

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

PROCEDURAL ORDER NO. 2

27 March 2020

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. INTRODUCTION

1. This Procedural Order No. 2 disposes of the outstanding objections to the Parties' respective requests to produce documents.

II. BACKGROUND

2. In accordance with the Procedural Timetable, the Parties exchanged document production requests in the form of Redfern Schedules on or about 6 March 2020. Responses or objections to these requests were exchanged on or about 13 March 2020, and replies to these responses or objections were exchanged on 20 March 2020.
3. The Procedural Timetable contemplates the Panel ruling on the outstanding objections on the basis of the positions and submissions set out in the Parties' respective Redfern Schedules. The Panel does so by this order.
4. The Claimant has addressed 21 requests to produce documents to the Respondent. The Respondent has addressed two (2) requests to the Claimant. The Claimant has objected to both of the Respondent's requests. The Respondent has objected to many, but not all, of the Claimant's requests, having agreed to search for some categories of documents targeted by the Claimant, sometimes setting limits to its search that are contested by the Claimant.
5. In the Panel's First Procedural Order in relation to Phase II, as set out in the Panel's letter dated 5 March 2020, it was noted that the Parties agreed that document production in this IRP would be governed by Rule 8 of the *Interim Supplementary Procedures for ICANN IRP (Interim Procedures)*, to be applied by the Panel using as non-binding guidelines the *IBA Rules on the Taking of Evidence in International Arbitration (2010) (IBA Rules)*. The Parties have in fact made reference to both the Interim Procedures and the IBA Rules in the submissions set forth in their respective Redfern Schedules.

III. OVERARCHING ISSUES

6. A number of overarching issues arise from general objections raised by the Respondent in response to the Claimant's requests. The Panel addresses them first.

A. *Number and Breadth of the Claimant's Requests*

7. The Respondent has objected to the number and breadth of the Claimant's requests for production, likening them to US-style discovery through requests for broad categories of documents going beyond the focused document exchanges contemplated by Rule 8 of the Interim Procedures and Article 3 of the IBA Rules. In response to this general objection, Afiliis submits that in formulating its requests, it has complied with the requirements of the Interim Procedures and the IBA Rules.

8. This being an ICANN accountability mechanism, focused as it must on alleged actions or inactions on the part of ICANN, it is not – in and of itself – surprising that a claimant would present more document requests than would ICANN as the respondent party. Be that as it may, rather than address the objection relating to the number of Claimant requests in the abstract, the Panel has approached and disposed of each of those requests on its merit.

9. The Respondent has questioned whether the schedule applicable to this case is achievable if the type of "broad discovery" that is being sought by the Claimant is allowed. The Panel is confident that adequate resources are available to the Parties to discharge their document production obligations under the applicable rules and in accordance with the applicable timetable. To the extent document production requests are otherwise proper and permissible under the Interim Procedures and the IBA Rules, pressure resulting from the applicable schedule would not, in the opinion of the Panel, be a sufficient reason to disallow one or more otherwise admissible requests. The Panel also notes that the number of requests made by the Claimant may not be reflective of

the burden they would place on the Respondent, given that many of the Claimant's requests overlap.

B. Possession, Custody, or Control

10. The Respondent objects to the Claimant's definition of "ICANN", which is stated to include counsel and agents not employed by ICANN. The Claimant counters that both Article 3 of the IBA Rules and Rule 8 of the Interim Procedures require parties to search for documents that are in a party's possession, custody, *or control*.
11. In the Panel's experience, international arbitral tribunals expect parties to produce documents requested or ordered to be produced even if they are in the possession of third parties – like subsidiaries, agents or advisors – who, because of a legal or relevant contractual relationship with a party, have in their possession documents which, effectively, are under the control of the party.¹ The Panel therefore directs that both Parties should produce responsive documents in their "possession, custody, or control", even if documents a Party knows or reasonably should know are responsive are in the possession of external counsel or agents.

C. Definition of "New gTLD Program Rules"

12. ICANN explained in its response to Afiliás' requests how it proposed to define "New gTLD Program Rules", in light of the Claimant's indication that the expression should include "other rules related to the New gTLD Program Rules". Afiliás points out in its reply that rules set forth in other documents were also applicable, such as the New gTLD Auctions Bidder Agreement. The Panel agrees that, for the purpose of document production, the "rules" set out in the latter agreement should be treated as included in the New gTLD Program Rules.

¹ See Nathan D. O'Mally, *Rules of Evidence in International Arbitration: An Annotated Guide*, 2nd ed., Abington, Routledge, 2012, para. 3.50, pp. 47-48.

D. *Privilege Log*

13. The Claimant has requested that, to the extent ICANN maintains that any responsive documents are protected from disclosure by any asserted privilege or other source of protection, each such document should be listed in a privilege log identifying the author(s), the recipient(s), the date of the document, and a description of the document sufficient for the Claimant and the Panel to assess the claim of privilege or other protection.
14. The Respondent has objected to this request on the basis that no applicable rules require it, adding that the burden on ICANN of creating such a log outweighs any benefit that the Claimant could expect to obtain.
15. In spite of the lack of an explicit requirement to that effect, for example in the IBA Rules, in the experience of the Panel, international arbitral tribunals frequently direct parties to provide basic information, such as those found in a privilege log, about documents that a party refuses to produce on the ground of solicitor-client or legal advice privilege, litigation or attorney work product privilege or settlement discussions privilege. The Panel notes the reference, in the Claimant's Redfern Schedule, to an IRP in which an experienced Panel ordered ICANN to provide a privilege log.²
16. As a privilege log may prove useful to the Parties and the Panel in addressing issues arising from refusals to produce justified on the basis of privilege, the Panel directs both Parties to prepare a privilege log in the present case. In light of the tight procedural timetable applicable to this case, the Panel directs that each Party shall have until 24 April 2020, that is, one week after the date set for the production, to provide the other Party with a privilege log. The privilege log shall list documents over which a privilege is asserted, and describe in regard to each document withheld, the type of document, the general subject matter thereof, the date on which it was created, the author(s) of the

² *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Procedural Order No. 6 (12 June 2015).

document, all persons who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law under which the privilege claimed is asserted.

E. *Tying Produced Documents to Specific Requests*

17. Afiliás has asked that the Respondent identify, for each produced document, all document requests to which the document is responsive. The Respondent objected to that request, pointing out that neither the Interim Procedures, nor the IBA Rules impose such an obligation on the producing party.
18. The Panel considers that it would be unduly burdensome for the Respondent to comply with this request, in circumstances where the Claimant has formulated requests many of which overlap in their scope. The Panel does not see much benefit in the present case for this information to be generated, and therefore decides that the Parties do not need to identify, for each document produced, the document request(s) to which it is responsive.

IV. DECISION ON OBJECTIONS TO DOCUMENT PRODUCTION REQUESTS

19. Having carefully considered the Parties' written submissions, and deliberated, the Panel's decisions are as follows.

A. *The Claimant's Document Production Requests*

20. The decisions of the Panel on the Claimant's requests that are objected to by the Respondent are set out in the column entitled "Panel Decision" in the attached Redfern Schedule titled "Afiliás' Replies to ICANN's Responses and Objections to Claimant's Phase II Request for the Production of Documents from Respondent".

B. *The Respondent's Document Production Requests*

21. The decisions of the Panel on the Respondent's requests that are objected to by the Claimant are set out in the column entitled "Panel Decision" in the attached Redfern Schedule titled "ICANN's Completed Redfern Schedule".

C. *Reasons*

22. The decisions set out in the attached Redfern Schedules reflect, among others, the Panel's careful weighing of the following key requirements under Rule 8 of the Interim Procedures and Article 3 of the IBA Rules, having regard to the issues in dispute based on the Parties' pleadings:

- that the documents requested to be produced "are reasonably likely to be relevant and material to the resolution" of the claims and defenses in the IRP (Rule 8 of the Interim Procedures) or are "relevant to the case and material to its outcome" (Article 3 of the IBA Rules);
- that the documents requested to be produced are not likely to already be in the possession, custody, or control of the requesting party;
- where a category of documents is being sought, that there is a description in sufficient detail (including as to subject matter) of a narrow and specific requested category of documents;
- that it does not appear unreasonably burdensome for the recipient party to produce the requested documents; and
- that consideration be given, as appropriate, to procedural economy, proportionality, fairness and equality of the Parties.

D. *Deadline for Production*

23. Under the Procedural Timetable for Phase II, documents ordered to be produced by the Panel are to be produced by 17 April 2020. The Parties are invited to consider producing documents on a rolling basis, as responsive documents become ready for production, but they are not directed to do so.

E. *Privilege and Confidentiality*

24. Any document otherwise responsive to a document production request that is protected by solicitor-client or legal advice privilege (or professional secrecy), by litigation or attorney work product privilege, or by settlement communications/discussions privilege may be withheld from production. Should a responsive document contain reference to a privileged communication, or to information in respect of which the producing party asserts a claim of confidentiality, the document should be appropriately redacted and produced. By parity of reasoning, the Panel directs that any privileged or confidential document that is inadvertently produced should, upon request, be immediately returned to the producing party.
25. In principle, matters of confidentiality and/or privilege shall be dealt with on a document-by-document basis and, as already indicated, any document over which either Party asserts a claim of privilege or confidentiality shall be identified in a privilege log, as described above.
26. In accordance with Article 3.13 of the IBA Rules, all documents produced by a Party shall be kept confidential by the other party and be used solely in connection with this IRP.

F. *Continuing Disclosure*

27. The Panel reminds the Parties that the obligation to produce documents is of a continuing nature. A Party that subsequently learns that it possesses, or obtains

possession from another source of, a document or category of documents previously required to be produced to the other Party has a duty to make an immediate disclosure of that fact to the other side, and to produce the document(s) in question.

28. The Panel has unanimously agreed the terms of this Procedural Order No. 2, which is signed by the Chair on behalf of the Panel at the request of his co-panellists.

Place of the IRP: London, England

Dated: 27 March 2020

A handwritten signature in black ink, appearing to read 'Pierre Bienvenu', written in a cursive style.

Pierre Bienvenu, Ad. E.
Chair
On behalf of the Panel

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ICDR Case No. 01-18-0004-2702

**AFILIAS' REPLIES TO
ICANN'S RESPONSES AND OBJECTIONS TO CLAIMANT'S PHASE II REQUEST
FOR THE PRODUCTION OF DOCUMENTS FROM RESPONDENT**

20 March 2020

Counsel for Claimant
Dechert LLP
Constantine Cannon LLP

Afilias' Preliminary Statement

Afilias Domains No. 3 Limited (“**Afilias**”) submits this Request for Production of Documents to the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) pursuant to Section 8 of the Interim Supplementary Procedures for ICANN’s Independent Review Process (“**Interim Procedures**”) and the Panel’s Procedural Timetable for Phase II dated 5 March 2020.

As set out in the following Redfern Schedule, the documents requested by Afilias are relevant and material to the issues in dispute, as set out in the Parties’ various submissions in this Independent Review Proceeding (“**IRP**”), including, but not limited to Afilias’ Amended Request for IRP and ICANN’s Response thereto. Moreover, Afilias reasonably believes that these documents are in the possession, custody, or control of ICANN, in particular, because they were generated by or believed to be provided to ICANN, or can be obtained by ICANN from VeriSign Inc. (“**VeriSign**”) and Nu DotCo LLC (“**NDC**”).

To the best of Afilias’ knowledge, the requested documents are not in Afilias’ own possession, custody, or control.

For the avoidance of doubt, for the purposes of document production, the term “ICANN” shall include all officers, employees, staff, agents, and counsel of ICANN as well as its external legal counsel.

The term “Verisign” shall include VeriSign, Inc., and all of its officers, employees, staff, and in-house and external legal counsel (including for all subsidiaries and affiliates of VeriSign, Inc.), as well as all agents acting on behalf of VeriSign, Inc. and/or its subsidiaries and affiliates.

The term “Nu DotCo” or “NDC” shall include Nu DotCo LLC, its shareholders, members, officers, employees, staff, in-house and external legal counsel (including for all subsidiaries and affiliates of Nu DotCo LLC), as well as all agents acting on behalf of Nu DotCo LLC and/or its subsidiaries and affiliates.

The term “document” used in this request shall include writings or communications, whether maintained on paper or in electronic form.

The term “New gTLD Program Rules” shall refer to gTLD Applicant Guidebook, the Auction Rules for New gTLDs: Indirect Contention Edition, and other rules related to the New gTLD Program.

The use of the singular shall include the plural, and the use of the plural shall include the singular. The term “or” shall include “and,” and the term “and” shall include “or.”

ICANN should make its production of documents in a manner that indicates the Request No. to which ICANN asserts the document(s) produced are responsive.

To the extent that ICANN maintains any responsive documents that are protected from disclosure by any asserted privilege or other protection, ICANN is requested to identify each such document in a privilege log that identifies for each such document: (a) the person(s) who prepared the document; (b) the person(s) inside or outside of ICANN who

received the document (including any persons who were copied on such document); (c) the date on which the document was prepared; (d) the dates(s) on which the document was sent to any person(s) inside or outside of ICANN; and (e) a description of the document and its contents sufficient for Afilias and the Panel to assess the claim of privilege or other protection.

ICANN'S General Objections and Response to Afilias' Preliminary Statement

ICANN objects to the number and breadth of Afilias' requests for production. Rule 8 of the Interim Supplementary Procedures and Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") contemplate focused discovery limited to specifically identified documents or narrow and specific categories of documents. They do not contemplate the type of U.S.-style requests for broad categories of documents propounded by Afilias. Moreover, ICANN noted in its March 2, 2020 letter in advance of the Case Management Conference that the current schedule potentially could accommodate up to five narrowly-tailored requests for specifically identified documents, but that if Afilias proceeds to seek broad U.S.-style discovery "the 3 August hearing date will almost certainly be unachievable." Two days later, during the Case Management Conference on March 2, 2020, Afilias stated that it would "agree to very focused and specific production requests in accordance with the IBA Rules and Rule 8 of the Supplemental Procedures" and Afilias' counsel rejected ICANN's assertion that Afilias was planning on propounding as many as fifteen separate requests (as opposed to the **twenty-one** requests Afilias actually propounded). (Case Management Conference Audio Recording at 41:50-42:05.)

ICANN reiterates that if broad discovery of the type sought by Afilias' requests for production is allowed, the current schedule will not be achievable. As set forth below, ICANN has agreed to produce documents in response to eleven of Afilias' requests. ICANN will endeavor to search for and produce those documents within the current schedule. However, this may not be possible if initial searches uncover a large number of documents that must be manually reviewed for responsiveness, privilege and confidentiality issues.

ICANN objects to Afilias' definition of "ICANN" to the extent that it includes counsel or agents that are not employed by ICANN. ICANN will search for documents in its own possession and custody. ICANN will not search for documents in the possession or custody of others.

ICANN objects that the definition of "New gTLD Program Rules" is vague and ambiguous to the extent that it includes unidentified "other rules related to the New gTLD Program." ICANN will construe "New gTLD Program Rules" to mean the gTLD Applicant Guidebook and the Auction Rules for New gTLDs: Indirect Contention Edition.

ICANN objects to Afilias' direction that ICANN identify, for each produced document, all document requests to which the document is responsive. No such requirement is imposed by the ICDR Arbitration Rules, the Interim Supplementary Procedures, the IBA Rules or any other applicable rules.

ICANN objects to Afilias' Requests for Production to the extent they seek documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege. ICANN will not produce privileged documents. ICANN further objects to Afilias' request that ICANN create a log of all privileged documents identifying: (a) the person(s) who prepared the document; (b) the person(s) inside or outside of ICANN who received the document (including any persons who were copied on such document); (c) the date on which the document was prepared; (d) the date(s) on which the document was sent to any person(s) inside or outside of ICANN; and (e) a description of the document and its contents sufficient for Afilias and the Panel to assess the claim of privilege or other protection. No applicable rules, including the ICDR Arbitration Rules, the Interim Supplementary Procedures, and the IBA Rules, require ICANN to create such a privilege log, and the burden on ICANN of creating a privilege log outweighs any benefit that Afilias reasonably could expect to obtain. In its submissions regarding the procedure for Phase II, Afilias did not seek to reserve time in the schedule for the compilation of a

privilege log or for the adjudication of challenges to particular privilege claims, and the timetable adopted by the Panel in its Procedural Timetable for Phase II does not provide time for such a time-intensive and burdensome procedural step.

**AFILIAS' REPLY TO ICANN'S
GENERAL OBJECTIONS AND RESPONSE TO AFILIAS' PRELIMINARY STATEMENT**

- 1. ICANN's assertion that Afilias has served "U.S.-style requests for broad categories of documents":** This is a boilerplate objection. It fails to withstand even modest scrutiny with respect to Afilias' requests. For each request, as required by the IBA Rules, Afilias has provided either a "description of each requested Document sufficient to identify it" and/or "a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist" (as provided for in Article 3.3(a) of the IBA Rules). Afilias has also provided a statement for each request explaining how the "Documents requested are relevant to the case and material to its outcome" (as provided for in Article 3.3(b) of the IBA Rules). And Afilias has stated that the requested Documents are not in its possession, custody or control (as provided for in Article 3.3(b) of the IBA Rules). Afilias observes that Rule 8 of the Interim Procedures similarly provides that in seeking documents, parties shall provide "a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute." That is precisely what Afilias has done.
- 2. ICANN's objection that Afilias has served twenty-one requests—when ICANN says it wanted to receive only five:** This objection is frivolous. It is neither surprising nor relevant to the Panel's ruling on document requests that Afilias has served more requests than ICANN, since this proceeding is an ICANN accountability mechanism and Afilias is the Claimant, nor is ICANN's preference as to how many requests it wanted to receive of any relevance. *First*, ICANN is the global regulator of the Domain Name System (the "DNS"). In that capacity, ICANN created, administered, and made all of the decisions relevant to the New gTLD Program *and* to the .WEB gTLD. It is ICANN's actions and inactions that are at issue in this IRP. Those actions (or inactions) will be reflected largely by the documents (or lack thereof) in ICANN's possession. *Second*, Afilias has served more requests than ICANN because Afilias' requests are focused and narrow—seeking specific categories of documents (often within a specified time frame). As acknowledged in the requests themselves, some of the requests may be overlapping. Afilias has drafted the requests in this manner so that ICANN will not (as is its tendency) construe the requests in a hyper-narrow and hyper-technical fashion and avoid producing responsive documents on that basis. *Third*, ICANN claims that during the preparatory conference all, Afilias' "rejected" its assertion that Afilias would serve "as many as fifteen separate requests; that is a serious misrepresentation of the remarks made by Afilias. *See* Transcript of Preparatory Conference Call (4 March 2020) at 17:21 to 18:2 (Mr. Ali) ("I don't know where Mr. Smith is getting his 15 document request number from. I don't think I've sent him any document requests. So, that seems to be a number pulled out of thin air. Be that as it may ... our view is that after we have filed and ICANN has filed and the *amici* have filed, all document production can simply take place if at all necessary at that point, depending on what is on record."). Moreover, Afilias' counsel made those remarks in asserting that discovery should be served *after* Afilias, ICANN, and the *Amici* made their next submissions—which would have enabled more focused discovery based on what had been submitted. ICANN rejected that proposal. ICANN cannot now complain that Afilias is serving too many requests after ICANN convinced the Panel that document discovery should precede the next rounds of written submissions.

3. ICANN’s suggestion that “the current schedule will not be achievable” if the Panel orders ICANN to produce the documents requested by Afilias—or to acknowledge that no such documents exist: This submission lacks foundation as well as merit. ICANN has provided no basis to explain why it cannot search for and produce the documents requested by Afilias (or acknowledge that it has no such documents) within the time frame provided by the Panel’s procedural timetable. Indeed, Afilias commenced this IRP in October 2018—and ICANN was well aware of Afilias’ claims before then. Further ICANN has long been aware of the controversy associated with Verisign’s back-door involvement in the .WEB contention set, and one would assume has collected and reviewed documents in the course of assessing the various complaints, including that raised by Afilias. It is highly unlikely, therefore, that ICANN has not already searched for, located, and reviewed the categories of documents requested by Afilias here (or, alternatively, determined that no such documents exist). More fundamentally, the desire to move Phase II quickly (which Afilias as the Claimant obviously shares) cannot unfairly compromise Afilias’ ability to take appropriate discovery. As stated by the Panel in its Phase I Decision, modern arbitral tribunals tend to “accord greater weight to the contents of contemporaneous documents than to oral testimony given, possibly years after the event, by witnesses who have obviously been ‘prepared’ by lawyers representing the parties.... [I]n international arbitration, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents that came into existence at the time of the events giving rise to the dispute.” Decision in Phase I (12 Feb. 2020), ¶ 31 (quoting Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press, 2015), ¶¶ 6.87 and 6.90). ICANN cannot seek to eliminate or significantly curtail Afilias’ right to the production of documents based on its assertion that ICANN cannot provide the documents within the time allotted by the Panel.

4. ICANN’s attempt to truncate the standard set out in the IBA Rules and Rule 8: Although ICANN purports to rely on the IBA Rules and Rule 8 of the Interim Rules, it conveniently ignores or omits portions of those rules when it believes doing so will be to its benefit. Thus, ICANN objects to Afilias’ definition of ICANN “to the extent it includes counsel or agents that are not employed by ICANN.” In those instances where ICANN has agreed to search for and produce documents requested by Afilias, ICANN asserts that it will only search for documents “in its own possession or custody. However, both Article 3 of the IBA Rules *and* Rule 8 of the Interim Rules require parties to search for documents that are in a party’s “possession, custody *or control*” (emphasis added). ICANN, as the global regulator of the DNS, has the ability to require non-parties, including but not limited to its counsel Jones Day, to provide it with documents. As stated by the Panel in its Decision on Phase I,

Moreover, there is no suggestion that ICANN is unwilling to adduce, in Phase II, evidence relevant to those allegations of wrongdoing from witnesses under the control of the Applicant Amici. Nor is it alleged that ICANN is unprepared to accept VeriSign and NDC’s offer of support to marshal this evidence. All indications are rather to the contrary, as evidenced by the positions adopted by these three participants before the Procedures Officer and throughout Phase I of this IRP.

Decision on Phase I, ¶ 201. Therefore, to the extent that documents sought by Afilias are not in ICANN’s “own possession or custody”—but are within the “control” of ICANN because ICANN has the ability to obtain them—ICANN must obtain and produce such documents. Further, it should by now be evident to the Panel that ICANN is coordinating its defense with NDC and Verisign and that both of the Amici are providing and are able to put documents on record via ICANN. Indeed, Afilias notes that the key document in this

case, the Verisign/NDC Domain Acquisition Agreement was provided directly to Eric Enson of Jones Day in response to Jones Day's letter sent on ICANN's behalf. Correspondence between Jones Day, acting as counsel to ICANN, and third parties is not privileged.

5. ICANN's objection that Afilias' definition of "New gTLD Program Rules' is vague and ambiguous to the extent it includes unidentified 'other rules related to the New gTLD Program'": ICANN states that it "will construe 'New gTLD Program Rules' to mean the gTLD Applicant Guidebook and the Auction Rules for New gTLDs: Indirect Contention Edition". Afilias observes that ICANN drafted and published the gTLD Applicant Guidebook (the "AGB") and the Auction Rules. As ICANN is well aware, the AGB and Auction Rules specifically refer to—and purport to require applicants to comply with—rules set forth in other documents, including, for example, the New gTLD Auctions Bidder Agreement. *See, e.g.*, Afilias' Amended Request for Independent Review ("Amended Request"), ¶ 25 (citing the requirements of the Bidder Agreement). Having drafted the AGB and Auction Rules so that they refer to and incorporate the requirements of other documents, ICANN cannot now pretend that it does not understand or is unfamiliar with the rules that governed the New gTLD Program.

6. ICANN's objection to a Privilege Log: ICANN maintains it has no obligation to provide a privilege log as requested by Afilias, notwithstanding its objection to many of Afilias' requests as seeking documents that ICANN asserts are protected by privilege. ICANN relies on the absence of a specific requirement contained in the ICDR Rules, the Interim Procedures, or the IBA Rules regarding a privilege log in asserting that it has no obligation to provide one. Yet Article 20 of the ICDR Rules provide that "the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate." It is well-established that an arbitral tribunal may require a party to provide a privilege log. Indeed, the IRP Panel in *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Procedural Order No. 6 (12 June 2015) (Brower, Kantor, and Donahey [Chair]) specifically ordered ICANN to provide a privilege log:

To the extent that ICANN withholds documents that are covered by the Panel's requests on the basis that ICANN asserts that a document is covered by a privilege recognized by the applicable laws, ICANN shall reference the document in a Privilege Log, which describes as to each document withheld the type of document, the general subject matter thereof, the date on which it was created, the authors of the document, all parties who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law that recognizes such claim of privilege.

See also Corn Lake, LLC v. ICANN, ICDR Case No. 01-15-0002-9938, Procedural Order No. 2 (17 Nov. 2015) (Morrill, Ostrove, and Miles [Chair]) (while declining to require a privilege log at the time, the Panel reminded ICANN that "the mere sending of a communication to or from an internal ICANN attorney does not render that communication privileged. The communication also must be made to facilitate the rendition of professional legal services to the client; therefore, the sending or receiving ICANN attorney must be functioning in the capacity of a lawyer (as opposed to Board Member or business advisor, for example) at the relevant time. Further, the mere fact that an in-house ICANN attorney is copied on an e-mail, including as one of many addressees, is insufficient by itself to establish the attorney-client privilege."). Especially where, as here, ICANN has claimed privilege in responding to numerous requests, the Panel should require ICANN to provide a privilege log so that Afilias has a basis on which to assess ICANN's withholding of documents on the basis of an asserted privilege.

7. **ICANN makes a general objection to Afilias’ requests for documents regarding the manner in which ICANN carried out the “informed resolution” and “consideration” of concerns raised by Afilias—which ICANN promised to carry out in its letters to Afilias dated 16 and 30 September 2016.** ICANN maintains that it does not have to respond to such requests based on its assertion that “Afilias makes no claim regarding the manner in which [ICANN] considered and carried out the resolution of questions and comments in Afilias’ [sic] letters of 16 and 30 September 2016.” *First*, ICANN confuses claims and issues. Afilias specifically alleges in its Amended IRP that as early as August 2016, ICANN “*learned of but concealed from the public the terms of the DAA ..., and falsely promised that it would investigate and consider Afilias’ complaints.*” Amended IRP, ¶ 88 (emphasis added). Afilias alleges that such conduct violates ICANN’s “*commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document[ed] policies—all for the purpose of assisting Verisign’s efforts to obtain the rights in .WEB for itself.*” *Id.* (emphasis added). Whether ICANN undertook any “consideration” or “resolution” of the concerns raised by Afilias—as promised in ICANN’s letters of 16 and 30 September—is an issue of fact related to Afilias’ claims that ICANN violated its Articles and Bylaws. *Second*, it is increasingly evident that ICANN intends to defend this case by selectively quoting and omitting portions of Afilias’ Amended IRP in an effort to argue that Afilias did not “include all claims” giving rise to the dispute in the IRP (which, ICANN asserts, is required under Rule 6 of the Interim Procedures). To illustrate the extent to which ICANN is misrepresenting the allegations of Afilias’ Amended IRP—and putting aside for the moment the distinction between issues and claims—we set forth the allegations contained in Afilias’ Amended IRP that are relevant to the document request in question:

46. On 16 September 2016, ICANN sent Afilias, VeriSign, NDC, and Ruby Glen a questionnaire to “facilitate informed resolution” of questions regarding, among other things, whether NDC should have participated in the 27-28 July 2016 .WEB Auction and whether NDC’s application for the .WEB gTLD should be rejected. ICANN did not disclose that it has already received the DAA from VeriSign.

47. On 30 September 2016, Mr. Akram Atallah (President, ICANN’s Global Domains Division) wrote to Afilias and stated: “As an applicant in the contention set, the primary contact for the Afilias[] application *will be notified of [any] future changes to the contention set status or updates regarding the status of [.WEB]....* We will continue to take Afilias’ comments, and other inputs that we have sought, into consideration *as we consider this matter.*”

48. Afilias responded to ICANN’s request [i.e., the questionnaire] on 7 October 2016. Afilias does not know what ICANN did with the information it received, including, presumably from VeriSign, NDC, and Ruby Glen.

49. Throughout 2017, ICANN did not—as Mr. Atallah had promised—notify Afilias of *any* “changes to the contention set status” or *any* “updates regarding the status of .WEB.” However, Afilias had no reason to believe that ICANN was not investigating and considering the issues raised by Afilias—which, again, is what ICANN said it would do.

50. Beginning in February 2018, Afilias’ counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB. On 28 April 2018, ICANN’s counsel at Jones Day responded to Afilias’ counsel that “*the .WEB contention set is on hold*. When the contention set is updated, your client—along with all members of the contention set—will be notified promptly[.]”

51. Without providing any reasons for its decision, on 7 June 2018, ICANN notified Afilias that it had decided to take the .WEB contention set off hold status—signaling that it intended to proceed with delegation of .WEB to NDC; and of course, in light of the terms of the DAA, of which ICANN was now fully aware, to VeriSign.

* * * *

88. Moreover, ICANN’s effectuation of the rule changes in this manner for the benefit of VeriSign in this manner is part of a course of conduct dating back to at least 2016, when ICANN learned of but concealed from the public the terms of the DAA ..., and falsely promised Afilias that it would investigate and consider Afilias’ complaints. Since that time, ICANN has continually violated its commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of documents policies – all for the purposes of assisting VeriSign’s efforts to obtain the rights in .WEB for itself.

Amended Request, ¶¶ 46-51, 88 (footnotes omitted) (emphasis in original). In light of these allegations, ICANN’s assertion that “Afilias Amended Request for IRP makes no claim regarding the manner in which ICANN considered and carried out the resolution of questions and comments”—as ICANN promised to do in its letters of 16 and 30 September 2016—is frivolous, if not an outright attempt to mislead the Panel.

8. Before turning to Afilias’ replies to ICANN’s specific objections and responses, we emphasize the following point regarding ICANN’s assertion that “[p]ursuant to Rule 6 of the Interim Supplementary Procedures, a Claimant’s Request for IRP ‘shall include all claims that give rise to a particular dispute,’ along with ‘[a]ll necessary and available evidence in support of CLAIMANT’S claims’” (emphasis added). Afilias has made broad claims in its Amended IRP concerning ICANN’s violations of its Articles and Bylaws with respect to ICANN’s failure to disqualify NDC from the .WEB application and auction process—“thereby enabling VeriSign eventually to acquire the .WEB gTLD.” Amended Request, ¶ 5. Afilias’ claims rest on a number of factual allegations regarding, *inter alia*, how ICANN conducted the application and auction process; how ICANN investigated (or failed to investigate) Afilias’ concerns about Verisign’s interest in .WEB; how and why ICANN decided to take the .WEB contention set off-hold in June 2018 and proceed to contracting with NDC for the .WEB; and whether, since at least August 2016, ICANN has engaged in a “course of conduct ... for the purpose of assisting VeriSign’s efforts to obtain the rights in .WEB.” *Id.*, ¶ 88. Afilias has made these allegations in good faith, based on the evidence that was “available” to it (to use the language of Rule 6 of the Interim Procedures) at the time it filed its Request for IRP and then its Amended Request for IRP. It must be recalled, however, that we now know that

ICANN received the DAA in August 2016—but failed to disclose even its existence until required to do so in discovery before the Emergency Panelist in December 2018. Ironically, ICANN is now relying on the fact that it has provided almost no information concerning the .WEB delegation process as the basis for arguing that Afilias is not entitled to certain discovery and, moreover, is limited to the allegations concerning factual issues set forth in its Amended Request.

Under ICANN’s position (which, again, conflates issues with claims), document disclosure would serve little or no purpose, and the provisions on disclosure in the Interim Rules would essentially be purposeless. Put differently, if ICANN’s answering statement gave rise to new factual allegations, based on ICANN’s made-for-IRP reading of the Rules, the claimant would not be able to assert them unless it amended its IRP Request. ICANN’s position is entirely inconsistent with the norms of international arbitration (and indeed, all forms of dispute resolution with which we are familiar), which recognize that a party’s allegations typically evolve as new information and evidence is discovered as the case proceeds, and with a dispute resolution system that specifically provides for discovery in the form of document production. Again, ICANN is the regulator whose actions and inactions are at issue in an IRP. For ICANN to take the position that a claimant is strictly, narrowly and forever bound to only the factual allegations that the claimant was able to state in its first pleading—before ICANN has stated its position or provided any evidence or before document disclosure—is as self-serving as it is baseless.

* * *

As the Panel considers Afilias’ requests, and ICANN’s objections and responses thereto, it is important to recall that ICANN’s Bylaws provide that ICANN is “accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws.” Bylaws § 4.1. Article 4 of the Bylaws creates an “independent review processes”, which is intended to “reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions” set forth throughout the Bylaws. *Id.* Afilias’ Amended Request for IRP challenges several actions and inactions by ICANN’s Board and Staff that Afilias claims violated ICANN’s Articles or Bylaws. *Id.* at 4.3(b)(iii)(A). To evaluate the merits of Afilias’ claims, the Panel will need to understand ***what ICANN knew*** about the relationship, agreements and understandings between Verisign and NDC, ***when ICANN learned*** of these things, ***what actions or inactions*** where undertaken by ICANN in response, and ***why ICANN chose to act or not act***. The purpose of seeking discovery in the context of this ICANN accountability mechanism is not to supplement the facts about Verisign’s and NDC’s relationship and conduct, but rather to discover what ICANN knew, when it knew it, and why it chose to act or not act. As stated above, it is therefore unsurprising that Afilias’ list of requests is significantly greater than ICANN’s. As the Claimant, Afilias seeks discovery into the merits of its claims, while ICANN, as the Respondent, may only take discovery on the merits of its defenses, which are comparatively fewer and far narrower in scope.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
1	<p>The documents sufficient to show when ICANN first learned that Verisign was interested or involved in acquiring rights in the .WEB gTLD, including, without limitation, through the Domain Acquisition Agreement that Verisign entered with NDC.</p>	<p>ICANN claims to have learned of Verisign's involvement with NDC only on 23 August 2016, when ICANN received a copy of the Domain Acquisition Agreement (“DAA”), however, this is disputed.¹ Afilias does not know when ICANN first learned that Verisign was interested in the rights to .WEB, but has good faith reason to believe it was before 23 August 2016. Afilias seeks these documents as evidence as to (1) whether and when ICANN should have “fully investigated rumors that NDC had reached an agreement with VeriSign”² and (2) the extent of ICANN's knowledge of Verisign's involvement before and immediately after the .WEB Auction.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles of Incorporation (“Articles”), Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which ICANN later considered</p>	<p>Contrary to Afilias' assertion, the date on which ICANN first learned that Verisign was interested in acquiring rights in .WEB is not material to the outcome of Afilias' claims that ICANN did not properly investigate or resolve allegations regarding NDC's relationship with Verisign once Afilias brought those allegations to ICANN's attention.</p> <p>Moreover, Afilias is incorrect in asserting that ICANN claims to have learned of Verisign's involvement with NDC only on 23 August 2016. ICANN is not aware of the earliest date on which any officer, employee or staff member may have heard a rumor of Verisign's involvement. However, ICANN notes that Afilias sent a letter to ICANN dated 8 August 2016, stating that</p>	<p>ICANN's objections to this request—and its position that it will not produce documents responsive to this request—are without merit and should be rejected.</p> <p><i>First</i>, the request is relevant and material to Afilias' allegation that ICANN has failed to investigate and properly consider violations of the New gTLD Program Rules that required ICANN to “disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction.” Amended Request, ¶ 5. The date on which ICANN first learned that Verisign was “interested or involved in acquiring rights in the .WEB gTLD, including, without limitation, through the [DAA] that Verisign entered into with NDC” is relevant to that</p>	<p>As limited in Afilias' Reply in regard to the custodians whose records are to be searched, the request is granted.</p>

¹ Letter from R. Johnston to E. Enson (23 Aug. 2016).

² *Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 01-18-0004-2702, Amended Request by Afilias Domains No. 3 Limited for Independent Review (21 Mar. 2019) (hereinafter, “Amended Request”), ¶ 78.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>and carried out the resolution of questions and comments raised by Afilias in regards to NDC's actions, such as ICANN's failure to comply with its transparency obligations by refusing to update Afilias on its investigation; (2) by accepting Verisign's secret participation in the .WEB contention set resolution; (3) by failing to disqualify NDC's application and/or bid for .WEB for violating the New gTLD Program Rules; and (4) by providing preferable treatment to Verisign.</p>	<p>a 10-Q filed by Verisign on 28 July 2016 and a press release issued on 1 August 2016 indicated that Verisign was involved with NDC in the .WEB auction. (Ex. C-0049.)</p> <p>ICANN further objects to the extent that this request purports to require ICANN to conduct a broad search of documents in the accounts of all of its officers, employees or staff in an effort to uncover the first instance in which any individual may have heard a rumor that Verisign was interested in acquiring .WEB. Afilias' request is an unwarranted fishing expedition, and the burden of conducting such a search substantially outweighs any legitimate benefit Afilias plausibly could expect from the results of such a search.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other</p>	<p>allegation and material to the claims at issue in the IRP.</p> <p><i>Second</i>, ICANN mischaracterizes the request to make it appear unduly burdensome, when in fact it is not. Contrary to ICANN's assertion, the request is not seeking when ICANN first heard of a "rumor" that Verisign was interested in acquiring .WEB. The plain language of the request seeks documents showing when ICANN first "learned" that Verisign was interested in acquiring rights in .WEB. Surely ICANN understands the difference between "learning" a fact—especially one as important as Verisign's interest in acquiring rights in .WEB—and "having heard a rumor."</p> <p><i>Third</i>, ICANN's objection to this requests on the grounds that it might seek documents protected by various privileged is unavailing. To the extent that the answer to when ICANN first learned that</p>	

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			<p>applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>Verisign was interested in acquiring rights in the .WEB gTLD is contained in a privileged document or documents, then ICANN can simply provide the date without disclosing the document(s) (while including such document(s) on an appropriate privilege log).</p> <p>While Afilias disagrees with ICANN's assertion that the request is burdensome, Afilias is willing to limit Request No. 1 so that ICANN needs only to conduct a search of the records of the following persons: Akram Atallah; Fadi Chehade; Jared Erwin; John Jeffrey; Christopher LaHatte; Amy Stathos; Herbert Wave; Russell Weinstein; Christine Willett; and Susan Yao. Especially with this limitation, the Panel should order ICANN to search for and produce responsive documents.</p> <p>Given that several of these individuals are in-house counsel at ICANN, Afilias</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
				emphasizes the need for ICANN to provide a privilege log if it withholds documents based on an asserted privilege, for the reasons explained in Paragraph 6 of Afilias' Reply to ICANN's General Objections and Responses. It also underscores the need for ICANN to comply with the standard for withholding any document as privileged, as articulated in the <i>Corn Lake</i> order cited in that paragraph. For the avoidance of doubt, we incorporate by reference the instant paragraph into each and every reply set forth below.	
2	The documents reflecting (a) ICANN's internal communications before 23 August 2016 and (b) communications before that date between ICANN and Verisign and/or NDC concerning Verisign's interest or involvement in acquiring	Afilias understands that ICANN sent Verisign and/or NDC a "request for information" following the .WEB Auction, in response to which Verisign sent ICANN the DAA and other communications between Verisign and NDC. Afilias further understands that ICANN and Verisign and/or NDC discussed (1) the possibility of assigning a new gTLD	Although styled as a single request for documents, this is actually two distinct requests: (2)(a) seeks internal ICANN communications and (2)(b) seeks communications between ICANN and Verisign and/or NDC. ICANN responds to these requests separately.	<u>Request 2(a)</u> : ICANN's internal communications before 23 August 2016 concerning Verisign's interest or involvement in acquiring rights in the .WEB gTLD—including with respect to ICANN's "request for information"—are relevant and material for the	Request 2(a) is granted. ICANN's acceptance to search for documents responsive to Request 2(b) is noted by the Panel.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	rights in the .WEB gTLD, including, without limitation, ICANN's "request for information" referred to on page 1 of the letter dated 23 August 2016 from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day. ³	<p>Registry Agreement prior to the 23 August 2016 letter,⁴ and (2) allegations that NDC failed to report material changes to its application.⁵ Afilias seeks these documents as evidence as to the extent of ICANN's knowledge about NDC's decision to sell, assign, and transfer virtually all of its rights and obligations in its .WEB application to Verisign.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which ICANN later considered and carried out the resolution of questions and comments raised by Afilias in regards to NDC's actions, such as ICANN's failure to comply with its transparency obligations by refusing to update Afilias on its investigation; (2) by accepting Verisign's secret participation in the .WEB contention set resolution; (3) by failing to disqualify NDC's application and/or bid for .WEB</p>	<p><u>Response to Request 2(a).</u></p> <p>ICANN objects that the documents sought by this request are not relevant and material to the outcome of this dispute. Internal ICANN communications prior to 23 August 2016 are not material to determining whether ICANN complied with its Bylaws in investigating and responding to complaints raised by Afilias in August/September 2016 and thereafter.</p> <p>ICANN further objects that this request is a fishing expedition in that it does not identify any particular persons whose communications Afilias seeks, but instead seeks to have ICANN search indiscriminately among its officers and staff for any communication regarding Verisign's potential interest in .WEB. The burden of conducting such a search</p>	<p>same reasons stated with respect to Afilias' Request No. 1 above, including to Afilias' allegation that ICANN has failed to investigate and properly consider violations of the New gTLD Program Rules that required ICANN to "disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction."</p> <p>They are also relevant and material to Afilias' allegation that ICANN "learned of but concealed from the public the terms of the DAA" as of at least August 2016. Amended Request, ¶88.</p> <p>Although Afilias disagrees with ICANN's assertion that the request is burdensome, Afilias is willing to limit Request No. 2(a), so that ICANN needs only to conduct a search of the</p>	

³ Letter from R. Johnston to E. Enson (23 Aug. 2016), p. 1 ("On behalf of Nu Dotco, LLC ('NDC') and VeriSign Inc. ('Verisign'), respectively, Brian Leventhal and I jointly submit this letter to you in response to **your request for information** regarding the agreement between NDC and Verisign relating to the .web gTLD ('Agreement').") (emphasis added)).

⁴ See Letter from R. Johnston to E. Enson (23 Aug. 2016), Attachment C (discussing ICANN's position on assignments in September 2015).

⁵ Amended Request, ¶¶ 30-34.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>for violating the New gTLD Program Rules; and (4) by providing preferable treatment to Verisign.</p>	<p>substantially outweighs any legitimate benefit Afilias plausibly could expect from the results of such a search.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p> <p><u>Response to Request 2(b).</u></p> <p>ICANN incorporates its objections to Request 2(a), which also apply to Request 2(b).</p> <p>Subject to these objections, ICANN will conduct a reasonable search and produce non-privileged documents constituting communications before August 23, 2016 between ICANN and Verisign and/or</p>	<p>records of the persons identified in Afilias' Reply for Request No. 1</p> <p><u>Request 2(b):</u> For the avoidance of doubt, this portion of the request specifically includes the "request for information" referred to on page 1 of the letter dated 23 August 2016 from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day, as well as any other communications before 23 August 2016 between (a) ICANN and (b) Verisign or NDC concerning Verisign's interest in acquiring rights in the .WEB gTLD.</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			NDC concerning Verisign's interest or involvement in acquiring rights in the .WEB gTLD, to the extent any such documents are found.		
3	The documents reflecting communications on or after 23 August 2016 between ICANN and Verisign and/or NDC concerning Verisign's interest or involvement in acquiring rights in the .WEB gTLD, including, without limitation, such communications regarding the letter dated 23 August 2016 from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day and/or its attachments, including, without limitation, the Domain Acquisition Agreement attached as Exhibit A to that letter).	<p>Afilias understands that ICANN claims to not have received a copy of the DAA prior to 23 August 2016. Afilias thus seeks these documents as evidence as to (1) ICANN's reaction to the DAA, especially whether ICANN believed that the DAA violated the New gTLD Program Rules; (2) NDC and/or Verisign's responses to ICANN's reaction; (3) any discussion regarding whether the DAA violated the New gTLD Program Rules; and (4) any investigation of NDC and/or Verisign that resulted from the disclosure of the DAA.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by concealing "the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign);"⁶ (2) by</p>	<p>ICANN objects that the phrase "documents reflecting communications" is vague and ambiguous. Moreover, to the extent Afilias seeks to require ICANN to review voluminous internal documents in an effort to identify any document that may "reflect[]" a communication with Verisign or NDC, Afilias' request is unduly burdensome and, as phrased, the time period for this request is well over three years. The burden on ICANN of conducting such a search substantially outweighs any benefit Afilias plausibly could expect to obtain from the results of such a search.</p> <p>ICANN objects to this request on the further ground that, to the</p>	<p>ICANN accepts that this request seeks documents that are relevant and material to the outcome of this dispute, but objects to the phrase "documents reflecting communications" as vague and ambiguous." It is not. Communications by telephone or in person, for example, may be reflected in a document that does not constitute the communication itself. Documents reflecting such communications should be searched for and produced.</p> <p>With respect to ICANN's objection to producing documents responsive to this request on the grounds that they might be privileged, ICANN does not explain how</p>	Request granted, save that the word "reflecting" shall be replaced by "evidencing, disclosing, or referring to".

⁶ *Id.*, ¶ 78.

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		<p>failing to disqualify NDC's application and/or bid for .WEB for violating the New gTLD Program Rules; (3) by accepting Verisign's secret participation in the .WEB contention set resolution; and (4) by providing preferable treatment to Verisign.</p>	<p>extent the phrase "documents reflecting communications" between ICANN and Verisign and/or NDC is construed to include documents other than any underlying communications, the request is a fishing expedition seeking documents that are not material to the outcome of Afilias' asserted claims.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search and produce non-privileged communications between ICANN and Verisign and/or NDC from 23 August 2016 to the initiation of this IRP concerning Verisign's interest or involvement in acquiring rights in .WEB, to the extent any are found.</p>	<p>communications between ICANN on the one hand and Verisign or NDC on the other could be protected by privilege. To the extent such communications are reflected in internal ICANN documents that contain otherwise privileged information, then the privileged information can be redacted so that the portion of the document reflecting the communication between ICANN and Verisign/NDC is produced.</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
4	<p>To the extent not produced in response to Requests No. 1-3, the documents reflecting ICANN's analysis of and reactions to Verisign's interest or involvement in acquiring rights in the .WEB gTLD, including, without limitation, ICANN's analysis of and reactions to the letter dated 23 August 2016 from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day, the attachments to that letter (including, without limitation, the Domain Acquisition Agreement), and/or any other information or communications provided by Verisign and/or NDC concerning Verisign's interest or involvement in acquiring rights in the .WEB gTLD.</p>	<p>Afilias understands that ICANN claims to have not received a copy of the DAA prior to 23 August 2016. Afilias thus seeks these documents as evidence on (1) ICANN's reaction to the DAA, especially whether ICANN believed that the DAA violated the New gTLD Program Rules; and (2) any investigation of NDC and/or Verisign that resulted from the disclosure of the DAA.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by concealing "the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign);"⁷ (2) by failing to disqualify NDC's application and/or bid for .WEB for violating the New gTLD Program Rules; (3) by accepting Verisign's secret participation in the .WEB contention set resolution; and (4) by providing preferable treatment to Verisign.</p>	<p>ICANN objects that this request is vague, ambiguous and overbroad in that it seeks documents "reflecting" ICANN's analysis of and reactions to Verisign's interest in .WEB. Further, the burden on ICANN of searching for documents that may "reflect[]" ICANN's reaction or analysis substantially outweighs any benefit that Afilias plausibly could expect to obtain.</p> <p>ICANN also objects that the reactions of individual ICANN officers or other staff members regarding Verisign's interest in .WEB are not relevant and material to the outcome of Afilias' claims. Nor are ICANN's analyses of the merits of Afilias' claims relevant or material to the outcome of this dispute. As set out in ICANN's Response to Afilias' Amended Request for IRP, ICANN has not yet made a determination on the merits of Afilias' allegations</p>	<p>Documents reflecting ICANN's analysis of and reactions to Verisign's interest or involvement in acquiring rights in the .WEB gTLD – including, without limitation, to the letter dated 23 August 2016 from Mr. Johnson to Mr. Enson and its attachments – are relevant and material for the same reasons stated with respect to Afilias' Request No. 2 above, including Afilias' allegation that ICANN has failed to investigate and properly consider violations of the New gTLD Program Rules that required ICANN to "disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction." They are also relevant and material to Afilias' allegation that ICANN "learned of but concealed from the public the terms of the DAA" as of at least August 2016. Amended Request, ¶88.</p> <p>ICANN's assertion that any</p>	<p>Request granted, save that the word "reflecting" shall be replaced by "evidencing, disclosing, or referring to".</p>

⁷ *Id.*, ¶ 78.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>against NDC and Verisign. Accordingly any such analyses are necessarily preliminary and incomplete.</p> <p>ICANN further objects that this request seeks documents protected by the attorney-client privilege and the work product doctrine. In particular, any analysis of the merits of Afilias' allegations against NDC and Verisign would have been done by counsel for ICANN for the purpose of providing legal advice to ICANN.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>such analyses are “necessarily preliminary and incomplete” does not excuse ICANN from producing such analyses. To the contrary, the fact that such analyses are “preliminary and incomplete” supports Afilias' claim that ICANN failed to conduct an adequate investigation and “falsely promised Afilias that it would investigate and consider Afilias' complaints” (Amended Request ¶ 88)—before taking the .WEB contention set off-hold in June 2018 and proceeding toward a contract with NDC for the .WEB registry agreement.</p> <p>The Panel should require ICANN to search for and produce any documents responsive to this request.</p>	
5	The documents concerning or discussing the two emails included as Attachment C to the 23 August 2016 letter	Afilias understands that Mr. Pat Kane of Verisign communicated with Messrs. Akram Atallah and Daniel Halloran of ICANN regarding “ICANN’s processes for	ICANN objects that this request is vague, ambiguous and overbroad in that it seeks “documents concerning or	Afilias rejects the limitation placed by ICANN on this request. The proximity in time between the date on which	Request granted.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	<p>from Mr. Johnston to Mr. Enson, referred to in Request No. 1), including, without limitation, documents discussing the purpose of the question posed by Mr. Pat Kane of VeriSign as discussed in the emails.⁸</p>	<p>the transfer and assignment of new gTLD registry agreements” in September 2015.⁹ Afilias further understands that NDC and Verisign entered into the DAA on 25 August 2015.¹⁰ Afilias seeks the documents in this request as evidence on (1) ICANN’s knowledge about Verisign’s involvement with NDC prior to the .WEB Auction; (2) ICANN’s position regarding the assignability of gTLD registry agreements; and (3) when ICANN learned that Verisign is the “true bidder-in-interest” at the .WEB Auction; and (4) whether ICANN knew the context in which VeriSign posed the question regarding assignability¹¹</p> <p>The request is therefore relevant and material to Afilias’ claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by failing to reject NDC’s application for violating the New gTLD Program Rules; and (2) by failing to fully investigate rumors that NDC had reached</p>	<p>discussing” two particular emails. As such, the request is also a fishing expedition that seeks documents that are not material to the outcome of Afilias’ asserted claims. ICANN will not search broadly for any documents that may concern or discuss those two emails.</p> <p>ICANN also objects to the extent this request seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search for additional communications between Mr. Kane of Verisign, on the one hand, and Akram Atallah and Daniel Halloran, on the other hand, in the two weeks preceding and succeeding the emails referred to in Afilias’ Request No. 5 that concern the same</p>	<p>Verisign and NDC entered the DAA (25 August 2015)—and the date on which Mr. Pat Kane of Verisign and Messrs. Akram Atallah and Daniel Halloran of ICANN exchanged emails about “ICANN’s processes for the transfer and assignment of new gTLD registry agreements” (on 2 and 4 September 2015)—raises the question as to whether these communications were made in connection with the DAA. ICANN’s proposed limitation—to search for additional emails between Mr. Kane on the one hand and Mr. Atallah and Mr. Halloran on the other, during the two weeks preceding and succeeding the emails referred to in Afilias’ request—is unlikely to provide any additional information that is not contained in the emails themselves. Indeed, the email</p>	

⁸ Letter from R. Johnston to E. Enson (23 Aug. 2016), Attachment C.

⁹ *Id.*, Attachment C, p. 2.

¹⁰ *Id.*, Attachment C, p. 1.

¹¹ Amended Request, ¶¶ 53-74.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		an agreement with Verisign prior to the .WEB Auction.	subject matter, and ICANN will produce such communications if any are found.	<p>from Mr. Kane to Messrs. Atallah and Halloran (dated 2 September 2015) specifically states: "Thanks for taking my call yesterday and addressing the question that I posed."</p> <p>While disagreeing with ICANN that the request is vague, ambiguous, or overbroad, Afilias is willing to limit the request to: communications between (a) Mr. Kane and (b) Mr. Atallah and/or Halloran; documents reflecting such communications (including, without limitation, the phone call referred to in Mr. Kane's 2 September 2015 email); and documents concerning or discussing those communications, during the period August and September 2015. Especially given this limitation, the Panel should order ICANN to search for and produce responsive documents.</p>	
6	The documents reflecting ICANN's analysis and consideration of the impact	Afilias believes that Verisign seeks the rights to the .WEB gTLD in order to prevent competitors from obtaining "the	Although styled as a single request for documents, this is actually two distinct requests:	<u>Request 6(a)</u> : ICANN states that it "doubts that it has any documents analyzing the	The Panel notes ICANN's acceptance to search documents

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	<p>that Verisign's acquisition of rights in .WEB would have on enabling competition and open entry in Internet-related markets, including documents that reflect ICANN's knowledge that Verisign sought to acquire rights to .WEB to prevent those rights from being acquired by Afilias or other registry operators.</p>	<p>best potential competitor to .COM."¹² Afilias seeks the documents in this request as evidence on (1) the viability of .WEB as a .COM competitor and (2) ICANN's knowledge regarding Verisign's intent to stymie competition in the domain name system by acquiring the .WEB gTLD.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by failing to promote competition by deciding to take to take the .WEB contention set off hold in June 2018 and (2) by proceeding to begin delegating .WEB to NDC (and hence to Verisign).</p>	<p>Request 6(a) seeks documents reflecting ICANN's analysis and consideration of the impact on competition of Verisign's potential acquisition of rights in .WEB; and Request 6(b) seeks documents concerning ICANN's knowledge that Verisign sought to acquire rights in .WEB. ICANN will respond to these requests separately.</p> <p><u>Request 6(a)</u></p> <p>ICANN objects that this request is vague, ambiguous and overbroad in that it seeks documents "reflecting" ICANN's analysis. ICANN also objects to the extent this request seeks documents protected by the attorney-client privilege and the work product doctrine. Any analysis by attorneys or persons acting on their behalf for the purpose of providing ICANN legal advice is privileged.</p> <p>Further, as set out in ICANN's Response to the Amended</p>	<p>impact that Verisign's acquisition of rights in .WEB would have on the market for gTLDs," but that it will "conduct a reasonable search and produce non-privileged, responsive documents, if any are found." Such documents are of course relevant and material to Afilias' claim that ICANN's failure to disqualify NDC—and its decision to proceed to contracting with NDC for the .WEB gTLD registry agreement (knowing that NDC is contractually obligated to assign the agreement to Verisign)—violates ICANN's competition mandate. <i>See, e.g.</i>, Amended Request, ¶ 83. ICANN's response to this Request—and its suggestion that it has no non-privileged documents that are responsive—again emphasizes the need for ICANN to provide a privilege log in this case.</p>	<p>responsive to Request 6(a).</p> <p>Request 6(b) is granted, save that the word "reflect" shall be replaced by "evidence, disclose, or refer to".</p>

¹² *Id.*, ¶ 82.

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			<p>Request for IRP and the witness statement of J. Beckwith Burr, ICANN does not act as a quasi-government regulator by assessing the extent to which any particular entity's acquisition of a given gTLD will promote competition. Rather, ICANN fulfills its competition mandate by enacting policies that promote competition, such as the New gTLD Program, which has made over 1,200 new gTLDs available to consumers and competitors. Accordingly, ICANN doubts that it has any documents analyzing the impact that Verisign's acquisition of rights in .WEB would have on the market for gTLDs.</p> <p>Subject to these objections, ICANN will conduct a reasonable search and produce non-privileged, responsive documents, if any are found.</p> <p><u>Response to 6(b).</u></p> <p>ICANN's objections to Request 6(a) apply also to Request 6(b). Documents "that reflect</p>	<p><u>Request 6(b)</u>: In objecting to this portion of Afilias' request—and stating that it will not produce documents responsive to this portion of the request—ICANN misstates the request. Afilias is seeking documents reflecting ICANN's knowledge that "Verisign sought to acquire rights to .WEB to prevent those rights from being acquired by Afilias or other registry operators" (emphasis added). In restating the request in its objection, ICANN omits the italicized portion—which is of course critical to the request. To the extent ICANN has any such documents, they are plainly relevant and material to Afilias' claim that ICANN has breached its competition mandate. The Panel should order ICANN to search for and produce such documents.</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>ICANN's knowledge that Verisign sought to acquire rights to ".WEB" is vague, ambiguous and overbroad. ICANN does not understand what documents are sought by this request. To the extent Afilias seeks to require ICANN to search broadly for documents indicating that any ICANN officer or staff member heard a rumor that Verisign may seek to acquire rights to ".WEB," Afilias' request is an unwarranted fishing expedition and the burden of searching for such documents substantially outweighs any benefit that Afilias reasonably could expect to obtain from the documents.</p> <p>Further, the documents sought by Request 6(b) are not material to the outcome of this case. It is undisputed that ICANN was aware by September 2016 that Verisign would seek to acquire rights to ".WEB." Documents "reflect[ing]" that awareness are not material to the outcome of Afilias' claims that ICANN violated its Bylaws by "deciding</p>		

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>to take the .WEB contention set off hold in June 2018 and [...] by proceeding to begin delegating .WEB to NDC (and hence to Verisign).”</p> <p>Based on these objections, ICANN will not produce documents responsive to Request 6(b).</p>		
7	<p>The document(s) that refer to (a) the letter sent by Scott Hemphill of Afilias to Mr. Atallah on 8 August 2016 concerning NDC’s violations of the Applicant Guidebook;¹³ (b) the letter sent by Scott Hemphill of Afilias to Mr. Atallah of ICANN on 9 September 2016 concerning NDC’s violations of the Applicant Guidebook;¹⁴ or (c) Mr. Atallah’s letter to Mr. Hemphill dated 30 September 2016.¹⁵</p>	<p>Afilias raised its concerns with NDC’s application for .WEB and the .WEB Auction in August and September 2016.¹⁶ ICANN further informed Afilias that the .WEB contention set was placed on-hold in response to a pending ICANN Accountability Mechanism without responding to Afilias’ concerns, except to say that it was considering those concerns and would keep Afilias apprised of the process.¹⁷ Afilias seeks the documents in this request as evidence on (1) ICANN’s response to Afilias’ concerns, including any investigative actions ICANN undertook; (2) ICANN’s decision to place the .WEB contention set on-hold; and (3)</p>	<p>ICANN objects that the documents sought by this multi-pronged request are not relevant and material to the outcome of Afilias’ claims. Internal ICANN documents referring to Mr. Hemphill’s and Mr. Atallah’s letters are not material to resolving Afilias’ claim that ICANN violated its Bylaws by not making a determination on the merits of Afilias’ contentions while accountability mechanisms were pending, or by purportedly failing to disqualify NDC based on its alleged violations of the</p>	<p>The documents referred to in this request – Mr. Hemphill’s letter to Mr. Atallah dated 8 August 2016; Mr. Hemphill’s letter to Mr. Atallah dated 9 September 2016; and Mr. Atallah’s letter to Mr. Hemphill dated 30 September 2016—are specifically discussed in the Amended Request (at ¶¶ 44-49). The 8 August 2016 and 9 September 2016 letters are the first letters by which Afilias raised its concerns about Verisign’s reported acquisition of rights in .WEB. As</p>	Request granted.

¹³ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 Aug. 2016) [Ex. C-49].
¹⁴ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (9 Sep. 2016), [Ex. RE-12].
¹⁵ Letter from A. Atallah (President, ICANN’s Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), [Ex. C-61].

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>ICANN's subsequent decision to take the .WEB contention set off hold and proceed to enter a registry agreement with NDC.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN's letters to Afilias dated 16 September 2016 and 30 September 2016; (2) by failing to act with transparency in regards to its investigation of NDC and Verisign; and (3) by concealing "the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign)." ¹⁸</p>	<p>New gTLD Auction Rules.</p> <p>ICANN further objects that this request is vague, ambiguous and overboard, in that it seeks documents that "refer" to any of three letters, without limitations as to custodian, time period, or the nature of any such "refer[ence]."</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>discussed above, Mr. Atallah, in his 30 September 2016 letter, promised Afilias that ICANN would "continue to take Afilias' comments, and other inputs that we have sought, into consideration as we consider this matter." There is no evidence whatsoever that ICANN ever did so.</p> <p>Documents referring to these letters are therefore relevant and material for the same reasons stated with respect to Afilias' Request No. 1 above, including to Afilias' allegation that ICANN has failed to investigate and properly consider violations of the New gTLD Program Rules that required ICANN to "disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction." They are also relevant and material to Afilias'</p>	

¹⁶ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (8 Aug. 2016) [Ex. C-49]; Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (9 Sep. 2016), [Ex. RE-12].

¹⁷ Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), [Ex. C-61].

¹⁸ Amended Request, ¶ 78.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
				<p>allegation that ICANN “learned of but concealed from the public the terms of the DAA” as of at least August 2016. Amended Request, ¶88.</p> <p>ICANN has provided no satisfactory explanation as to why it would be burdensome to search for documents referring to these letters. Given that the existence of such documents—or for that matter, the non-existence of such documents—are relevant to Afilias’ allegations and material to the outcome of this case, the Panel should order ICANN to search for and produce such documents.</p>	
8	The document(s) related to the preparation of the topics set forth in the letter dated 16 September 2016 from Ms. Christine A. Willett of ICANN to Mr. John Kane 2016, including, without limitation, documents reflecting or referring to any	Afilias understands that Ms. Willett requested “additional information” from Afilias, Ruby Glenn LLC, Verisign, and NDC in order to “help facilitate informed resolution of” the questions posed to ICANN by Afilias and Ruby Glen LLC regarding, among other issues, whether NDC should have participated in the .WEB Auction. ²⁰ Afilias believes that the	ICANN objects that the documents sought by this extremely broad request are not relevant and material to the outcome of this dispute. ICANN’s decision in September 2016 to seek additional information from Afilias, Ruby Glen, Verisign and NDC related	Ms. Willett’s 16 September 2016 letter to Mr. John Kane of Afilias provided what can best be described as a set of interrogatories, designed to seek Afilias’ position on a variety of topics in connection with the concerns raised by Afilias and others regarding	Request granted in part, as follows: The documents evidencing, disclosing or referring to any communications between (a) ICANN and (b) VeriSign and/or NDC

²⁰ *Id.*, p. 1.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	<p>communications between (a) ICANN and (b) Verisign and/or NDC concerning these topics.¹⁹</p>	<p>requests for “additional information” are tailored to issues that specifically arise from the DAA, and the manner in which NDC entered into the DAA with Verisign. Afilias seeks the documents in this request as evidence on (1) ICANN’s reasons for each “additional information” request in the 16 September 2016 letter; (2) the extent that the DAA informed the requests; and (3) the extent (if any) that Verisign and/or NDC influenced the requests.</p> <p>The request is therefore relevant and material to Afilias’ claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN’s letters to Afilias dated 16 September 2016 and 30 September 2016; (2) by accepting Verisign’s secret participation in the .WEB contention set resolution; (3) by failing to reject NDC’s application and/or disqualify NDC’s bids for failing to comply with the New gTLD Program Rules; and (4) by providing</p>	<p>to allegations against NDC and Verisign is not material to the Panel’s determination of whether ICANN breached its Bylaws by not making a determination on the merits of Afilias’ contentions while accountability mechanisms were pending, or by purportedly failing to disqualify NDC based on its alleged violations of the New gTLD Auction Rules.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad. It is not clear what is encompassed by “document(s) related to the preparation of the topics.” Moreover, the burden on ICANN of searching for such documents substantially outweighs any benefit Afilias’ could plausibly expect to obtain from them.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p>	<p>ICANN’s reported acquisition of rights in .WEB. As stated, Afilias believes that many of the topics were tailored to issues that specifically arose from the DAA and may have been developed in consultation with VeriSign and/or NDC.</p> <p>Documents related to the preparation of such documents are plainly relevant and material for the same reasons stated with respect to Afilias’ Request No. 1 above, including to Afilias’ allegation that ICANN has failed to investigate and properly consider violations of the New gTLD Program Rules that required ICANN to “disqualify NDC from the .WEB contention set, or to disqualify NDC’s bids in the .WEB Auction.” They are also relevant and material to Afilias’ allegation that ICANN “learned of but concealed from the public the terms of the DAA” as of at least August</p>	<p>concerning the topics set forth in the letter dated 16 September 2016 from Ms. Willett to Mr. Kane.</p>

¹⁹ Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afilias’ Corporate Services) (16 Sep. 2016), [Ex. C-50].

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		preferable treatment to Verisign.	Based on these objections, ICANN will not produce documents responsive to this request.	<p>2016, and that ICANN has acted “for the benefit of Verisign.” Amended Request, ¶88.</p> <p>ICANN does not and cannot explain why it would be burdensome to search for and produce the documents related to the preparation of the topics set forth in the 16 September 2016 letter.</p> <p>However, Afilias is willing to limit its request to documents reflecting or referring to any communications between (a) ICANN and (b) Verisign and/or NDC concerning these topics, and documents reflecting the extent to which the DAA provided a basis for the formulation of these topics. Afilias is also willing to limit the time period for this request to August and September 2016. Especially given these limitations, the Panel should order ICANN to search for and produce responsive documents.</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
9	<p>The responses provided by Verisign and NDC in response to the topics posed by Ms. Christine A. Willett in the letter dated 16 September 2016 from Ms. Christine A. Willett of ICANN to Mr. John Kane 2016, as well as the documents reflecting ICANN's analysis of their and any further communications between (a) ICANN and (b) Verisign and/or NDC concerning their responses.²¹</p>	<p>Afilias understands that Verisign and NDC also submitted responses to Ms. Willett's request for "additional information" in order to "help facilitate informed resolution of" the questions posed to ICANN by Afilias and Ruby Glen LLC regarding, among other issues, whether NDC should have participated in the .WEB Auction.²² Afilias seeks these responses as evidence concerning whether and how ICANN investigated whether NDC violated the New gTLD Program Rules.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN's letters to Afilias dated 16 September 2016 and 30 September 2016; and (2) by failing to reject NDC's application and/or disqualify NDC's bids for failing to comply with the New gTLD</p>	<p>ICANN objects that this request seeks documents that are not relevant and material to the outcome of Afilias' claims. As set out in ICANN's Response to Afilias Amended Request for IRP, ICANN has not made a determination on the merits of Afilias' allegations against NDC and Verisign. Accordingly, any analysis of the merits of Afilias' allegations against Verisign/NDC and Verisign/NDC's response is necessarily preliminary and incomplete.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will produce the responses provided by Verisign and NDC in response to the topics posed by Ms. Christine A.</p>	<p>Given ICANN's agreement to produce the documents specified in its response to this request, Afilias makes no reply.</p>	<p>The Panel notes ICANN's agreement to produce responsive documents.</p>

²¹ *Id.* (requesting responses from Verisign and NDC).

²² *Id.*

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		Program Rules.	Willett in the letter dated 16 September 2016 and will produce any communications between ICANN and NDC and/or Verisign concerning NDC's and/or Verisign's responses, to the extent any are found.		
10	The documents reflecting or analyzing Afilias' response to the topics posed by Ms. Christine A. Willett in the letter dated 16 September 2016 from Ms. Christine A. Willett of ICANN to Mr. John Kane 2016, ²³ as well as the documents reflecting any communications between (a) ICANN and (b) Verisign and/or NDC concerning Afilias' responses.	<p>Afilias understands that the 16 September 2016 letter is part of ICANN's purported investigation of NDC's actions in regards to its .WEB application and the .WEB Auction. Afilias seeks the documents in this request as evidence on (1) ICANN's response to Afilias' concerns, including any investigative actions ICANN undertook; (2) the length of ICANN's investigation, which affects the time limitations applicable to Afilias' claims; (3) the extent that NDC and/or Verisign were involved in ICANN's investigation; and (4) ICANN's analysis of whether NDC violated the New gTLD Program Rules.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB</p>	<p>Although styled as a single request for documents, this is actually two distinct requests: 10(a) seeking documents analyzing Afilias' response to Ms. Willett's 16 September 2016 letter; and 10(b) communications between ICANN and Verisign and/or NDC concerning Afilias' response to Ms. Willett's 16 September 2016 letter. ICANN will address these requests separately.</p> <p><u>Response to Request 10(a)</u></p> <p>ICANN objects that this request seeks documents that are not material to the outcome of Afilias' claims. As set out in ICANN's Response to Afilias</p>	<p><u>Request 10(a)</u>: Afilias repeats and incorporates by reference its Reply to ICANN's Objection to Request No. 4. The documents are relevant and material for the same reasons stated in that Reply, and ICANN's assertion that any such analysis is "necessarily preliminary or incomplete" provides no basis for ICANN to withhold such documents. To the contrary, the fact that any such analysis is "preliminary or incomplete" supports Afilias' allegations in this IRP. With respect to ICANN's assertion that the word "reflecting" with respect to "Afilias' response" is vague, ambiguous, and overbroad, the word</p>	<p>Request 10(a) is granted, save that the word "reflecting" shall be replaced by "referring to".</p> <p>The Panel notes ICANN's acceptance to produce documents responsive to Request 10(b).</p>

²³ *Id.*

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN's letters to Afilias dated 16 September 2016 and 30 September 2016; (2) by providing preferable treatment to Verisign; (3) by accepting Verisign's secret participation in the .WEB contention set resolution; and (4) by failing to reject NDC's application and/or disqualify NDC's bids for failing to comply with the New gTLD Program Rules.</p>	<p>Amended Request for IRP, ICANN has not made a determination on the merits of Afilias' allegations against NDC and Verisign. Accordingly, any analysis of the merits of Afilias' allegations against Verisign and Verisign's response to Ms. Willett's 16 September 2016 letter is necessarily preliminary and incomplete.</p> <p>This request is vague, ambiguous and overbroad. It is not clear what is encompassed by documents "reflecting . . . Afilias' response to the topics." Moreover, Afilias already has its own response to the topics. Afilias' cannot plausibly expect to obtain any legitimate benefit by acquiring additional documents "reflecting" its response.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other</p>	<p>"reflecting" means "discussing or referring to in any way."</p> <p><u>Request 10(b)</u>: Given ICANN's agreement to conduct a reasonable search for and produce responsive documents as described in ICANN's response, Afilias offers no reply with respect to Request 10(b).</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p> <p><u>Response to Request 10(b).</u></p> <p>ICANN's objections in response to Request 10(a) apply, <i>mutatis mutandis</i>, to Request 10(b). Any communications between ICANN and Verisign and/or NDC are not material to the outcome of Afilias' claims. Request 10(b) is vague, ambiguous and overbroad in that it is not clear what is encompassed by documents "reflecting" communications. ICANN also objects to the extent Request 10(b) seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search for</p>		

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			communications between ICANN and Verisign and/or NDC concerning Afilias' responses to Ms. Willett's 16 September 2016 letter and produce non-privilege responsive documents, to the extent any are found.		
11	The documents created during and reflecting and/or constituting the "informed resolution of these questions," as referred by Ms. Christine A. Willett in the letter dated 16 September 2016 from Ms. Christine A. Willett of ICANN to Mr. John Kane 2016, ²⁴ and the documents provided by ICANN to Verisign and/or NDC concerning such "informed resolution."	On 16 September 2016, Ms. Willett requested "additional information" from Afilias, Ruby Glenn LLC, Verisign, and NDC in order to "help facilitate informed resolution of" the questions posed to ICANN by Afilias and Ruby Glen LLC regarding, among other issues, whether NDC should have participated in the .WEB Auction. ²⁵ Afilias seeks the documents in this request as evidence on (1) the extent of ICANN's knowledge about NDC and/or Verisign's actions in regards to .WEB; (2) how ICANN conducted its investigation; and (3) ICANN's analysis of whether NDC violated the New gTLD Program Rules. The request is therefore relevant and material to Afilias' claim that ICANN	ICANN objects that Afilias' request is unintelligible. As set forth in ICANN's Response to Afilias' Amended Request for IRP, ICANN decided not to make a determination on the merits of Afilias' contentions against Verisign and NDC until accountability mechanisms had concluded. Accordingly, ICANN has not reached a resolution on the merits of Afilias' contentions. Afilias' request for documents constituting such a resolution therefore makes no sense. ICANN further objects that this request is vague, ambiguous and overbroad. In light of Afilias'	ICANN states that it will not produce documents created during and reflecting and/or constituting the "informed resolution" of the questions identified in Ms. Willett's letter of 16 September 2016, based on its assertion that "ICANN decided not to make a determination on the merits of Afilias' contentions against Verisign or NDC until accountability mechanisms had concluded." That ICANN at some unspecified time "decided not to make a determination on the merits of Afilias' contentions"	Request granted, save that the word "reflecting and/or constituting" shall be replaced by "evidencing, constituting or referring to".

²⁴ *Id.*

²⁵ *Id.*, p. 1.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN's letters to Afilias dated 16 September 2016 and 30 September 2016; (2) by accepting Verisign's secret participation in the .WEB contention set resolution; (3) and by failing to disqualify NDC's application and/or bid for .WEB; and (4) by providing preferable treatment to Verisign.</p> <p>The request is further relevant and material to ICANN's assertion that Afilias' claims in this IRP are "overdue" and time-barred; the time-bar issue is affected by the duration of ICANN's investigation of NDC and/or Verisign's actions regarding .WEB and whether ICANN ever provided any indication that ICANN had resolved such investigation prior to 7 June 2018.²⁶</p>	<p>definition of "and" in its preliminary statement, this request literally seeks all documents created during the period that ICANN was purportedly making its "informed resolution," regardless of whether such documents pertain to that resolution.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>in no way excuses ICANN from producing the documents it collected and/or prepared during the process it undertook in proceeding toward the "informed resolution" it advised Afilias it would reach. (Indeed, at no time prior to this IRP did ICANN inform Afilias that it had reached any such "decision.")</p> <p>Afilias has put ICANN's action and inaction regarding its investigation of .WEB squarely at issue in this IRP. <i>See, e.g.</i>, Amended Request, ¶ 88 (alleging that ICANN violated its Articles and Bylaws by, <i>inter alia</i>, concealing the terms of the DAA from the public and falsely promising Afilias that it would investigate and consider Afilias' complaints).</p> <p>The Panel should require ICANN to produce the internal documents it created and/or collected in its efforts to reach</p>	

²⁶ See *Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers*, ICDR Case No. 01-18-0004-2702, ICANN's Response to Amended Request for Independent Review Process (31 May 2019), ¶ 8 (hereinafter, "Response").

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				<p>the “informed resolution” of the questions at issue, as promised by Ms. Willett in her 16 September 2016 letter (notwithstanding ICANN’s assertion that it subsequently abandoned those efforts); its communications with Verisign and/or NDC concerning its efforts to reach the “informed resolution” that ICANN promised to make (even if ICANN did ultimately reach such resolution); and ICANN’s decision “not to make any determination” as promised by Ms. Willett in her 16 September 2016 decision, including, without limitation, any communications that ICANN had with Verisign and/or NDC concerning such decision.</p>	
12	<p>The documents created during and reflecting or constituting the “consideration” given by ICANN to “Afilias’ comments” and other “inputs” regarding the .WEB</p>	<p>The 30 September 2016 letter to Mr. Hemphill indicated that ICANN was continuing to conduct an internal investigation of NDC’s actions during and prior to the .WEB Auction in regards to the .WEB gTLD. Afilias therefore believed that ICANN was continuing to</p>	<p>ICANN objects that this request seeks documents that are not relevant and material to the outcome of Afilias’ claims. As set out in ICANN’s Response to Afilias Amended Request for IRP, ICANN has not made a</p>	<p>Afilias repeats and incorporates by reference its Reply to ICANN’s Objection to Request No. 4. The documents are relevant and material for the same reasons stated in that Reply, and ICANN’s assertion</p>	<p>Request granted, as particularized insofar as the meaning of “other inputs” is concerned, and save that the word “reflecting” shall be</p>

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	<p>contention set, as referred to in the 30 September 2016 letter from Mr. Atallah of ICANN to Mr. Hemphill of Afilias.²⁷</p>	<p>investigate NDC and/or Verisign. Afilias seeks the documents in this request as evidence on (1) the extent of ICANN's knowledge about NDC and/or Verisign's actions in regards to .WEB; (2) how ICANN conducted its investigation; (3) the duration of ICANN's investigation; (4) whether and how ICANN considered whether NDC had violated the New gTLD Program Rules.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias as referred to, <i>inter alia</i>, in ICANN's letters to Afilias dated 16 September 2016 and 30 September 2016; (2) by accepting Verisign's secret participation in the .WEB contention set resolution; (3) and by failing to disqualify NDC's application and/or bid for .WEB; and (4) by providing preferable treatment to Verisign.</p>	<p>determination on the merits of Afilias' allegations against NDC and Verisign. Accordingly, any consideration of the merits of Afilias' allegations against Verisign is necessarily preliminary and incomplete. ICANN's preliminary consideration of those allegations is not material to the outcome of Afilias' claim that its allegations require ICANN to disqualify NDC's application and award .WEB to Afilias.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad. "Other 'inputs'" is undefined and vague. As used in Mr. Atallah's letter, that term was clearly intended to convey that ICANN would consider all relevant information in considering the proper resolution of disputes regarding the .WEB contention set. Moreover, in light of Afilias' definition of "and" in its preliminary statement, this request, read</p>	<p>that any such analysis is "necessarily preliminary or incomplete" provides no basis for ICANN to withhold such documents. To the contrary, the fact that any such analysis is "preliminary or incomplete" supports Afilias' allegations in this IRP.</p> <p>With respect to ICANN's objection that the term "Other inputs" is "vague and defined," as ICANN acknowledges, that is the term used by Mr. Atallah, who wrote the letter in his capacity as President of ICANN's Global Domains Division. Afilias is therefore willing to accept the definition provided by ICANN in its objection, i.e., "all relevant information in considering the proper resolution of disputes regarding the .WEB contention set." For the reasons stated herein, ICANN should be required to produce all documents reflecting or</p>	<p>replaced by "evidencing".</p>

²⁷ Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), [Ex. C-61].

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			<p>literally, seeks all documents created during the period that ICANN was considering Afilias comments and “other ‘inputs’”, regardless of whether such documents pertain to that resolution.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>constituting its consideration of such information, regardless of ICANN’s assertion that its consideration is “necessarily preliminary and incomplete.” If ICANN’s consideration of such information is indeed “preliminary and incomplete,” then it should not be burdensome for ICANN to collect and produce such documents.</p>	
13	<p>The documents concerning the notifications and updates regarding any “future changes” to the .WEB contention set that Mr. Atallah of ICANN promised to provide to Afilias in his 30</p>	<p>Afilias seeks these documents as relevant and material to its claims that ICANN “violated its policy of transparency by refusing to update Afilias as to the status of its investigation, the details of its findings, and its intentions in that regard for over 18 months.”²⁹</p>	<p>ICANN objects that this request seeks documents that are already in Afilias’ possession and that are not relevant and material to the outcome of Afilias’ claims. Notifications regarding any change to the status of the .WEB</p>	<p>Based on ICANN’s assertion that all notifications and updates regarding any changes to the .WEB contention set have been provided to Afilias, Afilias withdraws this request.</p>	<p>The Panel notes Afilias’ withdrawal of the request.</p>

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
	September 2016 letter to Mr. Hemphill. ²⁸	<p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or applicable rules governing the .WEB application, auction, and delegation process by violating its transparency obligations in regards to its investigation of NDC and/or Verisign's actions related to the .WEB gTLD.</p> <p>The request is further relevant and material to ICANN's assertion that Afilias' claims in this IRP are "overdue" and time-barred; the time-bar issue is affected by Afilias' knowledge of any changes to the .WEB contention set.³⁰</p>	<p>contention set were provided to all members of the contention set, including Afilias. Afilias therefore has all such notifications. To the extent Afilias claims that ICANN failed to provide a notification or update in circumstances where, according to Afilias, such an update was required, by definition no such notification or update exists.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad. "[D]ocuments concerning the notification and updates" is undefined and ICANN does not understand what this phrase encompasses other than notifications and updates themselves.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other</p>		

²⁹ Amended Request, ¶ 78. ICANN did not inform Afilias of any "future changes" to the .WEB contention set until 7 June 2018. *Id.*, ¶ 51.

²⁸ *Id.*

³⁰ Response, ¶ 8.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>		
14	<p>The documents created during and reflecting or constituting the partial evaluation that ICANN staff or ICANN's Board has allegedly given to Afilias' allegations that NDC violated the Guidebook.</p>	<p>ICANN asserts that Afilias' claims are "premature in that the ICANN Board has not <i>fully</i> evaluated Afilias' allegations that NDC violated the Guidebook."³¹ The assertion indicates that ICANN's Board and/or Staff have apparently partially evaluated the allegations. The documents are therefore relevant and material to Afilias' claim that ICANN violated its Articles and Bylaws in the manner in which it considered and carried out the resolution of questions and comments raised by Afilias and failing to disqualify NDC's application and/or bid for .WEB.</p> <p>The request is further relevant and material to ICANN's assertion that Afilias' claims in this IRP are "overdue" and time-barred; the time-bar issue is affected by the duration of ICANN's investigation of NDC and/or Verisign's actions regarding .WEB, as well as by whether and when</p>	<p>ICANN objects that this request seeks documents that are not relevant and material to the outcome of Afilias' claims. As set out in ICANN's Response to Afilias Amended Request for IRP, ICANN has not made a determination on the merits of Afilias' allegations against NDC and Verisign. Accordingly, any consideration of the merits of Afilias' allegations against NDC and Verisign is necessarily preliminary and incomplete. Afilias' request implicitly acknowledges this by referring to a "partial evaluation." ICANN's preliminary consideration of Afilias' allegations is not material to the outcome of Afilias' claim that its allegations require ICANN to disqualify</p>	<p>Afilias repeats and incorporates by reference its Reply to ICANN's Objection to Request No. 4. The documents are relevant and material for the same reasons stated in that Reply, and ICANN's assertion that any such analysis is "necessarily preliminary or incomplete" provides no basis for ICANN to withhold such documents. To the contrary, the fact that any such analysis is "preliminary or incomplete" supports Afilias' allegations in this IRP.</p> <p>With respect to ICANN's assertion that Afilias has never claimed that ICANN violated its Articles and Bylaws in the manner in which it considered and carried out the resolution</p>	<p>Request granted, save that the word "reflecting" shall be replaced by "evidencing".</p> <p>For the purpose of this request, the word "and" shall mean "and", not "or".</p>

³¹ *Id.*, ¶ 7 (emphasis added).

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		<p>ICANN ever indicated to Afilias that it had completed its investigation.³²</p>	<p>NDC's application and award .WEB to Afilias. Nor is ICANN's preliminary consideration of Afilias' allegations relevant and material to the outcome of any time-bar defense. Afilias has not asserted a claim that ICANN's preliminary consideration of its allegations violated ICANN's Bylaws. Accordingly, the date of any such preliminary consideration is not material.</p> <p>Afilias seeks to justify this request on the basis that it is relevant to Afilias' purported claim that "ICANN violated its Articles and Bylaws in the manner in which it considered and carried out the resolution of" Afilias' allegations against NDC. However, as noted in ICANN's General Objections, Afilias has asserted no such claim.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad. In light of Afilias'</p>	<p>of' Afilias' allegations, Afilias incorporates by reference Paragraph 7 of its Reply to ICANN's General Responses and Objections above. Afilias also refers the Panel to the allegation in the Amended Request (at ¶ 88) that ICANN engaged in a course of conduct dating back to at least August 2016, in which ICANN, <i>inter alia</i>, "learned of but concealed from the public the terms of the DAA ..., and falsely promised Afilias that it would investigate and consider Afilias' complaints. Since that time, ICANN has continually violated its commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document[ed] policies—all for the purpose of assisting VeriSign's efforts to obtain the rights in .WEB for</p>	

³² *Id.*, ¶ 8.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>definition of “and” in its preliminary statement, this request, read literally, seeks all documents created during the period that ICANN was evaluating Afilias’ allegations, regardless of whether such documents pertain to that resolution.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this request.</p>	<p>itself.”</p> <p>For these reasons, the Panel should order ICANN to search for and produce the documents created during or reflecting the partial evaluation that ICANN staff or ICANN’s Board has allegedly given to the allegations that NDC violated the Guidebook. Again, if as ICANN asserts, the partial consideration by the ICANN Board or ICANN’s staff is “preliminary and incomplete,” then it should not be burdensome for ICANN to produce such documents.</p>	
15	The documents reflecting or referring to Verisign’s being “engaged in ICANN’s processes to move the delegation of .web forward,”	Afilias claims that NDC violated the New gTLD Program Rules by selling, transferring, and assigning “virtually all of its rights and obligations in its .WEB application to VeriSign”. ³⁴ Afilias seeks	ICANN objects that this request is vague, ambiguous and overbroad because it is not clear what is encompassed by documents “reflecting or	Based on ICANN’s agreement to produce the documents as reflected in ICANN’s response, Afilias makes no reply.	The Panel notes Afilias’ acceptance of ICANN’s agreement to produce as reflected in ICANN’s response.

³⁴ Amended Request, ¶ 40.

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	<p>as represented by Mr. D. James Bidzos, the Founder, President, CEO, and Executive Chairman of Verisign in the Verisign earnings conference call/presentation on 8 February 2018.³³</p>	<p>these documents because Verisign's participation in "ICANN's processes"³⁵ regarding the .WEB gTLD evidences Verisign's <i>de facto</i> ownership of NDC's rights regarding .WEB and ICANN's acknowledgement of those rights. The request is also relevant and material to whether ICANN effectively accepted NDC's proposed assignment of the registry agreement before NDC signed the agreement or formally requested its assignment.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by accepting Verisign's secret participation in the .WEB contention set resolution and Verisign's subsequent participation in the negotiations for the .WEB Registry Agreement; (2) by failing to disqualify NDC's application and/or bid for .WEB; and (3) by providing preferable treatment to Verisign.</p>	<p>referring" to Verisign's being engaged in the process to move delegation of .WEB forward.</p> <p>ICANN further objects that this request is overbroad insofar as it purports to require ICANN to search broadly for any document that may refer to any activity of Verisign aimed at moving forward with the delegation of .WEB.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search for communications between ICANN and Verisign, between October 1, 2017 and November 14, 2018 (when Afilias initiated this IRP), regarding the "processes to move the</p>		

³³ Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018) [Ex. C-47].

³⁵ Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018) [Ex. C-47].

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			delegation of .web forward” and will produce responsive non-privileged documents, to the extent any are found.		
16	The documents reflecting or referring to NDC’s assignment of the .WEB registry agreement to Verisign, including the documents reflecting or constituting ICANN’s communications with Verisign and/or NDC regarding such assignment.	<p>Afilias seeks these documents as evidence of ICANN’s position regarding NDC’s violations of the New gTLD Program Rules and whether and when ICANN approved of the assignment of the .WEB registry agreement to VeriSign.</p> <p>The request is therefore relevant and material to Afilias’ claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process (1) by failing to reject NDC’s application and/or disqualify NDC’s bids for failing to comply with the New gTLD Program Rules; and (2) by participation in the .WEB contention set resolution and Verisign’s subsequent participation in the negotiations for the .WEB Registry Agreement.</p>	<p>ICANN objects that this request is vague, ambiguous and overbroad. It is not clear what is encompassed by “documents reflecting or referring to NDC’s assignment of the .WEB registry agreement to Verisign” other than the Domain Acquisition Agreement (“DAA”), which has already been produced to Afilias. ICANN has not entered into a .WEB registry agreement with NDC, nor has NDC requested an assignment.</p> <p>ICANN further objects that the documents sought by this request are not relevant and material to the outcome of Afilias’ claims. NDC either violated the New gTLD Program Rules by virtue of its conduct in connection with the DAA, or it did not. Additional documents referring to NDC’s assignment of the .WEB registry agreement to Verisign are not material to the</p>	Based on ICANN’s agreement to produce the documents as reflected in ICANN’s response, Afilias makes no reply.	The Panel notes Afilias’ acceptance of ICANN’s agreement to produce as reflected in ICANN’s response.

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			<p>outcome of that issue.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search for communications between ICANN and Verisign and/or NDC, between August 25, 2015 (when the DAA was signed) and November 14, 2018 (when Afilias initiated this IRP), regarding “NDC’s assignment of the .WEB registry agreement to Verisign” and will produce non-privileged documents, to the extent any are found.</p>		
17	The documents reflecting, explaining, and/or analyzing ICANN’s decision to remove the .WEB contention set from on hold status on or about 7 June 2018 and to send the	Afilias has no evidence or understanding of the reason behind ICANN’s sudden decision to take the .WEB contention off hold. ³⁶ Afilias believes that ICANN’s decision is related to its decision to delegate the .WEB gTLD to NDC (and	ICANN objects to this request to the extent it seeks documents already in Afilias’ possession. As members of the .WEB contention set, Afilias and NDC received notice of ICANN’s	Based on ICANN’s agreement to produce the documents as reflected in ICANN’s response, Afilias makes no reply.	The Panel notes Afilias’ acceptance of ICANN’s agreement to produce as reflected in ICANN’s response.

³⁶ Amended Request, ¶ 51.

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	<p>.WEB registry agreement to NDC, including ICANN's communications with Verisign and/or NDC about that decision.</p>	<p>hence to Verisign), evidenced by ICANN's decision to send the .WEB Registry Agreement to NDC in June 2018. Afilias seeks these documents as evidence on ICANN's reason for suddenly removing the "on hold" status for the .WEB contention set and for proceeding to delegate the .WEB gTLD to NDC (and hence to Verisign) and also whether ICANN had fairly considered Afilias' concerns before doing so.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process by taking the .WEB contention set off hold in June 2018 and proceeding to delegate .WEB to NDC (and hence Verisign), contrary to its mandate to promote competition.</p> <p>The request is also relevant and material to ICANN's assertion that Afilias' claims in this IRP are "overdue" and time-barred, since the evidence indicates that ICANN's decision to proceed with delegating .WEB to NDC occurred in June 2018 and that Afilias had no reason to know that ICANN</p>	<p>decision to take the .WEB contention set off hold in June 2018. ICANN will not re-produce that notice.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad. It is not clear what is encompassed by documents "reflecting" ICANN's decision to take the .WEB contention set off hold.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search and produce non-privileged documents explaining or analyzing its decision to take the .WEB contention set off hold in June 2018, to the extent any are found.</p>		

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		had completed or purported to complete its investigation of Afilias' concerns prior to that date. ³⁷			
18	The documents created by ICANN evaluating, referring to or explaining the position that assignment of the gTLD Registry Agreement to Verisign would not violate its competition mandate.	<p>Afilias contends in its Amended Request for IRP that ICANN's decision to finalize a Registry Agreement with NDC, and thus approve of the Registry Agreement's assignment to Verisign, violates ICANN's mandate to promote competition.³⁸ Afilias seeks these documents as evidence as to ICANN's consideration of its mandate to promote competition in regards to the .WEB gTLD.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process by deciding to finalize a .WEB Registry Agreement while knowing of NDC's arrangement with Verisign, the monopolist of the domain name system.³⁹</p>	ICANN objects that this request is unintelligible. ICANN's position, as set forth at ¶¶ 68-72 of its Response to the Amended Request for IRP, is that ICANN is not a competition authority and does not have the mandate to serve as one. ICANN complies with its Core Value to sustain a competitive environment by enacting policies that promote competition, such as the New gTLD Program, which has resulted in the introduction of more than 1,200 new top-level domains that are available to consumers and competitors. ICANN defers to competition authorities—such as the Antitrust Division of the Justice Department—to determine whether a particular situation might be anticompetitive. This is	<p>This binding IRP allows members of the global Internet community to challenge ICANN if it is operating contrary to its Mission and Bylaws. In performing its Mission, ICANN's decisions and actions are guided by its "Core Values", which are set out in its Bylaws. Among those "Core Values" is ICANN's mandate to "[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process." Bylaws, Sec. 1.2(b)(4).</p> <p>ICANN asserts that it may satisfy its competition mandate</p>	Request denied.

³⁷ Response, ¶ 8.

³⁸ Amended Request, p. 22.

³⁹ *Id.*, ¶¶ 79-83.

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			<p>explained in the witness statement of J. Beckwith Burr, a member of ICANN's Board.</p> <p>ICANN further objects that the documents sought by this request are not relevant and material to the outcome of Afilias' claims. Afilias appears to contend, contrary to ICANN's position, that ICANN has a duty to reject applications that are alleged to be anti-competitive and, based on that assumption, Afilias alleges that ICANN violated that duty by taking the .WEB contention set off hold in June 2018. (<i>See</i> Amended Request for IRP ¶¶ 79-83). The documents sought by this request are not material to the outcome of either contention.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this</p>	<p>by enacting policies that promote competition, but that is not what the plain language of the Bylaws require. The Bylaws require that ICANN act consistently with its competition mandate, as identified through the policymaking process. This is an issue in dispute between the parties, yet ICANN treats this fundamental dispute as if it were settled by the submission of a witness statement.</p> <p>Moreover, contrary to ICANN's narrow reading of Afilias' Amended Request, Afilias asserts that ICANN adopted a policy of introducing new gTLDs to the DNS for the specific purpose of introducing competition and weakening Verisign's monopoly. <i>See</i> Zittrain Report. ICANN's Bylaws require that ICANN act consistently with that policy in its decision making process. Afilias claims that ICANN did not do so when (1) deciding</p>	

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
			request.	<p>not to take sufficient actions to investigate the rumors surrounding NDC in the weeks before the .WEB Auction, (2) deciding not to act to disqualify NDC's application when ICANN learned of the substance of the 2015 Verisign/NDC Domain Acquisition Agreement ("DAA"), (3) deciding not to invalidate NDC's bids submitted at the .WEB Auction in light of the provisions of the DAA, and (4) deciding to take the .WEB contention set off of hold in June 2018, which, but for Afilias' invocation of CEP, would have resulted in the delegation of .WEB to Verisign without any recourse to undo that transaction.</p> <p>Afilias should be granted discovery into ICANN's internal assessment of the competition issues raised by the monopolist Verisign's prospective acquisition of its nearest potential competitor.</p>	

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19	<p>The documents created by ICANN evaluating, referring to or explaining the position that ICANN “fulfills its competition mandate by enacting policies that promote competition – such as the New gTLD Program – and by deferring to an appropriate government regulator – such as DOJ – for investigation of potential competition issues.”⁴⁰</p>	<p>Afilias believes that Verisign’s acquisition of the rights to the .WEB gTLD will harm competition in the domain name system, and that ICANN’s decision to permit Verisign’s acquisition of the gTLD violates its mandate to promote competition. ICANN, however, asserts in this IRP that it fulfills its mandate by “enacting policies ... such as the New gTLD Program” and by deferring to any investigation of competition issues by local regulators within a particular jurisdiction. Afilias seeks the documents in this request as evidence on whether ICANN has ever before concluded that this is how it fulfills its competition mandate and the basis for such conclusion. Afilias does not believe that ICANN can fulfill its competition mandate in this manner, and that ICANN has never given proper consideration to this issue.</p> <p>The request is therefore relevant and material to Afilias’ claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation</p>	<p>ICANN objects that this request is vague, ambiguous and unintelligible. ICANN’s position that it fulfills its competition mandate by enacting policies that promote competition – such as the New gTLD Program – and by deferring to an appropriate government regulator – such as DOJ – for investigation of potential competition issues is set out in its Response to the Amended Request for IRP and the witness statement of J. Beckwith Burr. It is not clear what additional documents Afilias seeks to obtain by this request.</p> <p>To the extent Afilias seeks to require ICANN to search broadly to identify any document discussing the nature of its competition mandate, ICANN objects that the request is an unduly burdensome fishing expedition and that the</p>	<p>As noted in Afilias’ response to ICANN’ objection to the preceding request, there is a fundamental dispute between the parties regarding the effect of ICANN’s competition mandate. While ICANN asserts that it “fulfills its competition mandate by enacting policies that promote competition,” ICANN’s Bylaws require that ICANN’s decisions in performing its Mission should be guided by competition objectives identified in its policies.</p> <p>Here, while ICANN asserts that its competition mandate was satisfied simply by enacting the New gTLD Program, Afilias asserts that ICANN’s Bylaws require ICANN to take decisions consistent with the competition objectives that were identified in the adoption of that Program.</p>	Request denied.

⁴⁰ Response, ¶ 70.

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		<p>process (1) by failing to promote competition by deciding to take to take the .WEB contention set off hold in June 2018 and (2) by proceeding to begin delegating .WEB to NDC (and hence to Verisign).⁴¹</p>	<p>documents sought are not material to the outcome of Afilias' claims. Afilias appears to contend, contrary to ICANN's position, that ICANN has a duty to reject applications that are alleged to be anti-competitive and, based on that assumption, Afilias alleges that ICANN violated that duty by taking the .WEB contention set off hold in June 2018. (See Amended Request for IRP ¶¶ 79-83). Internal ICANN documents discussing its competition mandate are not necessary or material to the outcome of those contentions.</p> <p>ICANN also objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Based on these objections, ICANN will not produce documents responsive to this</p>	<p>Afilias' position is supported by the plain language of the Bylaws and the copious record that demonstrates that the New gTLD Program was adopted to, in the words of ICANN's first chair, to "break" Verisign's "monopoly." If ICANN has documents that support its assertions about how it may comply with its competition mandate, ICANN should produce those documents.</p>	

⁴¹ Amended Request, ¶¶ 79-83.

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			request.		
20	The documents reflecting communications between (a) ICANN and (b) Verisign and/or NDC concerning the threatened or actual IRP Request by Afilias concerning .WEB.	<p>Afilias believes that the changes to Rule 7 of the Interim Supplementary Procedures in October 2018 were triggered by the threat of Afilias filing an IRP Request against ICANN in regards to the .WEB gTLD. Afilias seeks these documents as evidence as to (1) Verisign's knowledge of the possibility that Afilias would file an IRP Request against ICANN and (2) any preparations that ICANN, Verisign, and/or NDC undertook to prepare for Afilias' potential IRP Request.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation process in the manner by which ICANN Staff participated in the preparation and drafting, and in the process by which the Board adopted Rule 7 of the Interim Supplementary Procedures.⁴²</p>	<p>ICANN objects to this request to the extent it seeks documents created after October 20, 2018, when the final version of the Interim Supplementary Procedures (including Rule 7) were sent to the Board for approval, and before September 30, 2018, when Afilias contends that Verisign began exploiting its position on the IOT in relation to the drafting of Rule 7.</p> <p>Documents outside of that period are not relevant to Afilias' claims regarding the drafting process for Rule 7. Afilias implicitly recognizes this by (seemingly) limiting its Request No. 21 to the period between September 30, 2018 and October 20, 2018 (that Request appears to include a typo by referring to September 30, 2019 where the reference should be to September 30, 2018).</p> <p>ICANN further objects to this request to the extent it seeks</p>	Based on ICANN's agreement to produce the documents as reflected in ICANN's response, Afilias makes no reply.	The Panel notes Afilias' acceptance of ICANN's agreement to produce as reflected in ICANN's response.

⁴² *Id.*, ¶¶ 84-88.

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			<p>documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search and produce communications between ICANN and Verisign and/or NDC taking place between September 30, 2018 and October 20, 2018 that reference Afilias' actual or threatened Request for IRP, to the extent any are found.</p>		
21	<p>The document(s) created on or between 20 October 2018 and 30 September 2019 reflecting communications between Samantha Eisner of ICANN and David McAuley of Verisign that concern, refer to, or otherwise relate to the (a) drafting of, (b) interpretation of, or (c) Afilias complaints regarding, Rule 7 of the Interim Procedures.</p>	<p>Afilias believes that the changes to Rule 7 of the Interim Supplementary Procedures in October 2018 were triggered by the threat of Afilias filing an IRP Request against ICANN in regards to the .WEB gTLD. Afilias seeks these documents as evidence as to (1) the justification for the October 2018 changes to Rule 7, and (2) the relationship between the October 2018 changes to Rule 7 and Afilias.</p> <p>The request is therefore relevant and material to Afilias' claim that ICANN violated its Articles, Bylaws, and/or the applicable rules governing the .WEB application, auction, and delegation</p>	<p>ICANN objects that this request is overbroad to the extent it seeks documents after 20 October 2018, when the Interim Supplementary Procedures (including Rule 7) were sent to the Board for approval. The reference to "30 September 2019" appears to be an error. ICANN will construe it as a reference to 30 September 2018.</p> <p>ICANN further objects that this request is vague, ambiguous and overbroad in that it seeks documents "reflecting"</p>	<p>Based on ICANN's agreement to produce the documents as reflected in ICANN's response, Afilias makes no reply.</p>	<p>The Panel notes Afilias' acceptance of ICANN's agreement to produce as reflected in ICANN's response.</p>

No.	Description of Requested Document	Relevance and Materiality to the Outcome of the Amended Request	ICANN Response or Objection	Afilias' Reply	Panel Decision
		<p>process in the manner by which ICANN Staff participated in the preparation and drafting, and in the process by which the Board adopted Rule 7 of the Interim Supplementary Procedures.⁴³</p>	<p>communications, rather than the communications themselves.</p> <p>ICANN also objects to the extent this request seeks documents that are publicly available on ICANN's website or have already been provided to Afilias.</p> <p>ICANN objects to this request to the extent it seeks documents protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.</p> <p>Subject to these objections, ICANN will conduct a reasonable search for and produce communications between Samantha Eisner and David McAuley relating to Rule 7 during the period from September 30, 2018 to October 20, 2018, to the extent any such communications are found that are not already publicly available.</p>		

⁴³ *Id.*, ¶¶ 84-88.

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-18-0004-2702

ICANN'S COMPLETED REDFERN SCHEDULE

20 March 2020

The Internet Corporation for Assigned Names and Numbers (“ICANN”) submits this Request for Production of Documents to Afilias Domains No. 3 Limited (“Afilias”) pursuant to Article 8 of the Interim Supplementary Procedures and Article 20(4) of the ICDR Arbitration Rules. As set out in the following Redfern Schedule, the documents requested by ICANN are relevant and material to the outcome of the claims in Afilias’ Amended Request for Independent Review Process. The documents sought are not in the possession of ICANN, and ICANN reasonably believes that they are in the possession, custody, or control of Afilias, in particular, because they relate to transactions engaged in by Afilias.

The term “document” used in this request shall include writings or communications, whether maintained on paper or in electronic form, including writings, text messages, instant messages and sound recordings.

The use of the singular shall include the plural, and the use of the plural shall include the singular. The term “or” shall include “and,” and the term “and” shall include “or.”

No.	Description of Requested Document	Relevance and Materiality	Afilias Response or Objection	ICANN's Response to Afilias' Objections	Panel Decision
1	<p>All documents and communications between Afilias and any other .WEB applicant between July 20, 2016 and August 17, 2016, regarding the .WEB gTLD, the .WEB applicants, or the .WEB auction.</p>	<p>The documents sought by this request are relevant and material to the Panel's determination of Afilias' prayer that it should be declared the winning bidder of the .WEB auction and that ICANN should be ordered to execute a Registry Agreement with Afilias.</p> <p>Based on complaints received before initiation of this IRP, ICANN pled in its Response to the Amended Request for IRP that Afilias is alleged to have communicated with other applicants during the blackout period in violation of Clause 68 of the Auction Rules for New gTLDs ("Auction Rules") and Section 2.6 of the Bidder Agreement. <i>See</i> ICANN Response to Amended Request for IRP ¶ 63. Such communications are defined as "a serious violation" by Clause 61 of the Auction Rules and Section 2.10 of the Bidder Agreement, with potential penalties expressly including forfeiture of the applicant's application and termination of its registry agreement.</p> <p>Accordingly, if the Panel reaches the merits of Afilias' request to disqualify NDC and declare Afilias the winning bidder—which it should not because such relief exceeds the Panel's authority</p>	<p>Afilias objects to this Request as neither relevant nor material to the outcome of this IRP.</p> <p>In its Response to Afilias' Amended Request for IRP, ICANN merely asserted that "NDC and Verisign claim that Afilias violated the .WEB auction rules and should itself be disqualified by ICANN." <i>See</i> ICANN Response to Amended Request for IRP ¶ 63. ICANN thus bases this Request on a "claim" made by Verisign and NDC in their <i>amici</i> submissions. (For the avoidance of doubt, Afilias denies the allegation.) ICANN has never itself raised the allegation that Afilias committed a violation of the "blackout period" in contravention of the Auction Rules or the Bidder Agreement. ICANN has never sought to investigate this allegation, nor even put any questions to Afilias concerning this allegation, prior to this Document Request. There is nothing in ICANN's Articles or Bylaws to suggest that ICANN can use an IRP to conduct an investigation into an allegation made by a third-party (or even an <i>amicus</i>) to the IRP, which ICANN itself</p>	<p>Among the relief requested by Afilias is an order disqualifying NDC as an applicant for .WEB and directing ICANN to execute a Registry Agreement for .WEB with Afilias. ICANN's position is that this form of relief is clearly outside the jurisdiction of the Panel as prescribed by Article 4.3(o) of the Bylaws. Nevertheless, if the Panel reaches the merits of Afilias' request, it will need to consider not only whether NDC should be disqualified for alleged violations of the Guidebook, but also whether Afilias is entitled to a Registry Agreement for .WEB in light of its own alleged violations of the Blackout Period.</p> <p>Contrary to Afilias' contention, the fact that ICANN has not made a determination regarding the merits of the allegations that Afilias violated the Blackout Period does not mean that those allegations are irrelevant or not material to the outcome of this case. As explained in ICANN's Response to the Amended Request for IRP, due to the pendency of Accountability Mechanisms, ICANN has not made</p>	Request granted.

No.	Description of Requested Document	Relevance and Materiality	Afilias Response or Objection	ICANN's Response to Afilias' Objections	Panel Decision
		<p>under Article 4.3(o) of the Bylaws—the Panel will need to consider whether Afilias' communications with other applicants during the Blackout Period should result in forfeiture of Afilias' application. Such a finding would therefore establish a complete defense to the relief being sought by Afilias and, as a result, the documents sought by this request are material to the outcome of the dispute.</p>	<p>failed to make in its Response (or elsewhere).</p> <p>Even assuming <i>arguendo</i> ICANN's incorrect assertion that a "finding" of the alleged conduct would "establish a complete defense to the relief sought by Afilias," it is not a defense that ICANN has timely raised—assuming that ICANN's reference to the allegation by a non-party in a document request can constitute raising a defense. Even if it could be raised and established, such "defense" would not, for example, excuse ICANN's violation of its Bylaws and Articles in failing to disqualify NDC's application and/or bid.</p> <p>Afilias further objects to this Request on the ground that it is overly broad and burdensome – seeking "All documents and communications between Afilias and any other .WEB applicant between July 20, 2016 and August 17, 2016, regarding the .WEB gTLD, the .WEB applicants, or the .WEB auction." The Blackout Period rules do not prohibit any and all communications between applicants. Rather, they prohibit applicants "from cooperating or</p>	<p>a determination on the merits of Afilias' allegations against NDC. For the same reason, ICANN has not made a determination on the merits of the allegations against Afilias. However, if this Panel is going to decide the ultimate disposition of .WEB, as Afilias requests (and contrary to ICANN's objection based on the limitations on the Panel's authority in ICANN's Bylaws), then the Panel must consider not only Afilias' allegations regarding the <i>amici's</i> misconduct, but also the equally serious allegations of Afilias' misconduct.</p> <p>Afilias' assertion that ICANN did not raise this issue in a timely manner is false. ICANN raised the issue in its Response to Afilias' Amended Request for IRP. ICANN did not file a response to Afilias' original IRP Request because Afilias notified ICANN of its intent to file an amended request (and thus told ICANN not to file a response to Afilias' original IRP Request). ICANN's Response to Afilias' Amended IRP Request therefore was its first pleading in defense of the main IRP.</p>	

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			<p>collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction." ICANN fails to limit this Request to communications falling within the prohibited categories. The Request therefore represents an impermissible "fishing trip," apparently launched in the hope of finding evidence to support a vague and unsupported allegation made not by ICANN, but by the <i>Amici</i>, which is in any event neither relevant nor material to the outcome of this dispute. For the foregoing reasons, Afilias objects to this Request.</p>	<p>Afilias misses the point by asserting that its potential violation of the Blackout Period would not be a defense to its claim that ICANN violated its Bylaws by failing to disqualify NDC. Evidence does not need to be material to every element of a party's theory of liability in order to be material to the outcome of the case. Here, Afilias' potential violation of the Blackout Period is incontestably relevant and material to determining whether Afilias' is entitled to the relief that it requests, and therefore is incontestably material to the outcome of this case.</p> <p>Finally, ICANN's request is not overbroad or burdensome. It covers a period of less than one month and is limited to communications between Afilias and other members of the .WEB contention set. These documents should be easy to identify, and they raise no issues of privilege requiring close review because communications with other applicants could not be privileged. Afilias does not contend that it conducted regular business with other members of the contention set or had reasons to communicate with them unrelated to the .WEB auction.</p>	

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				<p>Although the Blackout Period rules prohibit communications regarding certain subject matters, not all communications generally, it is for the Panel to determine whether any of Afilias' communications concern prohibited subject matters. Afilias cannot unilaterally decide that its communications with other .WEB applicants during the Blackout Period were not prohibited and refuse to produce them on that basis.</p>	
2	<p>All communications between Afilias and the Justice Department, and all submissions by Afilias to the Justice Department, in connection with its investigation of Verisign's proposed acquisition of NDC's contractual rights to operate .WEB. For the avoidance of doubt, this request includes communications and submission by persons acting on Afilias' behalf, including outside counsel and other advisors, such as Jonathan Zittrain and George Sadowsky.</p>	<p>The documents sought by this request are relevant and material to the Panel's determination of Afilias' claim that Verisign's potential acquisition of .WEB is anticompetitive and should not be allowed.</p> <p>As set out in paragraphs 49 and 50 of ICANN's Response to Afilias' Amended Request for IRP, in early 2017 the Antitrust Division of the United States Department of Justice ("DOJ") issued a civil investigative demand ("CID") to ICANN, Verisign and others involved in the .WEB auction, seeking documents and information "in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual rights to operate .WEB."</p>	<p>There is no debate between the Parties regarding the fact that the United States Justice Department ("DOJ") investigated and closed its .WEB investigation without making any findings or disclosing its opinion. Here, ICANN seeks to rely on the closure of the investigation as a defense to Afilias' claim that ICANN has failed to comply with the mandate in its Bylaws to act to promote competition in the DNS. But ICANN has not established how communications and submissions between Afilias and the DOJ, in the context of an investigation conducted for <i>different purposes and different standards</i>, can be material and relevant to ICANN's</p>	<p>As set forth in ICANN's Response to Afilias' Amended Request for IRP, and the Declaration of ICANN Board member, J. Beckwith Burr, ICANN's Core Value regarding competition does not require ICANN to act as a competition regulator. ICANN Response at 21-22, Burr Decl. at ¶¶ 29-31. In fact, ICANN's Bylaws prohibit ICANN from acting like a regulator. Burr Decl. at ¶ 30. Moreover, ICANN does not have the resources or expertise necessary to serve as a competition regulator for the DNS. <i>Id.</i> Instead, one way that ICANN complies with its Core Value regarding competition is by deferring to appropriate government regulators on potential competition</p>	Request denied.

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		<p>A year later, in January 2018, DOJ formally closed its investigation without taking any action. Such a decision typically is interpreted as meaning the government did not find a threat to competition that warranted further action. <i>See</i> Expert Report of Dennis W. Carlton (“Carlton Report”) ¶¶ 58-61.</p> <p>Mr. Carlton is a former Deputy Assistant Attorney General in the Antitrust Department of the DOJ. Based on his experience, Mr. Carlton’s expert opinion is that Afilias was likely given the opportunity by the Justice Department to raise its competitive concerns about Verisign’s potential operation of .WEB. Whether Afilias’ chose to avail itself of that opportunity, the concerns and information Afilias shared with the DOJ, and the DOJ’s response to any such information are relevant and material to the outcome of Afilias’ claim that competition concerns warrant blocking Verisign from potentially operating .WEB.</p>	<p>defense that it has acted consistently with its mandate to promote competition despite ignoring Verisign’s and NDC’s subterfuge and intentional circumvention of the New gTLD Program Rules.</p> <p>Afilias’ claims in this IRP are materially different from the issue investigated by the DOJ. The DOJ investigates whether “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of [an] acquisition may be substantially to lessen competition, or to tend to create a monopoly.” <i>See DOJ/FTC Horizontal Merger Guidelines</i>, p. 1 (2010), available at https://www.justice.gov/atr/file/810276/download (quoting Section 7 of the Clayton Act, 15 U.S.C. § 18). In contrast to the Section 7 standard under the Clayton Act, this Panel is asked to determine whether ICANN’s closure of its .WEB investigation and its determination to proceed to delegate .WEB to NDC (and, thus, to Verisign) violated ICANN’s mandate to promote competition, one of its Core Values. As explained in the Expert Report of Jonathan Zittrain,</p>	<p>issues (and by referring competition issues to those regulators as appropriate). ICANN Response at 21-22, Burr Decl. at ¶¶ 29-31. A prime example of this is ICANN’s deference to DOJ’s investigation of the competition issues associated with the possibility of Verisign operating .WEB.</p> <p>Thus, even though ICANN believes that Afilias’ competition claim is fundamentally misconceived, DOJ’s investigation of Verisign and its ultimate decision not to intervene is critically important to the Panel’s determination of that claim, as Afilias has framed it. The scope of that investigation, the positions taken by Afilias in that investigation, and DOJ’s response, if any, to those positions are similarly important to any such determination. Accordingly, ICANN’s request for materials relating to that investigation are material and relevant to this IRP. Afilias’ assertion that the competition claims in this IRP “are materially different from the issue investigated by the DOJ” is questionable on its face, but it cannot even be assessed until the materials that Afilias has regarding</p>	

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			<p>ICANN has an “<i>affirmative obligation</i>” to take steps to “<i>promote competition</i>” rather than act only to prevent “the creation of a monopoly” or a “substantial” lessening of competition.</p> <p>Moreover, even if the issue before this Panel were identical to that investigated by the DOJ, it is not appropriate, contrary to the views expressed by Dr. Carlton, to draw any conclusions from the DOJ’s decision to close its investigation without making any findings or taking any action.</p> <p>As the DOJ itself recently advised a U.S. court that was evaluating the competitive merits of a transaction that DOJ had investigated twice, each time closing its investigation without taking any action: “<i>there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The Division’s decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive.</i>” See DOJ Amicus Curiae Brief in <i>Steves &</i></p>	<p>that investigation have been produced.</p> <p>Afilias provides no support for its contention that ICANN’s request is unduly burdensome. There is no reason that it should be burdensome for Afilias to identify and produce its communications with and submissions to the Justice Department in connection with the .WEB investigation.</p>	

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			<p><i>Sons v. Jeld-Wenn</i>, attached hereto, at p. 15 (“No Inference Should Be Drawn From the Antitrust Division’s Closed Investigations of the JELD-WEN/CMI Transaction”).</p> <p>Finally, ICANN’s request is also overly broad and unduly burdensome. ICANN cannot and does not even attempt to explain how “[a]ll communications between Afilias and the Justice Department, and all submissions by Afilias to the Justice Department, in connection with its investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate .WEB” are relevant and material to Afilias’ allegation that ICANN failed to comply with its competition mandate. Here, too, ICANN is engaged on a fishing expedition. Finally, ICANN should not be allowed to request company confidential information from Afilias, or to disclose any information provided by Afilias (if Afilias is ordered to do so) to Afilias’ competitors – NDC and Verisign. For the foregoing reasons, Afilias objects to this Request.</p>		