving, reviewing, and forwarding to the Board the annual financial report of the external auditors; and such other matters as may warrant its attention.

### **II. Membership of Audit Committee**

The Audit Committee shall be comprised of three or more directors as determined and appointed annually by the Board, each of whom shall be free from any relationship that, in the opinion of the Board, would interfere with the exercise of his or her independent judgment as a member of the Committee. Unless a chair is appointed by the full Board, the members of the Committee may designate a Chair by majority vote of the full Committee membership.

### **III. Scope of Audit Committee Work**

In accomplishing its assigned responsibilities, the Audit Committee will review the following listed matters and such other matters as may warrant its attention. It may, with approval of the Board, engage additional assistance to undertake such reviews of financial management performance as it deems necessary.

- (1) Recommend to the Board of Directors the selection of ICANN's external auditors and the annual fees to be paid for services rendered by the external auditors, review each proposed audit plan developed by management and the external auditors, periodically review the performance of the external auditors, and recommend to the Board any proposed retention or discharge of the external auditors.
- (2) Review the Corporation's annual financial statements and reports as required by the Bylaws, including the compliance of the Corporation's accounting and financial management systems and reports with generally accepted accounting principles for nonprofit organizations.
- (3) Review and forward to the Board the annual financial management letter of the external auditors, with such comments of its own as may be appropriate.
- (4) Periodically review the Corporation's system of internal controls, including its risk management policy and any accompanying insurance coverage, and make recommendations to the Board for changes it considers desirable.

---

Comments concerning the layout, construction and functionality of this site should be sent to [webmaster@icann.org](mailto:webmaster@icann.org).

Page Updated 11-March-00

(c) 2000 The Internet Corporation for Assigned Names and Numbers. All rights reserved.

Date: Sat, 3 Mar 2001 16:03:13 -0800 (PST)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: <icann-board@icann.org>, Mike Roberts <roberts@icann.org>  
Subject: Re: [icann-board] December 31 Financial Statements  
In-Reply-To: <a04330102b6c711777148@[32.103.28.199]>  
Message-ID: <Pine.LNX.4.30.0103031540120.18127-100000@p2.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

> The text below appears in the footnotes to the statements. As a  
> result of discussions with our auditors, our accountants, and the  
> Audit Committee in November, the ICANN finance staff is providing  
> limited banking services to the Names Council...

Banking services?

ICANN is not a bank. Period.

Given that the neither the DNSO nor the Names Council have a distinct legal existence apart from ICANN, and that we board members are ultimately responsible for the proper use of the DNSO-tagged funds and payment of the DNSO's debts, I do find this method of accounting to be, at best, unusual.

Since the DNSO has no distinct legal existence, the DNSO's assets are ICANN's assets, the DNSO's obligations are ICANN's obligations, the DNSO's expenditures are ICANN's expenditures, any liabilities the DNSO incurs are ICANN's liabilities, and the DNSO's records are ICANN's records.

The DNSO is an integral part of ICANN and it is appropriate for the board to see the DNSO's finances clearly stated as part of ICANN's overall financial report.

If ICANN has made representations that amount to promises that we are acting as a "bank" or have some trustee relationship, it is quite appropriate for the board to know all the details of these obligations.

I, for one, would like to see the detailed statements of account for all financial matters related to the DNSO. Consider this a request for that material.

Is there anyone who has authority to disburse any DNSO-related funds who

is not an ICANN corporate officer?

Is there any person who has authority to enter into obligations on behalf of the DNSO who is not an ICANN corporate officer?

--karl--

Date: Sat, 3 Mar 2001 21:41:18 -0800  
To: Karl Auerbach <karl@cavebear.com>  
From: Mike Roberts <roberts@icann.org>  
Subject: [icann-board] Re: December 31 Financial Statements  
Cc: <icann-board@icann.org>  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"  
Sender: owner-icann-board@icann.org  
Precedence: discussion

Karl -

I guess what you are trying to do here is overturn Board policy that the SO's are expected to be financially independent and self-sufficient. You're welcome to do that, but the appropriate way to go about it is to propose a motion to that effect.

With respect to your views on accounting, I'm very confident in the integrity of the present handling of the funds raised by the DNSO for its expenses. In addition to my own extensive financial background, which includes a period as Associate Controller at Stanford, I have consulted with outside professionals as I have pointed out to you previously.

If you have further differences with my directions to the staff on handling of the funds in question, I suggest you take them up with Phil Davidson, Chair of the Audit Committee, which has oversight of this area of corporate management.

- Mike

At 16:03 -0800 3/3/01, Karl Auerbach wrote:

> > The text below appears in the footnotes to the statements. As a  
>> result of discussions with our auditors, our accountants, and the  
>> Audit Committee in November, the ICANN finance staff is providing  
>> limited banking services to the Names Council...  
>  
>Banking services?  
>  
>ICANN is not a bank. Period.  
>  
>Given that the neither the DNSO nor the Names Council have a distinct  
>legal existance apart from ICANN, and that we board members are ultimately  
>responsible for the proper use of the DNSO-tagged funds and payment of the

>DNSO's debts, I do find this method of accounting to be, at best, unusual.  
>  
>Since the DNSO has no distinct legal existence, the DNSO's assets are  
>ICANN's assets, the DNSO's obligations are ICANN's obligations, the DNSO's  
>expenditures are ICANN's expenditures, any liabilities the DNSO incurs  
>are ICANN's liabilities, and the DNSO's records are ICANN's records.  
>  
>The DNSO is an integral part of ICANN and it is appropriate for the board  
>to see the DNSO's finances clearly stated as part of ICANN's overall  
>financial report.  
>  
>If ICANN has made representations that amount to promises that we are  
>acting as a "bank" or have some trustee relationship, it is quite  
>appropriate for the board to know all the details of these obligations.  
>  
>I, for one, would like to see the detailed statements of account for all  
>financial matters related to the DNSO. Consider this a request for that  
>material.  
>  
>Is there anyone who has authority to disburse any DNSO-related funds who  
>is not an ICANN corporate officer?  
>  
>Is there any person who has authority to enter into obligations on behalf  
>of the DNSO who is not an ICANN corporate officer?  
>  
> --karl--

Date: Sun, 4 Mar 2001 00:04:26 -0800 (PST)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: Mike Roberts <roberts@icann.org>  
cc: <icann-board@icann.org>  
Subject: [icann-board] Re: December 31 Financial Statements  
In-Reply-To: <a04320401b6c782fb0702@[192.156.200.2]>  
Message-ID: <Pine.LNX.4.30.0103032324370.18839-100000@p2.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

I take it that you are refusing to answer my questions. I'm sorry to hear that because I shall compel answers to obtain this financial information - I am legally entitled to it.

So let's cut the nonsense.

Please provide the detailed statements of account for all financial matters related to the DNSO. And answer the following two questions:

1. Is there anyone who has authority to disburse any DNSO-related funds who is not an ICANN corporate officer?
2. Is there any person who has authority to enter into obligations on behalf of the DNSO who is not an ICANN corporate officer?

And let me add one more thing - I requested the general ledger reports from you last December 3. So far you have not complied. My request has not been dropped and I expect the general ledger materials to be delivered with all due speed.

> I guess what you are trying to do here is overturn Board policy that  
> the SO's are expected to be financially independent and  
> self-sufficient. You're welcome to do that, but the appropriate  
> way to go about it is to propose a motion to that effect.

This is not a matter of board policy, this is a matter of corporate accountability to its Directors.

Any SO that is not a legally distinct entity is part of my responsibility, and your responsibility, and of every board member.

- > With respect to your views on accounting, I'm very confident in the
- > integrity of the present handling of the funds raised by the DNSO for
- > its expenses.

You can have that belief. However, I have my own independent obligation to ensure that ICANN's finances are properly run.

And let me say this, I am appalled at this accounting that hides information from board members, that apparently has money flowing through ICANN which is held out of sight of the board and possibly even being expended by people who are not ICANN officers.

- > If you have further differences with my directions to the staff on
- > handling of the funds in question, I suggest you take them up with
- > Phil Davidson, Chair of the Audit Committee, which has oversight of
- > this area of corporate management.

No. I will not work through the Audit committee.

You *\*will\** deliver the requested information about the funds we hold on the DNSO account.

We can do this the easy way or the hard way, in either case, I will obtain the information I desire.

The easy way is you go to the accounting system and push a button to print a few standard reports - I figure that the most time consuming part will be waiting for the printer to finish.

The hard way (for you, not for me) is for me to obtain a court order.

It's your choice. Either way, I get the information.

--karl--

Date: Sun, 04 Mar 2001 08:01:24 -0500  
From: vint cerf <vcerf@MCI.NET>  
Subject: Re: [icann-board] Re: December 31 Financial Statements  
In-reply-to: <Pine.LNX.4.30.0103032324370.18839-100000@p2.cavebear.com>  
X-Sender: vcerf@shoe.reston.mci.net  
To: Karl Auerbach <karl@cavebear.com>, Mike Roberts <roberts@icann.org>  
Cc: icann-board@icann.org  
Message-id: <5.0.2.1.2.20010304075233.02fc0440@shoe.reston.mci.net>  
MIME-version: 1.0  
X-Mailer: QUALCOMM Windows Eudora Version 5.0.2  
Content-type: text/plain; charset=us-ascii  
Content-transfer-encoding: 7BIT  
References: <a04320401b6c782fb0702@[192.156.200.2]>

karl,

as I understand this (and it was set up before I became a director, I think), DNSO raised some funds and needed to place them in an account. ICANN was asked to hold these funds. If it is an ICANN account, I assume ICANN would act on requests from DNSO to disburse any such funds. I also assume that records are being kept of any disbursements or receipts.

I'm not sure I understand what it is about the arrangement that generates the degree of concern you've been expressing.

Mike,

if that's an inaccurate characterization, could you clarify?

vint

At 12:04 AM 3/4/2001 -0800, Karl Auerbach wrote:

>Please provide the detailed statements of account for all financial  
> matters related to the DNSO. And answer the following two questions:

>

> 1. Is there anyone who has authority to disburse any DNSO-related funds  
> who is not an ICANN corporate officer?

>

> 2. Is there any person who has authority to enter into obligations on  
> behalf of the DNSO who is not an ICANN corporate officer?

Date: Sun, 4 Mar 2001 14:28:29 -0800 (PST)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: vint cerf <vcerf@mci.net>  
cc: <icann-board@icann.org>  
Subject: Re: [icann-board] Re: December 31 Financial Statements  
In-Reply-To: <5.0.2.1.2.20010304075233.02fc0440@shoe.reston.mci.net>  
Message-ID: <Pine.LNX.4.30.0103041419160.26714-100000@p2.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

> as I understand this (and it was set up before I became a  
> director, I think), DNSO raised some funds and needed to  
> place them in an account. ICANN was asked to hold these  
> funds. If it is an ICANN account, I assume ICANN would act  
> on requests from DNSO to disburse any such funds. I also  
> assume that records are being kept of any disbursements  
> or receipts.

What you describe may be true. But that doesn't matter.

The funds are not "the funds of the DNSO" - remember the DNSO has no distinct legal existence, they are part of ICANN. So those funds are actually "the funds of ICANN". Perhaps they might be earmarked for a particular use - in which case I wonder about the obligations that are attached to that earmarking.

There is an active effort now underway to spin the assets of the DNSO off to a separate corporation. I want to know what those assets are, what ancillary obligations may be tied to them, etc.

And since those funds are indeed ICANN's funds, perhaps earmarked funds but nevertheless still ICANN's funds for which we Directors are responsible, it is a very proper question to know what non-ICANN officers have authority over those funds.

As for the question of whether I have the right to see the books of account of the corporation - I do. It is one of the most fundamental rights of a director. And as a Director I have a duty to make my own independent inquiries into the operation of the corporation.

I asked for the general ledger - the chart of accounts, the current

account balances, and the journal of transactions - three months ago. I've been very reasonably and patiently waiting for someone to spend a few minutes, and it is just a few minutes, to make a few mouse clicks on the accounting software and generate these very standard reports.

But given yesterday's knee-jerk reaction to my inquiry, my patience became exhausted by the recognition that unless I respond to this management sandbagging with an undeniable demand, that I will never get the information that I feel that I must examine.

--karl--

Date: Sun, 04 Mar 2001 17:44:41 -0500  
From: vint cerf <vcerf@MCI.NET>  
Subject: Re: [icann-board] December 31 Financial Statements  
In-reply-to: <Pine.LNX.4.30.0103041407290.26714-100000@p2.cavebear.com>  
X-Sender: vcerf@shoe.reston.mci.net  
To: Karl Auerbach <karl@cavebear.com>  
Message-id: <5.0.2.1.2.20010304174238.02fb0008@shoe.reston.mci.net>  
MIME-version: 1.0  
X-Mailer: QUALCOMM Windows Eudora Version 5.0.2  
Content-type: text/plain; charset=us-ascii  
Content-transfer-encoding: 7BIT  
References: <5.0.2.1.2.20010304074634.018e2678@shoe.reston.mci.net>

karl,

i agree you have a right to see financial records - and I will advise Mike (or perhaps more appropriately, Stuart) that this is the case.

You should be able to do this with a visit to Marina del Rey.

I was more interested in what it was that led you to want to review these records. Perhaps after you look, you'll be better able to say if there is anything to be concerned about.

vint

At 02:19 PM 3/4/2001 -0800, Karl Auerbach wrote:

>> what is it you think you will find? As nearly as I can tell, you'll  
>> find a bank account which has been public knowledge, containing funds  
>> collected by DNSO in its own support. I am mystified by your continuing  
>> concern. this looks simple and straightforward to me.  
>  
>It upsets me that you are bothered when I try to exercise even the most  
>basic of my rights as a Director. I know that you know me mostly as a  
>person who has done technical development and research. But I also have a  
>lot of business experience and looking at the books is something that I  
>have found to be important in my former roles as corporate officer and  
>corporate director.  
>  
>I am not sure what I will find in the DNSO records. However, given the  
>work that has begun to spin the DNSO off as a distinct corporation, I want  
>to know what assets and liabilities are involved and what kinds of  
>ancillary obligations might be tied to them.

>  
>As for the larger matter, it is one of the most basic rights of a Director  
>of a corporation to examine the books of account. And I have several  
>questions that I want to investigate in the general ledger - things like  
>the payments to JDRP (which, as you know, I believe ought to  
>subject to a recoupment effort), travel expenses, unusual payments, etc.  
>  
>The point is this: I have an absolute right to get this information. And  
>asking for it is in no way improper. Indeed I consider that I would be  
>derelict in my obligations if, after seeing what I have seen, to not  
>inquire into the records.  
>  
>Mike Roberts knee jerk reaction to respond to even the most simple of  
>questions - like whether anyone who is not an officer of ICANN has  
>signature authority over the DNSO funds - is simply unacceptable.  
>  
>I feel that I have been sandbagged at every turn by Mike's refusals to  
>provide information to which I am unquestionably entitled.  
>  
> --karl--

Date: Sun, 4 Mar 2001 19:32:27 -0800  
To: icann-board@icann.org  
From: Mike Roberts <roberts@icann.org>  
Subject: [icann-board] Re: December 31 Financial Statements  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"  
Sender: owner-icann-board@icann.org  
Precedence: discussion

Karl -

Whatever your motives for your recent barrage of e-mails angrily lambasting the manner in which the DNSO finances are handled, they cast considerable doubt on your willingness to work cooperatively with the rest of the Board (including its committees) to promote sound management of ICANN and on your intentions to abide by the obligations you incurred to the corporation when you became a Director.

For the record, at no time have I ever told you that you could not have access to the records of the corporation. I said to you that if you felt this was necessary, I would discuss the matter with General Counsel, with the Chair of the Board, and with the Chair of the Audit Committee, with the intention to establish a written procedure for the finance staff to follow, which hasn't been necessary in the past because the other Directors have felt that their responsibilities on financial matters were fulfilled by the work of the Audit Committee and the external auditors.

I did this shortly after the November Board meeting at which you took office and during which you mentioned your desire for access to financial records to me. I was advised by Vint, following his conversation with Linda, that he would have further conversation with you about the need for such access. I have had no further contact with this issue until the last day or so. In my message earlier today, I indicated to you that if you wish to resume this effort, you should contact Louis, who will seek guidance from the Chair of the Audit Committee, which has oversight of the financial records of the corporation, and you will be advised of the manner in which you may gain access to the records you wish to review.

Further for the record, the funds you are talking about are funds that were raised by the Names Council through calls to the constituencies to make contributions to fund the DNSO's own activities. Those funds were in fact contributed by the constituencies and their members with the understanding that decisions about spending them (for a secretariat, for meeting rooms, for paying for webcasting DNSO functions, and for other

DNSO programs) would be made by the Names Council. This is completely in line with the Board's preference, stated at the public meeting in Cairo and otherwise, that the Supporting Organizations should take responsibility for raising funds and paying for their own activities. Based on consultations with the Board's Audit Committee, as well as our outside accountants and the independent auditors, we are giving a modest level of administrative support to the DNSO by placing funds contributed for the DNSO's activities into a separate bank account and making payments from that account when we are authorized to do so by the Names Council. Although of course only authorized signatories on the accounts disburse funds (see the relevant Board check-signing resolutions), we do so when authorized by the Names Council. These funds are restricted from general ICANN use by the terms under which they have been given and ICANN and its officers are obliged to follow the restrictions that have attached to these funds. Your notion that the Board can step in and claim these funds as its own would not only be a serious breach of the contributors' trust, but would deprive the DNSO of the funds that it has raised with such difficulty, hobbling its ability to act as a consensus development body.

Further for the record, your statement with regard to "spinning off" the DNSO is completely irrelevant to this discussion, since as you state, there is no separate entity created by the provisions of Article VI of the Bylaws. However, the members of the Names Council are entitled to form any organizational entity, incorporated or not, that they believe is needed to support the work of the DNSO. It happens, as a matter of historical accident, that the Address Council and the Protocol Council are populated by existing organizations that have volunteered to provide administrative and financial support to the work of the Councils. Having participated in the DNSO WG Review process, you are fully aware that many in the DNSO believe that its work would benefit from having a permanent secretariat that would function in a parallel fashion to the other Councils' support organizations. Whether any of the three SO Councils receives support from a third party entity, existing or to be devised, is immaterial to the functions which the Councils themselves perform under Article VI of the Bylaws.

In my email to you yesterday, I indicated that ICANN management was performing limited banking services for the DNSO pending a decision on a permanent solution to the secretariat issue which has been under discussion for over a year. If you wish to be constructive, rather than destructive, in this matter, your energies could be usefully employed in helping the DNSO chart its future and determine its financial requirements so that the current trust account arrangement can be put to rest.

- Mike

At 14:28 -0800 3/4/01, Karl Auerbach wrote:

> > as I understand this (and it was set up before I became a  
> > director, I think), DNSO raised some funds and needed to  
>> place them in an account. ICANN was asked to hold these  
>> funds. If it is an ICANN account, I assume ICANN would act  
>> on requests from DNSO to disburse any such funds. I also  
>> assume that records are being kept of any disbursements  
>> or receipts.  
>  
>What you describe may be true. But that doesn't matter.  
>  
>The funds are not "the funds of the DNSO" - remember the DNSO has no  
>distinct legal existence, they are part of ICANN. So those funds are  
>actually "the funds of ICANN". Perhaps they might be earmarked for a  
>particular use - in which case I wonder about the obligations that are  
>attached to that earmarking.  
>  
>There is an active effort now underway to spin the assets of the DNSO off  
>to a separate corporation. I want to know what those assets are, what  
>ancillary obligations may be tied to them, etc.  
>  
>And since those funds are indeed ICANN's funds, perhaps earmarked funds  
>but nevertheless still ICANN's funds for which we Directors are  
>responsible, it is a very proper question to know what non-ICANN officers  
>have authority over those funds.  
>  
>As for the question of whether I have the right to see the books of  
>account of the corporation - I do. It is one of the most fundamental  
>rights of a director. And as a Director I have a duty to make my own  
>independent inquiries into the operation of the corporation.  
>  
>I asked for the general ledger - the chart of accounts, the current  
>account balances, and the journal of transactions - three months ago.  
>I've been very reasonably and patiently waiting for someone to spend a few  
>minutes, and it is just a few minutes, to make a few mouse clicks on the  
>accounting software and generate these very standard reports.  
>  
>But given yesterday's knee-jerk reaction to my inquiry, my patience became  
>exhausted by the recognition that unless I respond to this management  
>sandbagging with an undeniable demand, that I will never get the  
>information that I feel that I must examine.

>  
>

--karl--

Date: Mon, 5 Mar 2001 15:08:34 -0800 (PST)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: <icann-board@icann.org>  
Subject: Re: [icann-board] Re: December 31 Financial Statements  
In-Reply-To: <a0432040db6c8b5e77998@[192.156.200.2]>  
Message-ID: <Pine.LNX.4.30.0103051334330.29635-100000@p2.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

Mike Roberts wrote:

- > Although of course only authorized signatories on the accounts
- > disburse funds (see the relevant Board check-signing resolutions), we do
- > so when authorized by the Names Council.

Thanks for answering one of my questions.

The next question is this: Do we have any policies that review requests for disbursement? For example, if the Names Council directed us to write a check for entire amount to the Elect Joe Blap for President Committee (something our IRS 501(c)(3) status doesn't allow ICANN to do), would we do it?

- > Further for the record, the funds you are talking about are funds that
- > were raised by the Names Council through calls to the constituencies to
- > make contributions to fund the DNSO's own activities. Those funds were
- > in fact contributed by the constituencies and their members with the
- > understanding that decisions about spending them (for a secretariat, for
- > meeting rooms, for paying for webcasting DNSO functions, and for other
- > DNSO programs) would be made by the Names Council.

This is consistent with what I am expecting to find. And I remind you that because the DNSO is an integral part of ICANN, these moneys are ICANN's moneys, no matter by whom they were raised. I will be eventually looking for the accounting of any ancillary obligations that may adhere to these funds and the chain of authorization under which authority to spend these funds has been established to see whether it meets with reasonable business practices from the point of view of ICANN as a whole. This is particularly important since there is an effort underway to alienate this money to another corporation.

- > This is completely in line with the Board's preference, stated at the
- > public meeting in Cairo and otherwise, that the Supporting
- > Organizations should take responsibility for raising funds and paying
- > for their own activities.

As I've said before, this is irrelevant - as long as the DNSO is part of ICANN I have a duty to inquire and a right to investigate.

The DNSO could have been as a distinct legal entity, like the ASO, but it is not. And since the DNSO is not, its assets are ICANN's assets, its liabilities are ICANN's liabilities, and I have a right into see the books of account.

- > Based on consultations with the Board's Audit Committee, as well as our
- > outside accountants and the independent auditors, we are giving a modest
- > level of administrative support to the DNSO by placing funds contributed
- > for the DNSO's activities into a separate bank account and making
- > payments from that account when we are authorized to do so by the Names
- > Council.

You seem not to be able to appreciate that \*all\* of this money is ICANN's money. We can earmark it and give it special handling, and even establish non-ICANN officer signatory authority on it, all based on the fact that it is associated with the DNSO. But that does not change the fundamental fact that it is our money.

- > Your notion that the Board can step in and
- > claim these funds as its own would not only be a serious breach of the
- > contributors' trust, but would deprive the DNSO of the funds that it has
- > raised with such difficulty, hobbling its ability to act as a consensus development
- > body.

It is not my "notion" that the board can step in and claim these funds - it is simply a fact. There is no legal separation between ICANN and the DNSO. And the Board has overall responsibility for all that is ICANN.

Can I help it if you failed to provide the proper legal separation?  
Remember, I argued for the legal separation of the DNSO way back in 1998.

As for contributor's trust: Now you are using words that really scare me. If we are holding money "in trust" as a legal trustee, then ICANN has perhaps undertaken a fiduciary obligation as a trustee that may well be

inconsistent with its corporate role.

As a Director I must be very concerned about management actions that can create this kind of possibly conflicting corporate obligations.

- > Further for the record, your statement with regard to "spinning off"
- > the DNSO is completely irrelevant to this discussion, since as you
- > state, there is no separate entity created by the provisions of
- > Article VI of the Bylaws.

Huh?

The DNSO is part of ICANN, if the DNSO spins off its money simply by ordering one of the ICANN officers to liquidate the DNS accounts then the DNSO is spinning off our money. I personally don't mind them doing this as long as when we do this we make sure we spin off any ancillary obligations - those "trust" relationship you mention - at the same time. I am also concerned that such a spin-off does not violate our limitations as a tax exempt corporation or the limitations expressed in our Articles of Incorporation. One of the reasons I am inquiring is to begin to understand the ramifications and complications of the steps that the DNSO is beginning to take.

- > However, the members of the Names Council are entitled to form any
- > organizational entity, incorporated or not, that they believe is
- > needed to support the work of the DNSO.

Nonsense. The DNSO is as much a part of ICANN as my arm is part of me. The DNSO's actions are ICANN's actions. If the DNSO's Name Council forms a new corporation, then it is ICANN that has formed that new corporation.

-----

- > Whatever your motives for your recent barrage of e-mails angrily
- > lambasting the manner in which the DNSO finances are handled

Have I lambasted the manner of recordkeeping? No, I have not.

Rather, I have lambasted your refusal to provide me with access to the records.

- > they cast considerable doubt on your willingness to work cooperatively

- > with the rest of the Board (including its committees) to promote sound
- > management of ICANN and on your intentions to abide by the obligations
- > you incurred to the corporation when you became a Director.

I reject your unfounded and inaccurate accusation.

I am not violating any obligation by inquiring into the corporate financial records.

Indeed, to the contrary, I have an affirmative obligation to inquire into the operations of the corporation.

I would be violating my duty if I did not make my own independent inquiries.

You have refused to provide access to information to which I have the absolute right to see.

I have waited three months for you to do something that ought to take ten minutes to produce. I have been more than reasonably patient.

So I would suggest that the unwillingness to cooperate is on your shoulders, not mine.

As for "sound management"... let's just say my opinion is different from yours. Which is why I intend to look at the books.

I am indeed sorry that you do not understand the role of a Director and that you feel that my inquiries intrude on your ability to operate in the shadows and in the dark.

- > For the record, at no time have I ever told you that you could not
- > have access to the records of the corporation. I said to you that if
- > you felt this was necessary, I would discuss the matter with General
- > Counsel, with the Chair of the Board, and with the Chair of the Audit
- > Committee, with the intention to establish a written procedure for the
- > finance staff to follow, which hasn't been necessary in the past
- > because the other Directors have felt that their responsibilities
- > on financial matters were fulfilled by the work of the Audit Committee
- > and the external auditors.

Nonsense. When I asked for the General Ledger you wanted me to enter into an agreement of some kind. Then you whined about the time it would take away from your "important" work.

I figured that three months was plenty of time. I'm still waiting.

And let me remind you, two days ago I asked two simple questions about who has signature authority over the DNSO accounts. Instead of answering you went into your song-and-dance over how the DNSO is intended to be separate and so on on so forth. (All of which has engendered many new questions that I now intend to investigate about the degree to which the DNSO may have been allowed to perform acts inconsistent with ICANN's purposes and inconsistent with ICANN's limitations under the tax laws.)

- > I did this shortly after the November Board meeting at which you took
- > office and during which you mentioned your desire for access to
- > financial records to me. I was advised by Vint, following his
- > conversation with Linda, that he would have further conversation with
- > you about the need for such access. I have had no further contact
- > with this issue until the last day or so.

You have my letter of December 3. And I know you got it because you replied by e-mail demanding that I enter into a contract before the information could even be considered for release. After my conversations with Vint I was under the impression that I would get the information when it was convenient. December went by. January went by. February went by. I'm still waiting.

If you got the impression that I had somehow rescinded the request, please know that I have not.

- > In my message earlier today, I indicated to you that if you wish to
- > resume this effort, you should contact Louis, who will seek guidance
- > from the Chair of the Audit Committee, which has oversight of the
- > financial records of the corporation, and you will be advised of the
- > manner in which you may gain access to the records you wish to review.

My right of access is independent of the Audit Committee. I'm happy to work with Louis or any member of management. Although I'm surprised that one needs Corporate Counsel to generate the standard suite of general ledger reports - the chart of accounts, the table of current balances, and the ledger of transactions.

The right of access exists in each separate member of the board; I have no obligation to work through a committee of the board. Indeed, part of my obligation is to make my own independent judgements about corporate

operations.

I don't know what kind of corporations you have been associated with in the past that gave you your notion that a board can work only as a collective body and that it is permissible for management to stonewall reasonable inquiries by individual directors in the pursuance of their individual duty of oversight and information gathering.

> ... If you wish to be constructive, rather than destructive,

Once more you persist in characterizing my oversight role as "destructive". However, it is simply untrue. Yes, I make you feel uncomfortable - you seem to fear inquiries into actions performed under your hand. But it's my role as a Director, and my obligation as a Director, to make such inquiries.

--karl--

Date: Tue, 06 Mar 2001 18:08:03 -0800  
From: Louis Touton <touton@icann.org>  
X-Mailer: Mozilla 4.7 [en] (Win98; I)  
X-Accept-Language: en,ja  
MIME-Version: 1.0  
To: icann-board@icann.org  
Subject: [icann-board] Directors' Duties  
Content-Type: text/plain; charset=us-ascii  
Content-Transfer-Encoding: 7bit  
Sender: owner-icann-board@icann.org  
Precedence: discussion

Karl Auerbach wrote:

>  
> [snip]  
>  
> Indeed, to the contrary, I have an affirmative obligation to inquire into  
> the operations of the corporation.  
>  
> I would be violating my duty if I did not make my own independent  
> inquiries.  
>

Karl,

Corporate boards of directors are most effective if they work collaboratively, in an atmosphere of trust toward one another's abilities and intentions. It is, after all, the board of directors acting as a body, and not directors acting individually in an uncoordinated fashion, that has the responsibility to oversee the conduct of the affairs of the corporation. In recognition of this, the legal structure under which directors operate encourages collaborative effort, including the formation of committees of the Board so that the collective wisdom of the board can be most effectively harnessed.

As a matter of California corporate law, your claim that you are duty-bound to "make [your] own independent inquiries" about every detail regarding the corporation is simply not true. California Corporations Code section 5231(b) provides:

"(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

(2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence; or

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted."

The ICANN Board has established an audit committee, and appointed directors to it that are both serious-minded and talented. The manner in which the DNSO funds are being handled has been reviewed by that audit committee, as well as by KPMG, a highly respected independent auditing firm. You may wish, for your own reasons, to disregard the careful work the audit committee has done and delve for yourself into into the handling of the DNSO funds. But it is not accurate to claim that you are obligated to do this--every director is legally entitled to rely on the diligence of his or her fellow directors that have undertaken to serve on the Board's specialized committees.

Louis Touton

Date: Tue, 6 Mar 2001 20:28:48 -0800 (PST)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: Louis Touton <touton@icann.org>  
cc: <icann-board@icann.org>  
Subject: Re: [icann-board] Directors' Duties  
In-Reply-To: <3AA59803.79A0928C@icann.org>  
Message-ID: <Pine.LNX.4.30.0103061915390.1773-100000@p2.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

Before going into your comments, please let me remind you of the following:

California Corporations code Section 6334:

6334. Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director.

ICANN By-laws

ARTICLE V: STRUCTURE OF THE BOARD OF DIRECTORS  
Section 21. RIGHTS OF INSPECTION

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of the Corporation. The Corporation shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

So, I hope there is no remaining doubt that I have, in the words of the California statute, an "absolute right" to obtain the financials.

Now, on to your points...

I must respectfully disagree with your opinion. It is contrary to my own knowledge and experience, as well as the advice of my own attorneys with whom I have recently discussed this exact point.

My sense is that you seem to be mixing the concept of what sources of

information upon which a Director \*may\* chose to rely with the distinctly different concept of a Director's obligation to exercise independent judgment.

- > As a matter of California corporate law, your claim that you are
- > duty-bound to "make [your] own independent inquiries" about every detail
- > regarding the corporation is simply not true. California Coprorations
- > Code section 5231(b) provides:
- >
- > "(b) In performing the duties of a director, a director shall be
- > entitled to rely on information, opinions, reports or statements,
- > ~~~~~
- > including financial statements and other financial data, in each
- > case prepared or presented by:

Please note the critical word "entitled".

I am \*entitled\* to rely. But I am not \*required\* to do so. The decision whether to do so is mine. And mine alone.

- > The ICANN Board has established an audit committee, and appointed
- > directors to it that are both serious-minded and talented.

No doubt. But that does not diminish my right, nor my obligation, to make my own independent inquiries.

- > The manner in which the DNSO funds are being handled has been reviewed
- > by that audit committee, as well as by KPMG

No doubt.

However, Mike Robert's statements are indicative of a an unclear understanding of corporate boundaries which leads me to have concern about the status of certain funds and obligations which may be attached to those funds.

There are other matters that I have reason to inquire into.

There is smoke. I intend to see whether there is fire. I may not find anything amiss. If I do, I will bring it to our collective attention so that we can remedy it.

But even were there no smoke, I still have the right to examine the corporation's books of account.

- > ...But it is not accurate to claim
- > that you are obligated to do this--every director is legally entitled to
- > rely on the diligence of his or her fellow directors that have
- > undertaken to serve on the Board's specialized committees.

Again, there's that word "entitled".

I, and each director, is responsible for our decisions and we are required to exercise our independent judgement.

However, in the course of that judgement, the statute you cite allows us, at our individual discretion, to rely upon advice given by certain experts. In those limited cases, if there is a failure of judgement, a Director can be excused from liability because the reliance is permissible.

However, the statute only "entitles" us to rely, it does not obligate us to rely.

The bottom line is this: The statute you cited is not relevant to my duties, it pertains merely to those on whom I can rely if I chose to do so.

What is relevant is Calif Corporations Code 5231(a):

5231. (a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

In other words, it is my own belief as to what are the best interests of the corporation that must guide my actions. And I can assure you that it is indeed the best interests of ICANN, as expressed in its Articles of Incorporation, that do guide my actions.

As per the statute you cite, I am entitled to rely upon certain sources of expertise. But I need not do so. Whether I do so is up to me.

And part of that duty of independent judgement is the obligation to look deeper when there is reason to believe, as there is in this case, that there is something odd going on.

Given that the we are all heading towards airplanes, I'm not expecting the GL data until a reasonable time after we get back. But I am still expecting the GL data - the chart of accounts, the statement of current balances of all accounts, and the detailed ledger of transactions - preferable in electronic form, particularly if that form can be Microsoft Excel 2000 compatible.

I am under the impression that we are using Peachtree Accounting software. If so, it I believe that it can generate its output in a form that is compatible with Microsoft Excel.

--karl--

Date: Fri, 22 Jun 2001 13:09:38 -0700 (PDT)  
From: Karl Auerbach <karl@CaveBear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: "M. Stuart Lynn" <lynn@icann.org>  
Subject: Now that we have a pause in things I'd like to look at a copy of  
the GL  
Message-ID: <Pine.LNX.4.33.0106221305480.2186-100000@npax.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII

I'm still interested in taking a look at the general ledger. (I'm  
expecting it to be utterly boring. ;-)

What's the best way to arrange this?

--karl--

Date: Tue, 26 Jun 2001 09:23:54 -0700  
To: Karl Auerbach <karl@cavebear.com>  
From: "M. Stuart Lynn" <lynn@icann.org>  
Subject: Re: Now that we have a pause in things I'd like to look at a copy  
of the GL  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"

Hi Karl:

The Audit Committee in Stockholm had some changes it wanted to see to  
the governing document. I expect we will have that approved within  
the next tow to three weeks, depending on folks' schedules.

Just in time for you to enjoy your summer ;-)

Stuart

>I'm still interested in taking a look at the general ledger. (I'm  
>expecting it to be utterly boring. ;-)

>

>What's the best way to arrange this?

>

> --karl--

--

---

Stuart Lynn  
President and CEO  
ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292  
Tel: 310-823-9358  
Fax: 310-823-8649  
Email: lynn@icann.org

Date: Mon, 6 Aug 2001 13:42:34 -0700  
To: Karl Auerbach <karl@cavebear.com>  
From: "M. Stuart Lynn" <lynn@icann.org>  
Subject: Documents  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"

Karl: I thought I would bring you up to date on your request re ICANN documents. As you know, we have been trying to schedule a meeting of the audit committee to finalize the policy. We have finally been able to nail Phil Davidson (he has been on vacation) who has given us some dates towards the end of the month. Now we have to coordinate with the two other members.

Actually, I'm as interested in getting this behind us as you are. I do think we will be there soon.

Stuart

--

---

Stuart Lynn  
President and CEO  
ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292  
Tel: 310-823-9358  
Fax: 310-823-8649  
Email: lynn@icann.org

Date: Sun, 2 Sep 2001 17:23:24 -0700  
To: Karl Auerbach <karl@cavebear.com>  
From: "M. Stuart Lynn" <lynn@icann.org>  
Subject: Inspection procedures  
Content-Type: multipart/mixed; boundary="=====-1212645833==\_=====  
Status: RO  
X-Status:  
X-Keywords:  
X-UID: 4

--=====-1212645833==\_=====  
Content-Type: text/plain; charset="us-ascii" ; format="flowed"

Dear Karl:

You will no doubt be pleased to see from my note to the Board that the procedures for directors to inspect corporate records have now been released.

I think the ball is now in your court with regards to Paragraph 2. I am sure we can now proceed rapidly after Montevideo.

Stuart

--

---

Stuart Lynn  
President and CEO  
ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292  
Tel: 310-823-9358  
Fax: 310-823-8649  
Email: lynn@icann.org

... <attachment elided> ...

# **INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

## **Procedures Concerning Director Inspection of Records and Properties**

### **1. Purpose.**

These procedures will apply to requests by Directors of the Internet Corporation for Assigned Names and Numbers (the "Corporation") for inspection of records or of the physical properties of the Corporation. These procedures balance the Directors' interest in inspecting records and corporate properties with the legitimate interests of the Corporation in ensuring that requests are addressed in a reasonable fashion without undue burden on management, and with the protection of the security of corporate information against inappropriate disclosure and the protection of privacy interests. These procedures do not diminish a Director's rights to inspect, as reflected in California law and Article V, Section 21 of the Corporation's bylaws:

#### **Section 21. RIGHTS OF INSPECTION**

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of the Corporation. The Corporation shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

### **2. Requests for Records or Inspection.**

Director requests for inspection of records or properties shall be made in writing and submitted to the Chief Executive Officer of the Corporation. The request shall describe any requested records in terms which are sufficiently particular to permit compliance with the request. A Director seeking to inspect an extensive volume of records should exercise restraint by making a series of lesser requests for information over a period of time, where feasible and prudent, rather than a single burdensome request.

### **3. Responses to Requests for Inspection of Records.**

Within 10 business days of receipt of a Director request for inspection of records the Chief Executive Officer will advise the Director as to the time and place at which the records will be available for inspection and any restrictions on access to requested records. Records shall be made available during normal business hours of the Corporation and at a location in the Corporation's offices which is convenient to the conduct of the Corporation's business. Except in the case of a burdensome request for records, records shall be available for inspection not more than 20 days from the request; provided that the actual inspection may occur on a date that is convenient to the Director.

### **4. Responses to Requests for Inspection of Properties.**

Within 10 business days after receipt of a Director request for inspection of properties, the Chief Executive Officer will advise the Director as to the time or times when the Director may inspect the Corporation's properties. Any such inspection shall be made during normal business hours of the Corporation, consistent with the conduct of the Corporation's business.

#### **5. Restrictions on Access or Use.**

To the extent that the Chief Executive Officer, in consultation with the General Counsel of the Corporation, determines that compliance with any request for records necessarily involves issues of confidentiality, privilege, or privacy of a nature which require limitation of or conditions on the Director's access or use of the requested records, the Chief Executive Officer shall advise the requesting Director of the issues which require the restrictions and the nature of any proposed restrictions on access or use. Similarly, if permitting an inspection of the Corporation's properties necessarily involves such issues, the Chief Executive Officer shall advise the requesting Director in writing of any restrictions on access to the Corporation's properties. If the Director accepts the restrictions by countersigning the statement concerning limitations, the records shall be made available to the Director or the inspection scheduled as soon as possible.

#### **6. Appeal of Restrictions.**

If the Director believes that any restrictions proposed by the Chief Executive Officer are unreasonable, the Chief Executive Officer shall submit the request to the Audit Committee of the Board of Directors of the Corporation for resolution. The Audit Committee shall consider the request and respond to the Director not more than 20 days following submission of the request by the Chief Executive Officer. If the Director disagrees with the resolution of the issue by the Audit Committee, the Director may appeal this decision by notice to the Chairman of the Board of the Corporation, and the entire Board (other than the requesting Director) shall make a final and binding decision concerning the production of the records involved or the timing of any inspection of the Corporation's properties.

#### **7. Violations of Procedures.**

If the Chief Executive Officer or the Audit Committee has reasonable cause to believe that a Director has or intends to violate the procedures, he or it shall inform the Director of its belief and afford the Director an opportunity to explain the apparent violation. If after hearing the response of the Director, and making such investigation as may be warranted under the circumstances, the Audit Committee determines that the Director has violated these procedures, it shall recommend to the Board of Directors appropriate disciplinary and corrective action, which may include authorizing a lawsuit to prevent violation of these procedures. A violation of these procedures is a serious matter and may lead to further action by the Board.

Date: Sun, 2 Sep 2001 21:38:59 -0700 (PDT)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: "M. Stuart Lynn" <lynn@icann.org>  
cc: ICANN Board List <icann-board@icann.org>  
Subject: Re: [icann-board] Directors' Access to Corporate Records  
In-Reply-To: <a05100301b7b87b36b8d6@[10.0.1.2]>  
Message-ID: <Pine.LNX.4.33.0109022122210.10829-100000@npax.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

On Sun, 2 Sep 2001, M. Stuart Lynn wrote:

> For the past few months Louis Touton, Diane Schroeder and I have been  
> working with the Audit Committee to develop procedures governing  
> Directors' access to corporate records consistent with Article 21 of  
> ICANN's Bylaws.

Thanks for putting that together. I'll send you a copy of last year's letter that I sent to Mike Roberts in his role as President in which I requested to inspect the General Ledger.

By-the-way, I'd like to point out that sections 5 and 6 of the procedures, which presume that ICANN can impose "Restrictions" on access and require a director to sign a restrictive agreement as a condition of access, appear to be at variance with California law:

California Corporations code Section 6334:

6334. Every director shall have the absolute right at any

~~~~~

reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director. (Emphasis added)

--karl--

Date: Mon, 03 Sep 2001 12:00:59 -0700  
From: Louis Touton <touton@icann.org>  
X-Mailer: Mozilla 4.7 [en] (Win98; I)  
X-Accept-Language: en,pdf  
MIME-Version: 1.0  
To: icann-board@icann.org  
Subject: Re: [icann-board] Directors' Access to Corporate Records  
Content-Type: text/plain; charset=us-ascii  
Content-Transfer-Encoding: 7bit  
Sender: owner-icann-board@icann.org  
Precedence: discussion

PRIVILEGED AND CONFIDENTIAL  
LEGAL ADVICE

Karl,

As the inspection procedures specifically state, they are not intended to change any Director's right to receive access under the bylaws and California law. They are intended to provide a procedural framework to ensure that access is given in a way that avoids unnecessary controversy as well as misuse of any inspected materials.

With respect to your quoting of section 6334 of the California Corporations Code, from your legal training I'm sure you realize that (at least under the common-law system used in the U.S.) it takes more than a simple reading to properly understand a law's meaning. Expressions of the legislature's intent, the language of related statutes, and rulings of courts and responsible agencies interpreting the language often are also highly relevant. As the legal adage goes, "In interpreting a statute, the text of the statute is a good place to start, but a bad place to stop."

After reviewing the applicable legal principles, in my opinion both California law and Section 21 of ICANN's bylaws permit (in fact, encourage) establishment of clear, reasonable procedures regarding access and use of items to be inspected. Directors reviewing corporate materials do so to permit them to fulfill their responsibilities as Directors of the corporation, and in doing so they have duties to the corporation to use their best care to ensure that confidential information, including personnel records and other information about third parties which the corporation may have, is not disclosed outside the corporation. The inspection procedures, including sections 5 and 6, appear to be reasonable measures to ensure that those involved in the inspection have a common understanding of the manner in which the

materials and the information they contain are to be treated.

On the assumption that all concerned are committed to conduct themselves according to their obligations, the inspection procedures should promote reasonable inspections without unnecessary controversies. I take your message to proceeding in that constructive spirit, and hope to work toward completion of your request.

Best regards,

Louis Touton

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

Subject: Re: [icann-board] Directors' Access to Corporate Records

Date: Sun, 2 Sep 2001 21:38:59 -0700 (PDT)

From: Karl Auerbach <karl@cavebear.com>

Reply-To: Karl Auerbach <karl@cavebear.com>

To: "M. Stuart Lynn" <lynn@icann.org>

CC: ICANN Board List <icann-board@icann.org>

On Sun, 2 Sep 2001, M. Stuart Lynn wrote:

> For the past few months Louis Touton, Diane Schroeder and I have been  
> working with the Audit Committee to develop procedures governing  
> Directors' access to corporate records consistent with Article 21 of  
> ICANN's Bylaws.

Thanks for putting that together. I'll send you a copy of last year's letter that I sent to Mike Roberts in his role as President in which I requested to inspect the General Ledger.

By-the-way, I'd like to point out that sections 5 and 6 of the procedures, which presume that ICANN can impose "Restrictions" on access and require a director to sign a restrictive agreement as a condition of access, appear to be at variance with California law:

California Corporations code Section 6334:

6334. Every director shall have the absolute right at any

~~~~~

reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director. (Emphasis added)

--karl--

Date: Mon, 3 Sep 2001 14:17:17 -0700 (PDT)  
From: Karl Auerbach <karl@cavebear.com>  
Reply-To: Karl Auerbach <karl@cavebear.com>  
To: Louis Touton <touton@icann.org>  
cc: <icann-board@icann.org>  
Subject: Re: [icann-board] Directors' Access to Corporate Records  
In-Reply-To: <3B93D36B.24E2DCE2@icann.org>  
Message-ID: <Pine.LNX.4.33.0109031345170.17819-100000@npax.cavebear.com>  
MIME-Version: 1.0  
Content-Type: TEXT/PLAIN; charset=US-ASCII  
Sender: owner-icann-board@icann.org  
Precedence: discussion

On Mon, 3 Sep 2001, Louis Touton wrote:

> After reviewing the applicable legal principles, in my opinion both  
> California law and Section 21 of ICANN's bylaws permit (in fact,  
> encourage) establishment of clear, reasonable procedures regarding  
> access and use of items to be inspected.

I personally am very happy that there are now clearly specified procedures. And as I sit here looking at the letter in which I requested to inspect the General ledger, I see that my original request - a request made nearly ten months ago - was quite in conformance with the new procedure.

However, that procedure can only go so far as to specify the "when" and "how" of inspection. The procedure may not constrain the "what" - the procedure may not place any materials off limits.

For example, in my intended inspection of the general ledger, I expect to see every item - including payroll items - without exception.

And it is my present intention to send an agent, as I am entitled to do, to obtain the copies - copies that I am clearly entitled to make - of these materials. The behaviour of that agent and his/her obligation to confidentiality is, of course, my responsibility.

That some of this, perhaps even all of this, is confidential is understood by me. In fact I embrace the thought that there is a clear statement of what such concerns may be so that mistakes may be avoided.

However, the burden of such limitations is upon my shoulders already - as it is with each Director individually - without any agreement that a Director must sign as a pre-condition of access.

I personally find the concept of an agreement to be something that is dangerous - From the Director's point of view it muddies the obligations by creating a duplicate, and perhaps dissonant, definition of what actions are permissible and thus creates a question as to which obligation is controlling. And from the corporation's point of view such an agreement could be construed as a waiver should the Director find a way within the scope of the agreement but that otherwise violates the Director's obligations.

I'd like to add that I do find it somewhat troubling to know that these provisions are being levied on directors yet at the same time we do not have in place a handbook of employee obligations.

I, personally, am far more concerned that our employees have clear and enforceable rules governing their behavior rather than for rules for directors that are at best duplicative of the obligations that Directors are already obliged to follow.

--karl--

K A R L A U E R B A C H  
*Member, Board of Directors*  
*Internet Corporation for Assigned Names And Numbers*  
*(I C A N N)*

September 23, 2001

Stuart Lynn  
President, ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

Dear Stuart:

As you know a Director of ICANN has both an obligation of due diligence and a right of inspection.

Enclosed is a copy of a letter sent to your predecessor, Mike Roberts, on December 3, 2000 in which I made a request to inspect ICANN's books of account, in particular the general ledger. A follow-up letter was sent two months later.

It is now ten months since the original request and that request has still not been fulfilled.

This letter renews, clarifies, and expands that request.

Please make available the following materials for my inspection and copying.

1. ICANN's General Ledger reports (chart of accounts, transaction journal, and account balances) from corporate inception to the present (or as close to present as is reasonably feasible.)
  - a. These reports should include, at a minimum, the following standard accounting reports.
    - i. Chart of accounts
    - ii. The daily transaction journal showing each transaction on a chronological basis
    - iii. The account journal showing for each account in the chart of accounts all amounts and transactions that have been debited or credited to that account.
  - b. In order to save time and cost and to facilitate my analysis, I'd prefer to get these reports in two distinct forms:
    - i. An electronic image capture of each of the above described reports. This electronic image capture would, for example, use something like a Adobe Acrobat.
    - ii. Some format that can be loaded into Microsoft Excel.
2. Any supplemental accounting ledgers showing all funds or financial obligations held by ICANN but not listed on the General Ledger. This would include, but is not limited to, accounting ledgers pertaining to entities such as IANA, the Domain Name Supporting Organization (DNSO), and the Government Advisory Committee (GAC).

3. With regard to employee hiring and employee policies:
  - a. The corporate employee handbook, if any.
  - b. All materials, if any, that an employee of ICANN is expected to enter into when he or she is hired. These would include, for example, offer letter forms that are typically used, employment agreements, intellectual property agreements, non-disclosure agreements, and the like.
4. With regard to ICANN's law firm:
  - a. Engagement letters
  - b. Conflict notices and requests for waivers that have been received from the law firm.
  - c. Waivers granted by ICANN to the law firm.
  - d. Detailed invoices from the law firm since the inception of the corporation.
5. Logs of all international travel not directly associated with one of the regular public meetings made by ICANN officers other than the President from January 1, 2001 until the present (or as close to present as is reasonably feasible.)

It is my desire to obtain this information with minimal impact on ICANN's staff. There will, of course, be some, hopefully small, work involved. Please do feel free to make suggestions if you see a way to get me the same information with less effort.

However, given the lengthy delay that my request has already undergone, I believe that expediency is warranted.

It is my intention to exercise my right to make copies and to take them to my offices for examination.

It is also my intention to send an agent to obtain these materials.

Sincerely,

Karl Auerbach  
Member, Board of Directors  
ICANN

**INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS**

October 5, 2001

Mr. Karl Auerbach  
218 Carbonera Drive  
Santa Cruz, California 95060-1500

Re: Request for Inspection of Records

Dear Karl:

I have received your request, dated September 23, 2001, to inspect various books and records of Internet Corporation for Assigned Names and Numbers ("ICANN"). As you know, the procedures that I follow for handling such requests are detailed in the Procedures Concerning Director Inspection of Records and Properties (a copy of which you recently received), which were prepared in consultation with, and endorsed by, the Audit Committee of the ICANN Board. In accordance with item 3 of those procedures, this letter is to advise you as to the time and place at which the records will be available for inspection and the arrangements and conditions for your access to the materials.

1. The materials will be made available for your inspection at the ICANN offices in Marina del Rey. We can make the materials available between 8:30 a.m. and 5:00 p.m. on October 18, 19, 22, and 23, 2001. Please let me know in writing which dates you wish to schedule. If these dates are inconvenient to you, please contact me to arrange alternatives that meet your needs. In particular, if more convenient to you, we can arrange instead to have the inspection at the ICANN offices right after the annual meeting in November. (Because of the hectic pace right before the meeting, holding the inspection then would not be feasible without disrupting needed functions.)

2. Much of the material you have requested to review contains non-public and confidential information. In making this information available for inspection, ICANN in no way intends to diminish its confidentiality. As you know, all Directors of ICANN owe a duty of loyalty to ICANN to respect and to strictly maintain this confidentiality. (If during the inspection you have questions regarding the extent of confidentiality of any item disclosed to you, you should direct the questions in writing to me and maintain the utmost confidentiality until receiving a response from me relaxing the confidentiality.) By signing at the bottom of this letter, you acknowledge your duties as Director to preserve confidentiality.

3. Because the inspection is being conducted to assist you with your personal role as a Director of ICANN, you must be present at the inspection. You may be accompanied at such inspection by your counsel or other advisor, provided that you must furnish me, in advance the name of any such person and an explanation of how the presence of counsel or advisor contributes to the discharge of your duties as a Director in assisting in the inspection process. (In this regard, the counsel or advisor must not have any interest in conflict with ICANN or otherwise be so situated that disclosure to her or him of confidential information in the inspection would likely lead to harm to ICANN's interests.) Any individual who accompanies you must agree in writing to

reasonable limitations on access to the materials produced as well as such confidentiality restrictions as may be determined appropriate by the General Counsel.

4. I will be pleased to ensure that you will be given access to paper copies of the general ledger reports of ICANN, from the date of its organization through the fiscal year ending June 30, 2001, including chart of accounts, transaction journal and account balances. (This will include any supplemental materials showing funds or financial obligations held by ICANN and pertaining to subsidiary ICANN groups.) As is the case of much of the material you seek to inspect and as noted above, these materials are confidential, and their release or disclosure to anyone other than an officer or Director of ICANN has not been approved by the Board of Directors of ICANN. Provision of these materials in the electronic formats you have requested has been determined to be inconsistent with the preservation of confidentiality of this material, due to the risk of inadvertent dissemination or alteration of the data.

5. You will also be given access to copies of ICANN's employee policies and general forms used in documenting employment relationships at ICANN.

6. You will also be given access to copies of those materials in ICANN's files concerning the engagement of legal counsel, conflict notices and waiver requests, and invoices for services. Please note that, as in the case of the other materials you seek to inspect, these items are confidential and may also contain information as to which ICANN holds a privilege. Again, all ICANN Directors are duty bound to preserve this confidentiality and privilege.

7. Finally, you will be given access to a list of international trips taken by ICANN officers, other than myself, related to ICANN's business (but not including those associated with the regular public meetings), for the period January 1 through September 30, 2001.

8. In accordance with paragraph 5 of the Procedures, I advise you that the only limitations on your access to the materials you have requested are those set forth in this letter. However, to the extent that you require copies of any of the foregoing materials which you intend to retain for purposes of your duties as a Director of ICANN, you should request those copies at the conclusion of the inspection. Your request for copies will be given prompt consideration by me with the advice of the General Counsel of ICANN – acting in consultation with the Board's Audit Committee – as to whether any request you have made implicates confidentiality or privilege concerns which require limitations on the provision of such copies. No request from any counsel or advisor who may accompany you will be considered.

9. In accordance with paragraph 5 of the Procedures, I request that you countersign the enclosed copy of this letter, acknowledging the foregoing terms. If you decline to do so, it would be inconsistent with the Procedures endorsed by the Board's Audit Committee to make these materials available for inspection by Directors.

10. If you feel any of the above is unreasonable, I encourage you to refer the matter to the Audit Committee of the Board as contemplated in paragraph 6 of the Procedures.

Mr. Karl Auerbach  
October 5, 2001  
Page 3

We look forward to accommodating your requests as provided for in the foregoing to assist you in carrying out your duties as a Director of ICANN.

Sincerely,

M. Stuart Lynn  
President

I hereby acknowledge the above terms of the inspection of records, in furtherance of my duties as a Director of ICANN.

---

Karl Auerbach

Cc: Vint Cerf, Chairman of the ICANN Board of Directors  
ICANN Board of Directors Audit Committee

KARL AUERBACH  
*Member, Board of Directors*  
*Internet Corporation for Assigned Names And Numbers*  
*(ICANN)*

October 15, 2001

Stuart Lynn  
President, ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

Dear Stuart:

I am in receipt of your letter of October 5, 2001 that you sent to me in response to written requests that I made repeatedly over the past year to inspect and copy certain clearly identified corporate records such as a series of standard financial reports commonly known as the "general ledger".

As you know, the rights of a Director derive from the laws of California and may not be abrogated or limited either by corporate management or by other Directors.

Your letter, and the document entitled "Procedures Concerning Director Inspection of Records and Properties" ("Document") that it cites, contain unacceptable limitations on the rights of Directors and are a significant impediment that blocks a Director from the performance of his or her duties. Consequently, I will not sign your letter, and cannot do so consistently with my duties to the corporation.

I made my initial request within minutes after the end of the last annual meeting. Several letters followed that original oral request, the first of these was sent on December 3, 2000 - nearly 11 months ago. Yet I have not yet been given access to the materials. Instead I have patiently listened to a sequence of excuses and evasions, the latest chapter of which is your October 5 letter.

Management's refusal to make corporate records available for my inspection has made it impossible for me to carry out my duty of oversight, particularly with regard to the financial management of the Corporation, the degree of protection by employees of the property of the corporation and of third parties, and the identification of conflicts of interest.

I have no objection to the Document to the extent that it establishes an understanding regarding what are reasonable times and places for Director inspection. Indeed I am glad that Corporate management has set forth what they believe constitutes reasonable times and places. I have minimized the degree to which my access would inconvenience corporate management in the pursuit of their ordinary duties. I have spent 11 months waiting for corporate management to find a time that is convenient. Corporate management has exhausted its ability to claim further delay.

The Document, and your letter, contain several substantive limitations and attempt to improperly subordinate my right of independent action and judgment to that of Corporate management and to other Directors.

For example, your letter imposes vague obligations of "confidentiality" on my use of whatever it is that I might see. But the decision as what material is confidential, and confidential from whom,

October 15, 2001

and how I may use such materials, is not in your discretion; it is subject to my own discretion, carefully exercised as a Director, and as defined and limited solely by the laws of California and the United States. I am, of course, very happy to review and will seriously consider a statement from corporate management that describes, with particularity, your concerns for confidentiality in a particular body of information

Similarly, your letter subjects my right to make copies to the ill-defined "consideration" of corporate management and to other Directors. This too is an improper imposition on my rights as a Director. It is perfectly obvious that I cannot review all the materials on site during the inspection periods set aside.

Moreover your letter attempts to control my choice of advisers by requiring my advisors to present credentials to the satisfaction of corporate management. Whom I chose to assist me in my evaluation is my own decision. I am, of course, fully responsible for the behavior of those people who I chose to assist me. I would be happy to provide you basic information on these advisors in advance, as a courtesy.

I do note that your demand that I be present in person, while moot in the present circumstances because I intend to be personally present, unlawfully interferes with the inspection rights of directors who, due to their location elsewhere in the world, are unable to be personally present.

ICANN has delayed and obstructed for too long. The excuse of confidentiality and inconvenience are makeweights, and your letter continues that unacceptable theme.

I require ICANN that make all the materials that I have requested available to me at a place to be determined and at a time sufficiently in advance of the forthcoming annual meeting of the Corporation for me and my advisors to perform a preliminary analysis. This date shall be no later than November 1, 2001.

This letter, signed by me, alleviates any legitimate concerns management may honestly have with respect to my inspection. Please inform me promptly whether I will be permitted to exercise my statutory rights of inspection as demanded here, or not. Unless I hear otherwise in writing, I will be present on Thursday, November 1, 2001 at 11am to conduct the inspection.

Sincerely,

Karl Auerbach  
Member, Board of Directors  
ICANN

**INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS**

October 21, 2001

Mr. Karl Auerbach  
218 Carbonera Drive  
Santa Cruz, California 95060-1500

Re: Request for Inspection of Records

Dear Karl:

I have received your letter of October 15, and I am hopeful that there is a basis in it for making progress on your request for inspection of records. Obviously, since you are a lawyer and because this matter involves a number of legal issues, I have consulted with our General Counsel, Louis Touton, and this letter contains our response. Since your letter contains several assertions about legal responsibilities, I will set forth in some detail the corporation's legal position on these points.

Let me first note that we have tried to discuss your request with you in good faith, first informally and then, in response to your formal written request on September 23, by a detailed statement describing the procedures under which all the requested records would be made available. These procedures were presented to you to allow you to inspect the requested materials while ensuring that ICANN's interests are protected.

As you have pointed out in the past, these interests include the need to protect the confidentiality of information. (Indeed, in this connection your October 15 letter identifies "protection by employees of the property of the corporation and third parties" as an area you would especially like to investigate.) The arrangements I offered for the inspection are intended to ensure your ability to inspect the records you requested while protecting the corporation's interest in preserving that confidentiality. You have, after all, acknowledged in connection with your inspection request that "some of this, perhaps even all of this, is confidential." The duty to preserve confidentiality rests not only with ICANN's employees, but with its Directors as well. All Directors of ICANN are "under obligations of trust and confidence to the corporation," Professional Hockey Corporation v. World Hockey Association, 143 Cal. App. 3d 410 (1983). In view of the statements in your letter that you would disregard the corporation's efforts to preserve confidential materials, I have a duty to ICANN to proceed cautiously in order to protect the corporation. Indeed, it is hard for me to imagine that I should be proceeding in any other manner.

Second, I want to be clear that ICANN has never refused to permit your inspection of records. While you have a right to inspect ICANN's records, that right is subject to the overriding duty to act in good faith and in the best interests of the corporation. Hartman v. Hollingsworth, 255 Cal. App. 2d 579, 581-82 (1979) and Hoiles v. Superior Court, 157 Cal. App. 3d 1192 (1984), both hold that the right of inspection is manifestly in aid of the fiduciary duty of directors and should be exercised accordingly. The Professional Hockey Corporation case (see above) holds that the "duty of loyalty requires [directors] not act in their own self-interest when the

interest of their corporation will be damaged thereby." The assertions in your letter (and similar assertions in other public statements) that you have "discretion" individually to determine "what material is confidential, and confidential from whom, and how [you] may use such materials" and your outright refusal to acknowledge your duties as a Director to preserve confidentiality in connection with the inspection (see paragraph 2 of my October 5 letter) raise legitimate questions about whether this inspection is truly in furtherance of your duties, as opposed to a private agenda. This question is not wholly subjective, as you assert, but is governed by the standard of a prudent individual under California Corporations Code Section 5231(a).

Contrary to your assertion that your rights are absolute and may not be restricted, California courts have concluded that inspection rights are *not* unfettered and must be tempered by reasonable conditions to protect the interests of the corporation. In Havlicek v. Coast to Coast Analytical Services, 39 Cal. App. 4<sup>th</sup> 1844 (1995), the court held that the word "absolute" in the inspection statute cannot be taken literally, in that "inequitable results would arise *if a disgruntled director were allowed to exercise his inspection rights in violation of his fiduciary duty*" (emphasis supplied). This is especially true in the context of protecting attorney-client privilege or other interests of the corporation in preserving confidentiality. In fact, California courts have even upheld a *refusal* to permit inspection where the right of inspection may conflict with other protected rights, including the corporation's attorney-client privilege and individual rights to privacy, Bushnell v. Vis Corp., 1996 WL 506914 (N.D. Cal. 1996), Chantiles v. Lake Forest II Master Homeowners Association, 37 Cal. App. 4<sup>th</sup> 914 (1995). While I have never refused to permit your inspection of ICANN's records, it is not hard to imagine that a refusal might be warranted in this instance. But instead of refusing an inspection, we are merely attempting to make certain that the terms and conditions of your inspection are absolutely clear so that there are no misunderstandings either before or after the inspection.

Your statement that your inspection rights as a Director are not subject to reasonable conditions established by the Board of Directors or its corporate management is simply wrong. As required by California law, ICANN's affairs are conducted under direction of the Board of Directors and those persons to which it delegates management responsibility. Corp. Code § 5210. To suggest that your inherent rights as a Director should supersede the powers of the Board to manage the affairs of the corporation, including to take action to preserve the confidential character of records, is wholly without support. Simply put, the decision as to whether confidentiality of records should be maintained is up to the Board (and the management to which it delegates these matters), and not to an individual Director.

On matters such as what measures should be employed to protect confidentiality, California law indeed does, as your October 15 letter puts it, "subordinate [your] right of independent action and judgment to that of Corporate management and to other Directors." Your claim of *an individual right* to determine what information should be maintained as confidential demonstrates a desire on your part to frustrate the duly authorized corporate decisions because you are unable to convince a majority of the Board to agree with your positions. In an analogous context, the Supreme Court of California has held that an official of an enterprise cannot argue that his rights are superior to those of the other constituents in the entity to make policies through

bylaws, otherwise this would vitiate the right of the majority to make policies, Elevator Operators and Starters Union, Local 117 v. Newman, 30 Cal. 2d 799 (1947).

In this case, ICANN's Procedures Concerning Director Inspection of Records and Properties, which have been expressly endorsed by the Audit Committee (to which the Board of Directors delegated responsibility in this area), is intended to respect the right of inspection while providing a reasonable mechanisms to assure that the right is exercised in a manner consistent with the corporation's rights and those of other individuals. This type of restriction is entirely consistent with the cases above. Under those procedures, I set forth specific arrangements for inspection in my letter of October 5. In your letter of October 15, you objected to those arrangements. Accordingly, as required by the Procedures, I am submitting your letter to the Audit Committee for its consideration:

6. Appeal of Restrictions.

If the Director believes that any restrictions proposed by the Chief Executive Officer are unreasonable, the Chief Executive Officer shall submit the request to the Audit Committee of the Board of Directors of the Corporation for resolution. The Audit Committee shall consider the request and respond to the Director not more than 20 days following submission of the request by the Chief Executive Officer. If the Director disagrees with the resolution of the issue by the Audit Committee, the Director may appeal this decision by notice to the Chairman of the Board of the Corporation, and the entire Board (other than the requesting Director) shall make a final and binding decision concerning the production of the records involved or the timing of any inspection of the Corporation's properties.

To assist both you and the Audit Committee in assessing whether the arrangements for inspection are appropriate, I have the following comments on some of the assertions in your October 15 letter:

You have criticized the conditions in my letter concerning confidentiality and review of requests for materials as "vague" and "ill defined." In fact, there is no condition on your inspection rights as such, and the conditions on the copying and use of information do not apply until you have inspected the records and made an actual request for copies of particular materials. In accordance with the Procedures, my letter is merely stating that potential dissemination of some of the materials you have requested implicates reasonable concerns about confidentiality, and requesting a prior documented understanding regarding Directors' duties to maintain information confidential. In doing so, the corporation is preserving the ability to address any of those concerns if and when there is an actual issue, while at the same time permitting your inspection to proceed without further delays due to debate over ground rules that may never be relevant.

As to the individuals who may advise you in the inspection, my letter does not unreasonably restrict those individuals who may serve as your advisors. Rather, we have asked you to provide the corporation with reasonable assurance that these parties are not actively hostile

Mr. Karl Auerbach  
October 21, 2001  
Page 4

to the interests of the corporation, and that such parties are bound by such confidentiality restrictions as govern your conduct. How can such a request possibly be improper? The right of inspection of records cannot be used in aid of litigation or other actions detrimental to the corporation. In National Football League v. Superior Court, 65 Cal. App. 4<sup>th</sup> 100 (1998), the court held that a director could not designate a representative to participate in an inspection when that individual was a lawyer representing a party suing the corporation. To similar effect, the Hoiles court cited a leading Delaware case, Henshaw v. American Cement Corporation, 252 A.2d 125 (1969): "it begs common sense and elemental notions of fairness to say that the Corporation must submit its records ... for inspection by a person whose interest in pending litigation is adverse to the corporation." Your offer to take responsibility for the actions of your advisors obviously is not meaningful; if these individuals inappropriately use or disclose information they review, I fail to see what you can do to remedy that situation.

Since I must interpret your letter as disagreeing with the arrangements contained in my letter to you of October 5, I am referring the matter to the Audit Committee under Paragraph 6 of the Procedures Concerning Director Inspection of Records and Properties. The Audit Committee will advise you once it has considered this matter. If, in the interim, you wish to proceed with the inspection according to the arrangements of my October 5 letter, please let me know and we can proceed with the inspection on that basis without the need for action by the Audit Committee. However, since the original dates proposed by me in that letter are now moot, we will now need to set the date to occur after November 15 because of the ICANN meetings in Marina del Rey.

Sincerely,

M. Stuart Lynn  
President

Cc: Louis Touton, ICANN Vice President and General Counsel

KARL AUERBACH  
*Member, Board of Directors*  
*Internet Corporation for Assigned Names And Numbers*  
*(ICANN)*

October 27, 2001

Stuart Lynn  
President, ICANN  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601

Dear Stuart:

I am in receipt of your e-mail letter of October 21, 2001.

I understand your letter to be a refusal to allow me to inspect and copy the corporate materials by November 1, 2001, the latest date at which I would be able to perform even a cursory analysis of that material before the Annual Meeting of the Corporation.

Your letter requires me to make yet another entreaty to corporate management, following any inspection, for permission to make copies. Let me clarify my request: It is my intention to make copies of every document that I have requested and take those copies with me. My request to inspect corporate records is also a request to make copies. The rationale is obvious; but you have deliberately misconstrued it, and so I set it out again below.

Your letter accuses me of intending to violate my duties as a Director of ICANN, and implies I am not acting in good faith. Both accusations are personally insulting; and both are false. Indeed, it appears that these accusations misrepresent and misconstrue my prior statements for the purpose of preventing me from fulfilling my duties as a Director of the Corporation. Management has delayed my inspections for nearly a year, in an apparent effort to continue this delay until my term as Director is complete. That is improper.

I am a Director of the corporation ICANN. Part of my duty is to oversee the behavior of corporate management. To that end directors are granted powers by the State of California to engage in such oversight. It would be a violation of my duties to allow corporate management to dictate to me the terms and conditions under which I exercise my rights to oversee that very same corporate management.

I cannot allow my rights and duties as a Director to become subject to the vague, arbitrary, and capricious whims of corporate management.

Management's argument – that my rejection of management's demands that I submit to their constraints on my access to corporate records constitutes proof that it is necessary for management to constrain my access to corporate records – is nothing more than self-serving circular logic. And I cannot help but contrast management's putative concern about confidentiality when a Director wishes to exercise the right to inspect corporate records with management's failure to take even initial steps – despite three years of corporate existence – to define the confidentiality obligations of corporate employees or contractors.

You have suggested in your letter that you have never blocked my ability to inspect the records. This is not true. Management has spent much of the last year providing excuses, asking me to wait on a variety of events to occur, insisting on agreements that give corporate management veto powers over my advisors or over what copies I may make and even over how I may use the information that I may discover. Such conditions permit nothing but cursory glances at the records and reduce the substance of my Director's right of access to nothing more than an empty charade. My rights as a Director go further than being merely able to take an occasional fleeting peek at corporate records – I have to be able to digest and analyze those records. Those conditions that you seek to impose have the effect of eviscerating my rights to deal with the records in a way that allows me to understand and evaluate their contents to the degree necessary to carry out my Director's duty to act in the best interests of the corporation.

As I have stated more than once my actions are governed by my duty of loyalty to the Corporation. I have never violated those duties and I have no intention of doing so now or in the future, including maintaining the confidentiality of appropriate records. Your statement that I "would disregard the corporation's efforts to preserve confidential materials" is simply untrue. I have expressed my willingness to receive from corporate management statements that describe with precision and particularity any concerns they may have about the sensitivity or confidentiality of any information that I may inspect or copy. I would, of course, take those statements into consideration. But I cannot, consistent with my duties, allow corporate management to bind me in advance in the performance of my duties, particularly my duty to exercise my own independent judgment.

I have noticed your list of case citations. I find them all in agreement with the position that I have taken in all of my prior letters: that in the exercise of my role as Director I am subject to obligations of loyalty to the Corporation. Not one of your citations supports your claim that corporate management, or even a committee composed of other Directors, can block or limit a Director from the pursuance of his or her rights to inspect and copy corporate documents. Those authorities that you do cite involve situations that simply do not exist here. And, as you know, the relevant statute gives me the **absolute right to inspect and copy** at any reasonable time. Corporations Code § 6334.

I will undertake the following as a matter of courtesy: I am willing to give ICANN seven calendar days advance written or e-mail notice of any disclosure of data that I learn solely from the corporate materials I have inspected to parties beyond my inner circle of advisors. (My inner circle consists of my attorney, Curtis Karnow of Sonnenschein Nath & Rosenthal, Sheila Joyce Kellerman, CPA, and the members and employees of their respective firms.) This will give you ample opportunity to suggest alternatives, to offer constructive advice, or, to take other actions if you feel that I am violating my rights and duties as a Director.

October 27, 2001

---

I am still willing and able to come to ICANN at 11am on November 1, 2001 to inspect the records described in my prior letters and under the terms of those prior letters. I shall consider your non-response to be a refusal.

Sincerely,

Karl Auerbach  
Member, Board of Directors  
ICANN

**INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS**

October 31, 2001

Mr. Karl Auerbach  
218 Carbonera Drive  
Santa Cruz, California 95060-1500

Re: Request for Inspection of Records

Dear Karl:

I have received your letter of October 27. Rather than engage in unproductive repetition of positions, I would prefer to focus on the manner in which your request has been addressed, and that your letter indicates your substantial agreement with most of the proposed arrangements for your inspection, set forth in my letter to you of October 5. While I think we have narrowed the issues in dispute, your letter indicates continuing dissatisfaction with the present state of affairs, and accordingly, we have referred this matter to the Audit Committee, which has until November 12, 2001 to act.

You continue incorrectly to characterize my correspondence to you as refusals to permit your inspection and the discharge of your duties as a director of ICANN. In fact my letter of October 5, 2001 did not deny access to any of the requested information, and provided a series of dates on which the information was to be available for your inspection. The letter did not deny to you the right to make copies, but rather contemplated a procedure for addressing requests for copying materials which is intended to ensure the continued confidentiality of materials in the possession of ICANN which you choose to copy. The letter did not contain vague, arbitrary or capricious standards on this point. It was not intuitively obvious to me, contrary to what your October 21 letter states, that you would want or need to copy every document you have requested, and my letter properly deferred this issue until such time as you made an actual request. As I previously noted, it is sensible to deal with actual requests for information which may require specific treatment rather than becoming needlessly engaged in hypothetical controversies.

My letter did ask that you acknowledge the confidentiality and sensitivity of much of the information requested. In your letter of October 27, you acknowledge that confidential material is involved, but you continue to assert that you rather than the Corporation have the right to determine what is and what is not confidential. My letter requested that you be present personally to conduct the inspection. You have agreed. My letter asked that you identify those advisers who would accompany you. You have done so, and we have no objection to their presence. My letter requested your affirmation that the inspection be conducted in furtherance of your duties and not for some other purpose. You have stated that your actions are governed by your duty of loyalty to the corporation, and of course we accept your representation of this at face value. I did not intend for my letter of October 5 to create any insurmountable barriers to your conduct of the inspection, and in the course of our exchange we are approaching a point of mutual accommodation and understanding.

In my view our remaining differences are really limited to our proposal to protect the confidentiality of non-public information and the timing of the inspection. As to the former, I must

reiterate that you do not have the unilateral right to determine whether or not information provided to you requires protection against breaches of privilege or confidentiality. This is a fundamentally different issue from providing you with access to the information. Your position here, unfortunately, is consistent with your perspective that in all matters relating to your inspection, you have the final word. I have previously noted that determination of issues of confidentiality and privilege are the province of the Board of Directors, not an individual Director, and the Director's rights are accordingly limited, Bushnell v. Vis Corp., 1996 WL 506914 (N.D.Cal. 1996); Chantiles v. Lake Forest II Master Homeowners Association, 37 Cal. App. 4<sup>th</sup> 914 (1995). This principle is entirely consistent with the obligation of the Board to protect the corporation from potential exposure to third parties. From our perspective the only acceptable solution would be your agreement to abide by determinations made by the Board of Directors as to confidentiality, with the understanding that you may seek consent of the Board to make disclosure of particular information. Your proposal merely to give the corporation notice of a prospective disclosure would require that we be prepared to go to court to prevent unwarranted disclosure. Since you are not entitled to make these determinations in the first place, it seems inappropriate to force ICANN to vindicate its rights, rather than your being obligated to seek permission for disclosures.

With respect to the timing of your inspection, we provided five different dates in October, which would have provided you with flexibility and sufficient time to complete your review. You rejected these dates without explanation, and rather than conducting your inspection and trying to work things out, you have chosen to spend three weeks debating your "rights" as a director. You have now fixed on November 1, 2001 as the only date that will meet your needs prior to the Annual Meeting. Your demand ignores the fact that those of us in management also have responsibilities related to the Annual Meeting, and the requirement that we be available to deal with any issues arising from your inspection would be a significant distraction of the attention of management at a critical time. This was the reason we suggested dates well in advance of the Annual Meeting.

I invite you once again to conduct your inspection at a mutually convenient time in accordance with the procedures set forth in my October 5, 2001 letter. Alternatively you may follow the course set forth in paragraph 6 of the Procedures Concerning Director Inspection of Records and Properties, and await resolution of outstanding issues by the Audit Committee or the entire Board of Directors. I have made sincere efforts to deal reasonably and in good faith with a situation made difficult by your resistance to our efforts to resolve issues. In spite of our disagreements I remain committed to the observance of your rights as a Director and the policies established by the Board..

Sincerely,

M. Stuart Lynn  
President

Mr. Karl Auerbach  
October 21, 2001  
Page 3

Cc: Louis Touton, ICANN Vice President and General Counsel

From: phil.davidson@bt.com  
To: karl@cavebear.com  
Cc: audit-comm@icann.org, lynn@icann.org  
Subject: Access to ICANN records  
Date: Sat, 17 Nov 2001 11:25:22 -0000  
MIME-Version: 1.0  
X-Mailer: Internet Mail Service (5.5.2654.89)  
Content-Type: text/plain;  
charset="iso-8859-1"

Dear Karl

At its meeting on 15 November 2001 the Audit Committee considered the referral by the CEO, of the request for inspection of the Corporations records by Director Karl Auerbach and the lack of agreement on the arrangements for access or use. This consideration was in accordance with the process endorsed by the Audit Committee and sent to the Board as the process for progressing the Procedures Concerning Director Inspection of Records and Properties issued 03 September 2001. The material considered was the e-mail and letter attachments sent by the CEO to Director Karl Auerbach on 22 October 2001.

The Audit Committee considered that the arrangements requested by the CEO in his letter dated 5 October 2001 provided reasonable safeguards for the confidentiality of ICANN information. The Audit Committee requests the CEO to ensure that these arrangements were made generally applicable to all Directors seeking similar access to the Corporation Records.

The Audit Committee urged Director Karl Auerbach to reconsider his refusal to accept the arrangements in the letter dated 5 October 2001 and to sign and return the letter so that he might proceed with the inspection of the records he had requested.

It was noted that some of the material requested, where confidentiality was not an issue, had already been provided.

Please accept my apology for the slight delay in communicating with you in the timescale outlined in the Procedures but this was caused by my unavailability through travelling and other commitments

Yours sincerely

Phil Davidson  
Chair of the Audit Committee

- > Phil Davidson
- > Strategic Technology Enablers
- > CTO
- > BTextact Technologies
- > BT
- >
- >
- > Telephone: +44 1977 593288
- > Fax: +44 1977 593289
- > Email: phil.davidson@bt.com
- >
- >
- >
- > BTextact Technologies is a trademark of British Telecommunications plc
- > Registered office: 81 Newgate Street London EC1A 7AJ
- > Registered in England no. 1800000
- >
- > This electronic message contains information from British
- > Telecommunications plc which may be privileged or confidential. The
- > information is intended to be for the use of the individual(s) or entity
- > named above. If you are not the intended recipient be aware that any
- > disclosure, copying, distribution or use of the contents of this
- > information is prohibited. If you have received this electronic message in
- > error, please notify us by telephone or email (to the numbers or address
- > above) immediately.