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Review of Documents Released under the Freedom of Information Act in the .XXX Case

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On Friday, May 19, 2006, ICM Registry announced that it would file a reconsideration request with ICANN. ICM Registry applied for the .XXX top level domain from ICANN and was turned down May 10 following pressure placed on ICANN by the US government.

ICM is also filing a judicial appeal under the Freedom of Information Act to challenge redactions and omissions from the internal US government documents released to it under a Freedom of Information Act (FOIA) request. In connection with its judicial appeal, ICM Registry released 88 pages of documents obtained under the FOIA showing how the U.S. handled its application.

A summary and review of the documents follows. The documents themselves can be reviewed on the IGP web site.

On June 2, 2005, the ICANN decision to approve the .XXX TLD hit the news media. On that day Fred Schwien, Executive Secretary of the Commerce Department, sent an email message to the NTIA head, Assistant Secretary of Commerce Michael Gallagher, and Commerce Department Deputy Assistant Secretary John Kneuer asking, "Mike, think this will cause us any problems?" A flurry of emails among Gallagher, Senior Advisor Meredith Attwell, and Kneuer parties ensued throughout the day. But we don't know what Gallagher or Attwell said in response, because their comments have been completely redacted.

Then the political pressures began. First, on June 14 Commerce heard from the Family Research Council asking about DoC's authority over the root zone file. Then they heard from the office of Rep. Charles Pickering, a Mississippi Republican, whose staffer said that "I had read that you guys will have to approve" and that the Hill is "reviewing its options" (including legislation to make .xxx compulsory for adult material). Attwell sent an email to Robin Layton and Suzanne Sene, ardently asking for "talking points on why this (xxx) is a good thing and why we support it." This was, obviously, before Commerce had turned against the proposal, and supports ICM Registry's contention that the Commerce Department had indicated to them that it had no objections.

The next day, Attwell prepared a memo outlining the DoC-ICANN relationship, the history of the XXX proposal, and a list of supporters of the XXX proposal. The memo distances the agency from ICANN, emphasizes the support for XXX among "child advocates," and notes that the U.S. Supreme Court in the CIPA case made it impossible to ban pornography. The memo emphasized that DoC "does not exercise oversight in the traditional context of regulation and plays no role in the internal governance of the organization."

On June 16, the Commerce Dept. (DoC) met with a group of representatives of four conservative anti-pornography groups and Pickering's staff person and told them that "they [NTIA] do not have authority to approve the substance of domain names - only the technical aspects of it." On June 21 Kneuer and the NTIA's PR person met with Family Research Council and Concerned Women for America. NTIA staffers Suzanne Sene and Attwell continued their efforts to redirect the conservative rage over .XXX to ICANN, offering up the email addresses and phone numbers of ICANN's President, General Counsel, and VP of business operations, and also offering to dig up the addresses and numbers of ICANN Board members from the United States.

At this point Attwell and the mid-level NTIA people seemed to be content to get the conservative groups to lobby ICANN. But on June 16, Fred Schwien sent an email to Gallagher, Attwell and others that started to change the tone of the debate. He said "who really matters in this mess is Jim Dobson [head of Focus on the Family and founder of the Family Research Council]." Schwien continued:

"What [Dobson] says on his radio program in the morning will determine how ugly this really gets--if he jumps on the bandwagon, our mail server may crash. My suggestion is that someone from the White House ought to call him ASAP and explain the situation, including that the White House doesn't support the porn industry in any way, shape or form."

From this point on, the prophylactic relationship between DoC and ICANN began to erode, although it did not break down completely until some time in late July or early August. Attwell said on June 21, "I think there will be a call for Secretary Guitierrez to weigh in to urge ICANN not to approve it. I don't know where we will go if that happens."

NTIA's PR person, Clyde Ensslin, started assiduously keeping track of the number of emails sent to the DoC by the conservative campaign, and tracking editorial comment in the press as to whether it was for or against xxx. Most of the emails had identical text and came from the Family Research Council web site. It was clear that the approach to the issue was becoming increasingly political, and less one of "technical" supervision. For most of June the record shows a concerted effort by DoC to cover up its role in approving ICANN actions. It got news outlets to remove from their stories references to the Commerce Department's role in approving ICANN TLD additions. A June 6 CNET story quoted Karl Auerbach as saying "For .xxx to go into the root is going to require positive action on the part of the United States government." The NTIA staffers complained among themselves, "that language is really awful." Later, the Department succeeded in getting CNN to remove any reference to DoC in a story on XXX. Their media managers also persuaded AP to edit out a reference to the DoC role, claiming that "the department has a strictly technical role in the implementation of new top level

domains, but we do not make policy decisions with respect to domain names or internet content."

Thus the FOIA documents show that in mid-July 2005, when ICANN held its quarterly meeting in Luxembourg, NTIA had already received about 4000 emails against XXX, and at least two governments within GAC (Brazil and Denmark) had expressed concerns about it. DoC nevertheless refrained from exerting any formal pressure to delay or stop .XXX, and was basically trying to ride out the storm by deflecting opposition to its agent, ICANN. The NTIA point person on ICANN, Suzanne Sene, reported from Luxembourg that "happily....there is no mention ofXXX in the final GAC communiqué."

Following Sene's Luxembourg report there is no record in the documents released by ICM Registry of what ultimately caused the turnaround in the DoC's position. ICM has only released some heavily redacted exchanges in late July in which NTIA staff show great interest in when the next ICANN Board meetings are scheduled. In this exchange, Attwell says, "we need to know if they plan on approving .xxx at that meeting..."

What we do know, from other sources, is during that period James Dobson met with Bush administration political operative Karl Rove to insist that XXX be stopped. And then the US government suddenly abandoned its commitment to the independence of ICANN and took the initiative. At some point during this late July early August period, a "stop XXX" order was issued and Sene, the NTIA operative in ICANN followed the order. A letter was drafted and transmitted from Michael Gallagher of NTIA to Vint Cerf and Paul Twomey on August 11. The letter asked ICANN to delay a decision on .XXX and expressed the US government's concerns about the opposition to it that had been expressed.

NTIA's Sene sent this letter out early on August 12 by email to a dozen countries, including Mohd Sharil Tarmizi, Chairman of ICANN's Government Advisory Committee, and Australian GAC delegate Ashley Cross. The record thus proves, beyond any doubt, that the Commerce Department letter preceded the letter from Mohd Sharil Tarmizi, Chairman of ICANN's Government Advisory Committee. This is quite significant, because in their public relations campaigns both ICANN and the US government used the Tarmizi letter as the excuse for delaying a decision on .XXX. It is now clear that this was done to deflect responsibility for the delay away from the U.S. government. On its website, ICANN backdated the Commerce Department letter to August 15, even though the record proves that they had received it on the 12th. And ICANN posted the GAC Chair's letter on its front page, while burying the Commerce Department letter in its "Correspondence" section. Many news media reported that the GAC had requested the delay. Efforts by the IGP to highlight the pressure brought by the USG were disputed.

Later records show that from mid-August until March of 2006, the NTIA and the US government completely abandoned its position that it had no interest in the "substance of domain names" and actively lobbied against the .XXX domain, systematically calling up GAC members and urging them to send in letters opposing .xxx. More information about this intrusion of domestic US politics into the management of the Internet will surface if ICM Registry's FOIA appeal is successful. We hope that it is; the redactions seem excessive and somewhat arbitrary.

Even with the major redactions, these documents show how US supervision of ICANN was influenced by domestic political pressure generated by the religious Right. They leave no room for doubt that the US altered its policy toward ICANN in response to this pressure, and that it actively worked in tandem with ICANN's management to conceal the nature and significance of US governmental oversight of ICANN from the public and the media. By looking for additional evidence of state action by the U.S., ICM prepares the way for a legal challenge more powerful than a mere ICANN reconsideration.

The main lesson of this story is not the merits or problems of .XXX, but the inevitable effects of unilateral oversight of ICANN by a single nation-state. No national government is exempt from politics, and no single national government can be expected to resist the imprecations of domestic politics on its supervision of the Internet. Despite its WSIS-period claims that US control of the DNS root was protecting the Internet from interference by "power-hungry governments," it is the US government that has been the most aggressive -- and effective -- at imposing its political agenda on ICANN. The record also contradicts US claims that its supervision was necessary to protect the "stability" of the internet. Politics are inherently unstable, and the US government showed that it can, within the space of three weeks, completely alter its policy position. A summary and review of the documents follows. The documents themselves can be reviewed on the IGP web site at this link