

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
SUMMARY DISMISSAL OF RECONSIDERATION REQUEST 22-2
1 JUNE 2022**

I. Introduction and Summary

The Requestors, the Namibian Network Information Center (Pty) Ltd (NA-NIC) and Blacknight Internet Solutions, Inc. (Blacknight), seek reconsideration of alleged staff action regarding a travel waiver that participants are required to accept to attend the ICANN74 Public Meeting in person (ICANN74 In-Person Travel Waiver or Waiver). In Request for Reconsideration 22-2 (AM-R 22-2 or Request 22-2),¹ the Requestors allege that the Waiver is “unduly wide and harsh” because, among other things, it “constitutes a blanket exclusion of liability,” grants ICANN employees, agents, and representatives discretion to require a participant to leave the event, and requires foreign nationals to review a U.S. website (the U.S. Centers for Disease Control and Prevention website) for health travel advisories.²

Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, ICANN’s Board Accountability Mechanisms Committee (BAMC) is to review the request “to determine if it is sufficiently stated.”³ As discussed below, the BAMC concludes that Request 22-2 does not meet this standard because the Requestors have not identified: (i) an established ICANN policy or Bylaws provision that the Waiver violates; (ii) material information that should have been considered but was not; or (iii) false or inaccurate information that was relied on. Thus, Request 22-2 does not meet any of the three grounds for

¹ Request for Reconsideration 22-2, 12 April 2022, <https://www.icann.org/resources/pages/reconsideration-22-2-nnic-bis-request-2022-04-13-en>.

² *Id.* § 6 at Pg. 2; *id.* § 10 at Pg. 5.

³ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(k).

reconsideration under Article 4, Section 4.2(c). The BAMC therefore summarily dismisses Request 22-2.⁴

II. Factual Background

ICANN74 is set to be held from 13 through 16 June 2022 in The Hague. Meetings are open to everyone, and registration is free. Participants may attend either in person or remotely.⁵ To attend in person, a participant must accept the ICANN74 In-Person Travel Waiver. The Waiver includes a “Release and Indemnification” provision that states,

I hereby knowingly assume all risks, and covenant not to sue any employees, board members, agents, executives, contractors or volunteers of ICANN or its affiliate for any expense, loss, damage, personal injury, including loss of life, illness, including but not limited to COVID-19, disability, property damage, or property theft or actions of any kind that I may hereafter suffer or sustain before, during, or after the Event, unless said expense, loss, damage, personal injury, including loss of life, illness, disability, property damage or property theft or actions of any kind is caused by the sole, gross negligence of ICANN or its affiliate. This Liability Waiver and Release is specifically binding upon my heirs and assigns and is knowingly given.

I agree to indemnify and hold ICANN and its affiliate harmless from and against any claims, suits, causes of action, loss, liability, damage or costs, including court cost and attorneys’ fees, and fees to enforce this Agreement, that ICANN may incur arising from my involvement in the Event.⁶

The Waiver also provides,

Applicable Laws, Regulations, and Policies Regarding Conduct

I understand that while I participate in the Event, I am subject to the laws of the local jurisdiction, host country and any other country where I may travel or stay during the Event. I agree to obey these rules, guidelines, regulations, codes, policies and laws.

⁴ A substantive review of the merits of the Requestors’ claims is beyond the scope of the BAMC’s procedural evaluation. The BAMC’s conclusion is limited to the preliminary procedural assessment of whether the Requestors have sufficiently stated a reconsideration request.

⁵ ICANN74 News & Information, <https://74.schedule.icann.org/>.

⁶ ICANN74 Registration, <https://events.icann.org/icann74/dnuregistration/Site/Register>.

ICANN reserves the right to terminate my participation in future ICANN events at any time should my actions or general behavior impede the operation of the Event or the rights or welfare of any person. If I am receiving ICANN travel funding for this Event, I understand that ICANN also reserves the right to terminate my eligibility for any future travel funding. Similarly, if my conduct violates any policy or procedure of ICANN or the host institution, or the laws of the host country or any country where I travel, I understand that I may be required to leave the Event at the sole discretion of ICANN's employees, agents and representatives, I may be referred to the appropriate ICANN officials and ICANN Community leadership for further disciplinary action, and I may be banned from future program participation. No refund will be made for any portion of expenses for my participation in the Event and I will return to my origin location at my own expense.⁷

The Waiver further states,

Ability to Travel

I have reviewed travel advisories and requirements for my travel destination and transit location(s), as well as my local government's travelers advisories, and health section of the U.S. Centers for Disease Control and Prevention's website, and am informed of health and safety risks present in those locations. I understand that there may be health risks associated with travel, including but not limited to those involving water quality, food quality and preparation, standards of hygiene, access to medication, as well as non-modern or inadequate medical treatments and technology. I hereby assume, knowingly and voluntarily, each of these risks and all of the other risks that could arise out of or occur during my travel to, from, in or around the country in which the Event is held.⁸

The Requestors learned of the Waiver on or around 1 April 2022.⁹ On 12 April 2022, the Requestors filed Request 22-2, seeking urgent reconsideration of ICANN staff's alleged action regarding the Waiver. Urgent consideration is available in certain circumstances with respect to requests for reconsideration of only "Board action or inaction," not staff action or inaction, and must be sought within two business days of the relevant Board resolution's posting.¹⁰

⁷ *Id.*

⁸ *Id.*

⁹ Request 22-2 § 5 at Pg. 2.

¹⁰ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(s).

On 14 April 2022, the BAMC denied the Requestors’ request for urgent reconsideration, explaining that Request 22-2 challenged only staff conduct because the Board did not adopt the Waiver and Request 22-2 does not identify any Board resolution regarding the Waiver.¹¹ The BAMC also noted that the Requestors did not seek urgent reconsideration until more than a week after they learned of the Waiver.¹² The BAMC explained, however, that Request 22-2 may still proceed under the timeline for a standard (meaning non-urgent) reconsideration request.¹³

III. Standard of Review

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that “any person or entity materially affected by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”¹⁴

The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.¹⁵ The BAMC may summarily dismiss a reconsideration request if the BAMC determines

¹¹ Determination of the Board Accountability Mechanisms Committee (BAMC) Re: Need for Urgent Consideration of Reconsideration Request 22-2 at Pg. 3, 14 April 2022, <https://www.icann.org/en/system/files/files/reconsideration-22-2-nnic-bis-bamc-determination-urgent-consideration-request-14apr22-en.pdf>.

¹² *Id.* at Pgs. 3–4.

¹³ *Id.* at Pg. 4.

¹⁴ ICANN Bylaws, 28 November 2019, Art. 4, §§ 4.2(a) and (c).

¹⁵ *Id.* § 4.2(k).

the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous.¹⁶

IV. Analysis

In evaluating whether a reconsideration request is sufficiently stated, the following factors are considered: (1) is the reconsideration request timely; and (2) has the requestor met the requirements for bringing a reconsideration request? The BAMC concludes that Request 22-2 is not sufficiently stated. Although it was timely filed under the standard Reconsideration Request timelines, Request 22-2 does not meet any of the criteria under Article 4, Section 4.2(c) to maintain a Reconsideration Request.

A. Request 22-2 Is Timely.

A reconsideration request challenging staff action must be filed “within 30 days after the date on which the Requestor became aware or, or reasonably should have become aware of, the challenged Staff action.”¹⁷ The Requestors state that they became aware of the Waiver on or around 1 April 2022. The Requestors timely filed Request 22-2 within 30 days, on 12 April 2022.

B. The Requestors Do Not Meet the Requirements Set Forth Under Article 4, Section 4.2(c) of the ICANN Bylaws for Bringing a Reconsideration Request.

As explained above, Article 4, Section 4.2(c) sets forth three grounds for bringing a reconsideration request. Request 22-2 does not allege any of them.

First, Request 22-2 does not allege that the challenged conduct “contradict[s] ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)” to establish standing under Article 4, Section 4.2(c)(i).¹⁸ The Requestors have not identified any Bylaws

¹⁶ *Id.*

¹⁷ *Id.* § 4.2(g)(i)(B).

¹⁸ *Id.* § 4.2(c)(i).

provision or established ICANN policy that the Waiver allegedly violates. At best, the Requestors state they are “unaware of any ICANN policy” that authorizes the Waiver.¹⁹ But that is not the standard under Section 4.2(c)(i) of the Bylaws for bringing a reconsideration request. Rather, Section 4.2(c)(i) requires the Requestors to identify an established ICANN policy or Bylaws provision that the challenged conduct “contradict[s].”²⁰

Second, Request 22-2 does not allege that ICANN staff failed to consider “material information” in drafting and implementing the Waiver, and therefore does not satisfy standing under Article 4, Section 4.2(c)(ii) of the Bylaws.²¹ Although the Requestors attached to Request 22-2 examples of waiver language used by other organizations as models for how they would like ICANN to rewrite the Waiver,²² the Requestors nowhere allege that ICANN staff could or should have previously consulted these other sources yet failed to do so.

Third, Request 22-2 does not allege that ICANN staff “reli[ed] on false or inaccurate relevant information” in drafting and implementing the Waiver to maintain standing under Article 4, Section 4.2(c)(iii).²³

In sum, Request 22-2 does not identify: (i) an established ICANN policy or Bylaws provision that the Waiver violates; (ii) material information that should have been considered but was not; or (iii) false or inaccurate information that was relied on. Thus, Request 22-2 does not meet any of the three grounds for reconsideration under Article 4, Section 4.2(c).

The BAMC appreciates that in addition to the Requestors, some other members of the community have also expressed concerns about the Waiver. The BAMC notes that there has been significant dialogue within the ICANN community about the Waiver, and ICANN org

¹⁹ Request 22-2 § 10 at Pg. 5.

²⁰ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(c)(i).

²¹ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(c)(ii).

²² Request 22-2 § 13 at Pg. 6.

²³ ICANN Bylaws, 28 November 2019, Art. 4, § 4.2(c)(iii).

continues to provide clarifications about its impact on the ICANN74 Health and Safety webpage.²⁴ ICANN org has confirmed its commitment to supporting ICANN meeting participants, as always, while recognizing the personal responsibility of participants choosing to once again attend ICANN meetings in person given the “new” global environment in which we find ourselves. The BAMC also notes that remote participation in ICANN74 is still possible if participants are uncomfortable or otherwise unable to attend in person for any reason, and ICANN org remains committed to supporting an enhanced hybrid meeting experience for those attending remotely.

V. Conclusion

A substantive review of the merits of the Requestors’ claims is beyond the scope of this procedural evaluation. The BAMC’s conclusion is limited to the preliminary procedural assessment of whether the Requestors have sufficiently stated a reconsideration request. For the foregoing reasons, the BAMC concludes that Request 22-2 does not meet the requirements for bringing a reconsideration request and therefore it is summarily dismissed. If the Requestors believe that the Waiver is unfair, the Requestors may file a complaint with the Ombudsman under Article 5 of the Bylaws.²⁵ In addition, ICANN has a Complaints Office that handles complaints regarding ICANN org that are not otherwise subject to existing accountability mechanisms. This may include complaints about how a request has been handled, a process that appears to be broken, insufficient handling of an issue, or something that may be an indication of a systemic issue, among other things.²⁶

²⁴ Health and Safety for ICANN74, <https://74.schedule.icann.org/health-safety>.

²⁵ *Id.*, Art. 5, § 5.3(a).

²⁶ ICANN Complaints Office, <https://www.icann.org/complaints-office>.