

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requester Information**

Requester:

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requester is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).<sup>1</sup>  
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

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<sup>1</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.<sup>2</sup>

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

**5. On what date did you become aware of action or that action would not be taken?**

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

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<sup>2</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>3</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>4</sup>

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

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<sup>4</sup> Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”<sup>5</sup> ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>6</sup> The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>7</sup> (2) “employ[ ] open and transparent policy development mechanisms;”<sup>8</sup> (3) “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>9</sup> and (4) “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>10</sup>

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>11</sup> ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>12</sup>

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<sup>5</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>6</sup> *Id.*, Art. 4, § 4.2(o).

<sup>7</sup> *Id.*, Art. 1, § 1.2(a).

<sup>8</sup> *Id.*, Art. 3, § 3.1.

<sup>9</sup> *Id.*, Art. 1, § 1.2(v).

<sup>10</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>11</sup> *See id.*, Arts. 1, 3-4.

<sup>12</sup> Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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<sup>13</sup> ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.<sup>14</sup> In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>15</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>16</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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<sup>14</sup> See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>15</sup> See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>16</sup> ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.<sup>17</sup> In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>18</sup>

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

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<sup>17</sup> Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>18</sup> See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.



the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>19</sup>

Almost a year later, and after numerous letters to ICANN,<sup>20</sup> on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>21</sup>

## 8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.<sup>22</sup> The reason for

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<sup>19</sup> See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>20</sup> See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>21</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>23</sup> *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>24</sup> The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>25</sup>

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>26</sup>

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.<sup>27</sup> ICANN explained that:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>28</sup>

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.<sup>29</sup>

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:<sup>30</sup>

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>30</sup> Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

*First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

*Second*, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

### **8.3 ICANN’s Response to the Request**

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.<sup>31</sup> ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

*As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:*

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

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<sup>31</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*<sup>32</sup>

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*<sup>33</sup>

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*<sup>34</sup>

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*<sup>35</sup>

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*<sup>36</sup>

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>37</sup>

*ICANN provided the same response as for Item 1.*<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>38</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

**9. What are you asking ICANN to do now?**

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 30, 2017

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Date