

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-2  
23 AUGUST 2017**

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The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. The Requestor was invited to, and did, participate in CPE, but did not prevail. On 24 February 2016, the Requestor sought reconsideration of the CPE determination (Request 16-5).<sup>3</sup>

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of

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<sup>1</sup> Request 17-2, § 3, at Pg. 5 (incorrectly marked page 4).

<sup>2</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>3</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.<sup>4</sup> The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-5, pending completion of the CPE Process Review.

On 5 May 2017, the Requestor submitted the DIDP Request. The Requestor sought ten categories of documents and information relating to the CPE Process Review, some of which the Requestor had already requested in a prior DIDP request. On 4 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-2 (Request 17-2), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws

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<sup>4</sup> Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

concerning non-discriminatory treatment and transparency by: (1) providing information rather than documents in response to Items No. 2 and 4; (2) determining not to produce certain documents responsive to Items No. 5, 6, and 8, and (3) determining not to produce any documents responsive to Item No. 10.<sup>5</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>6</sup>

The BAMC has considered Request 17-2 and all relevant materials and recommends that the Board deny Request 17-2 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

## **II. Facts.**

### **A. Background Facts.**

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited to participate in CPE.<sup>7</sup> The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.<sup>8</sup>

On 10 February 2016, the CPE panel issued a CPE Report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria.<sup>9</sup> Because a minimum of 14

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<sup>5</sup> Request 17-2, § 10, at Pg. 16 (marked 15).

<sup>6</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>7</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.<sup>10</sup>

On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.<sup>11</sup>

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP Request).<sup>12</sup> On 15 May 2016, ICANN organization responded to the 2016 DIDP Request.<sup>13</sup> ICANN organization provided links to all the responsive, publicly available documents, furnished an email not previously publicly available,<sup>14</sup> explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>15</sup> The Requestor thereafter filed Request 16-7 challenging ICANN organization's response to the 2016 DIDP Request. On 26 June 2016, the BGC denied Request 16-7.<sup>16</sup>

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by the Requestor on 17 September 2016 during its presentation to the BGC regarding Request 16-5, as well as issues that were identified in the Final Declaration from the Independent Review

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<sup>10</sup> See CPE Report at 1.

<sup>11</sup> Request 16-5.

<sup>12</sup> See 2016 DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>13</sup> 2016 DIDP Response, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>14</sup> 2016 DIDP Response at 3, 12, Attachment.

<sup>15</sup> *Id.*, Pgs. 1-7, 11-12.

<sup>16</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. The Requestor has now filed three reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DIDP Request), and the instant request, Request 17-2 (challenging the response to the Requestor's 2017 DIDP Request).

Process (IRP) proceeding initiated by Dot Registry, LLC.<sup>17</sup> As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in their evaluations of the community applications.<sup>18</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 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>19</sup>

On 5 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:<sup>20</sup>

1. The identity of the individual or firm undertaking the CPE Process Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;

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<sup>17</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>20</sup> DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

6. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the CPE Process Review.<sup>21</sup>

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).<sup>22</sup> The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.<sup>23</sup> The Status Update explained that the CPE Process Review is occurring on two parallel tracks – the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, and was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.<sup>24</sup>

On 4 June 2017, ICANN organization responded to the DIDP Request.<sup>25</sup> As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.<sup>26</sup> The DIDP Response

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<sup>21</sup> *Id.* at Pg. 4-5.

<sup>22</sup> Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

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

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

<sup>25</sup> DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>26</sup> *See generally id.*

further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.<sup>27</sup> Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>28</sup>

On 18 June 2017, the Requestor filed Request 17-2, seeking reconsideration of ICANN organization's response to Items No. 2 and 4, and its determination not to produce certain documents responsive to Items No. 5, 6, 8, and 10 because they were subject to Nondisclosure Conditions. The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable[,] and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it is one of only two recourses "for applicants . . . in lieu of litigation," and the other recourse, IRP, is "expensive and time-consuming."<sup>29</sup>

On 7 July 2017, the BGC concluded that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>30</sup>

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<sup>27</sup> *Id.* at Pg. 5-6.

<sup>28</sup> DIDP Response at Pg. 6.

<sup>29</sup> Request 17-2, § 6, at Pg. 12 (marked 11).

<sup>30</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-2 was pending. The BGC was tasked with reviewing Request 17-2 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-2.

On 9 July 2017, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.<sup>31</sup> Accordingly, the BAMC reviews Request 17-2 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

### **B. Relief Requested**

The Requestor asks the BAMC to: (1) “[r]eview the ICANN Staff decision to withhold” information requested in the DIDP, “to ensure that each and every requested Item . . . was considered and evaluated individually, and that the public interest test was applied to each individual item properly”; (2) disclose the materials that ICANN staff withheld in response to the DIDP Request; (3) “instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to”; and (4) for any items that the Board decides to withhold, “inform the Requestor[] as to the specific formula used to justify the nondisclosure.”<sup>32</sup>

### **III. Issue.**

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
2. Whether ICANN organization was required by the DIDP or established policies to provide the Requestor with “the specific formula used to justify the nondisclosure.”
3. Whether ICANN organization complied with its Core Values, Mission, and Commitments.<sup>33</sup>

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<sup>31</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf>.

<sup>32</sup> Request 17-2, § 9, at Pg. 13-14 (marked 12-13).

<sup>33</sup> Request 17-2, § 9, at Pg. 14 (marked 13).



The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-2 seeks reconsideration of staff and Board action or inaction.<sup>34</sup> The only subsequent discussion of Board action is the Requestor’s passing reference to its view that, in requesting materials from CPE panels for use in its evaluation of pending reconsideration requests, “the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.”<sup>35</sup> The Requestor makes no further arguments concerning the BGC’s actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on the “ICANN staff” response to the Requestor’s DIDP request.<sup>36</sup> Accordingly, the BAMC understands Request 17-2 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.<sup>37</sup>

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

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

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

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<sup>34</sup> Request 17-2, § 2, at Pg. 1.

<sup>35</sup> Request 17-2, § 3, at Pg. 2 (marked 1).

<sup>36</sup> Request 17-2, § at Pg. 13 (marked 12).

<sup>37</sup> Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>38</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-2 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>39</sup> That substantive provision did not change when ICANN's Bylaws were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>40</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>41</sup>

On 9 July 2017, the BGC determined that Request 17-2 is sufficiently stated and sent Request 17-2 to the Ombudsman for review and consideration.<sup>42</sup> The Ombudsman thereafter recused himself from this matter.<sup>43</sup> Accordingly, the BAMC has reviewed Request 17-2 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and

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<sup>38</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>39</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

<sup>40</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>41</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>42</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1-2.

<sup>43</sup> Response from Ombudsman Regarding Request 17-2, Pg. 1.

that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization’s approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization’s operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>44</sup> In addition to ICANN organization’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.<sup>45</sup> The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization’s operational activities, and within ICANN organization’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>46</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information

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<sup>44</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>47</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>48</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) 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;
- (ii) 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;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) 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.<sup>49</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular

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<sup>47</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>48</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>49</sup> DIDP.

circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>50</sup>

**V. Analysis and Rationale.**

**A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.**

**1. The DIDP Response Complies With Applicable Policies And Procedures.**

The DIDP Response identified documentary information responsive to all 10 items. For Items No. 1 through 9, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.<sup>51</sup> Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,<sup>52</sup> ICANN organization identified and provided the hyperlinks to 21 publicly available categories of documents that contain information responsive to Items No. 1 through 9.<sup>53</sup>

The DIDP Response also explained that some of the documents responsive to Items No. 6 and 8, as well as all documents responsive to Item 10, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>54</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *See generally* DIDP Response.

<sup>52</sup> DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>53</sup> DIDP Response at Pg. 3-4.

<sup>54</sup> DIDP Response at Pg. 6.

The Requestor claims that ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 violated established policies and procedures.<sup>55</sup> However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.<sup>56</sup> As demonstrated below, ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>57</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>58</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>59</sup>

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<sup>55</sup> The BAMC notes that the ten categories of documents and information relating to the CPE Review Process that the Requestor requested in its DIDP Request (i.e., Item Nos. 1-10) are identical to the requests set forth in a subsequent DIDP Request submitted by dotgay LLC (i.e., Item Nos. 4-13). While dotgay LLC, which is represented by the same counsel as the Requestor here (who also filed the DIDP requests on behalf of the Requestor and dotgay LLC), has sought reconsideration of portions of ICANN's response to its DIDP Request (Reconsideration Request 17-3), dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Items No. 5, 7, and 11, which are identical to Items No. 2, 4, and 8 here.

<sup>56</sup> Request 17-2, § 10, Pg. 15 (marked 14).

<sup>57</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

**a. ICANN organization’s response to Item No. 2 adhered to established policies and procedures.**

Item No. 2 requested information regarding “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment.”<sup>60</sup> In its response, and consistent with the DIDP Response Process, ICANN organization identified and provided the hyperlink to the Status Update, which described the selection process for the company conducting the CPE Process Review.<sup>61</sup> The response to Item No. 2 further explained that “[w]ith respect to the disclosures and conflict checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.”<sup>62</sup>

The Requestor argues that ICANN organization was required to “disclose not only the existence of selection, disclosure, and conflict check processes . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>63</sup> The Requestor’s claim is unsupported. The Requestor asked for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI.”<sup>64</sup> Notwithstanding that Item No. 2 requested information rather than documents, and as noted above, the DIDP Response identified and provided the hyperlink to the Status Update, which substantiated the narrative in the DIDP Response.<sup>65</sup> Even if Item No. 2 were to be interpreted as a request for documents, the DIDP Response adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.<sup>66</sup> The

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<sup>60</sup> DIDP Request at Pg. 4.

<sup>61</sup> DIDP Response at Pg. 3.

<sup>62</sup> DIDP Response at Pg. 3.

<sup>63</sup> Request 17-2 § 3, Pg. 9 (marked 8).

<sup>64</sup> See DIDP Request at Pg. 4.

<sup>65</sup> DIDP Response at Pg. 3.

<sup>66</sup> DIDP Response Process; DIDP Response at Pg. 3.

only other documents in ICANN’s possession relating to the selection process and conflicts check are communications with ICANN organization’s outside counsel. Those documents are not appropriate for disclosure because they comprise:

- 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.<sup>67</sup>

The Requestor does not claim that ICANN organization’s response to Item 2 is contrary to the DIDP Response Process, nor does the Requestor provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values.<sup>68</sup> Reconsideration is not warranted on these grounds.

**b. ICANN organization’s response to Item No. 4 adhered to established policies and procedures.**

Item No. 4 requested the “terms of instructions provided to the evaluator.”<sup>69</sup> Like Item No. 2, this was a request for information. Nevertheless, ICANN organization identified and provided the hyperlink to the Status Update, which contained information regarding the scope of the Review. The Status Update states:

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.

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<sup>67</sup> DIDP.

<sup>68</sup> The Requestor claims that ICANN organization asserted certain Nondisclosure Conditions in response to Items No. 1-4. *See* Request 17-2, § 3, Pg. 5 (marked 4). The Requestor is mistaken. ICANN did not determine that Nondisclosure Conditions prevented the disclosure of documents responsive to Items No. 1-4. *See* DIDP Response, at Pg. 3. Therefore, reconsideration is not warranted on those grounds. As noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 5, which is identical to Item No. 2 here.

<sup>69</sup> DIDP Request at Pg. 5.



The review is being conducted in two parallel tracks . . . . The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. . . . The second track focuses on gathering information and materials from the CPE provider.<sup>70</sup>

The Requestor argues that the DIDP required ICANN organization to “disclose not only . . . the existence of the terms of appointment . . . but also the underlying documents that substantiate ICANN’s claims.”<sup>71</sup>

As with Item No. 2, and notwithstanding that the Requestor sought information rather than documents in this DIDP Request, the DIDP Response to Item No. 4 adhered to the DIDP Response Process, because it identified responsive documents and provided a hyperlink to the responsive document that was appropriate for disclosure.<sup>72</sup> ICANN organization possesses only one other document potentially responsive to Item No. 4: the letter engaging FTI to undertake the CPE Process Review. That document is not appropriate for disclosure because it comprises:

- 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.<sup>73</sup>

Accordingly, reconsideration is not warranted for the same reasons that reconsideration of the DIDP Response to Item No. 2 is not warranted.

**c. ICANN organization’s responses to Items No. 5, 6, and 8 adhered to established policies and procedures.**

Items No. 5 and 6 sought the disclosure of the “materials provided to the evaluator by [the CPE provider]” (Item No. 5) and “materials provided to the evaluator by ICANN staff/legal,

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<sup>70</sup> Status Update.

<sup>71</sup> Request 17-2 § 3, Pg. 9 (marked 8). Again, and as noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN’s response to dotgay LLC’s Item No. 7, which is identical to Item No. 4 here.

<sup>72</sup> DIDP Response Process; DIDP Response at Pg. 3.

<sup>73</sup> DIDP.

outside counsel or ICANN’s Board or any subcommittee of the Board” (Item No. 6).<sup>74</sup> Item No. 8 sought the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator,” which overlaps with Items No. 5 and 6.<sup>75</sup>

With respect to Item No. 5, ICANN organization responded as follows:

The second track of the review focuses on gathering information and materials from the CPE provider. As noted Community Priority Evaluation Process Review Update of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.<sup>76</sup>

As noted in the Status Update, and referenced in the DIDP Response, the CPE provider had not provided the requested materials at the time ICANN organization responded to the DIDP Request.<sup>77</sup> Accordingly, ICANN organization did not possess any documents responsive to Item No. 5 to provide to the Requestor, even if disclosure under the DIDP was appropriate, which is not yet clear.<sup>78</sup>

In response to Item No. 6, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with the correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization’s response to the 2016 DIDP

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<sup>74</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>75</sup> DIDP Request at Pg. 5.

<sup>76</sup> DIDP Response at Pg. 4-5.

<sup>77</sup> *Id.*

<sup>78</sup> *See* DIDP (DIDP applies to “documents . . . within ICANN’s possession, custody, or control”).

Request, which sought the same documentary information.<sup>79</sup> The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2016 DIDP Request.<sup>80</sup>

The Requestor argues that ICANN organization’s statement that it provided all materials responsive to Item No. 6<sup>81</sup> except the correspondence between ICANN organization and the CPE provider “is undercut by ICANN organization’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP [R]equest.”<sup>82</sup> This complaint is misplaced. Item No. 6 sought materials provided to FTI.<sup>83</sup> The Requestor does not assert that interview notes—if any exist and are in ICANN organization’s possession—were provided to FTI.<sup>84</sup> Even if ICANN organization possessed copies of interview notes and provided those materials to FTI, the materials would fall under three Nondisclosure Conditions: (i) “[d]rafts of . . . documents . . . or any other forms of communication”; (ii) “[i]nternal 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[ and] memoranda”; and (iii) “[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege [...]”.<sup>85</sup> The Requestor raises the same arguments for ICANN organization’s response to Item

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<sup>79</sup> DIDP Response at Pg. 3-4.

<sup>80</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

<sup>81</sup> The Requestor identified Item No. 5 in its argument on this issue, but it appears from the context that the Requestor intended to reference Item No. 6, materials provided to the evaluator by ICANN.

<sup>82</sup> Request 17-2, § 3, at Pg. 9 (marked 8).

<sup>83</sup> DIDP Request at Pg. 5.

<sup>84</sup> *See id.*

<sup>85</sup> DIDP.

No. 8 as raised with respect to Item No. 6, and the BAMC rejects those arguments as outlined above.

**d. ICANN organization’s response to Item No. 10 adhered to established policies and procedures.**

Item No. 10 requested “[a]ll materials provided to ICANN by the evaluator concerning the [CPE] Review.”<sup>86</sup> The DIDP Response stated:

[T]he review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure....

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Item No. 10—“requests for documents and information to ICANN and the CPE provider”—then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>87</sup> Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>88</sup>

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>89</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the

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<sup>86</sup> DIDP Request at Pg. 5.

<sup>87</sup> DIDP Response Process.

<sup>88</sup> DIDP Response at Pg. 6.

<sup>89</sup> DIDP.

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>90</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Items No. 6 and 8, ICANN organization determined that the correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because they comprised:

- 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 provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>91</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> DIDP Response at Pg. 4-5, citing 2016 DIDP Response at Pg. 5, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Items No. 6 and 8. Those items request correspondence between ICANN organization and the CPE Provider.<sup>92</sup> The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 16-7 without success.<sup>93</sup> The BAMC recommends that Request 17-2 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Item No. 10 seeks materials that FTI provided to ICANN organization concerning the CPE Process Review. In response to Item No. 10, ICANN organization noted that it was in possession of the requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

- 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;

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<sup>92</sup> DIDP Request at Pg. 5.

<sup>93</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>.

- 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;
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.<sup>94</sup>

These materials certainly comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process” with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request.”<sup>95</sup> The Requestor’s arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>96</sup> There is no policy or procedure requiring that ICANN organization provide *additional* justification for nondisclosure.

The Requestor asks the Board to “inform the Request[or] as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm.”<sup>97</sup> Neither the DIDP nor the DIDP Response Process require ICANN organization to use or provide a “formula” for determining whether materials that are subject to Nondisclosure Conditions may nonetheless be disclosed.<sup>98</sup>

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<sup>94</sup> DIDP Response at Pg. 5-6; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>95</sup> Request 17-2, § 3, at Pg. 8 (marked 7).

<sup>96</sup> DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

<sup>97</sup> Request 17-2, § 9, Pg. 14 (marked 13) (emphasis in original).

<sup>98</sup> *See* DIDP; DIDP Response Process.

The Requestor also asserts that nondisclosure “needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN’s Bylaws.”<sup>99</sup> However, the DIDP provides the procedural fairness that the Requestor seeks. Here, ICANN organization applied the DIDP, determined that certain of the requested materials were subject to Nondisclosure Conditions, considered whether the materials should nonetheless be made public, determined that the public interest in disclosing the information did not outweigh the harm of disclosure, and explained that determination to the Requestor.<sup>100</sup> Therefore, reconsideration is not warranted on this ground.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

The DIDP states that documents subject to the Nondisclosure Conditions “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.”<sup>101</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>102</sup>

The Requestor previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the

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<sup>99</sup> Request 17-2, § 9, Pg. 14 (marked 13).

<sup>100</sup> *See generally* DIDP Response.

<sup>101</sup> *See id.*

<sup>102</sup> DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.



harm that may be caused by such disclosure.”<sup>103</sup> Nevertheless, the Requestor claims reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”<sup>104</sup> However, the Dot Registry IRP Final Declaration is not an established ICANN policy or procedure, and the Board’s acceptance of aspects of the Final Declaration does not make it so. Moreover, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.<sup>105</sup> Accordingly, the argument does not support reconsideration.

**B. The Reconsideration Process is Not A Mechanism for “Instructing” ICANN Staff on General Policies Where No Violation of ICANN Policies or Procedure Has Been Found.**

The Requestor asks the Board to “recognize and instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to do so.”<sup>106</sup> The Requestor is correct insofar as, under the DIDP Response Process, documents “concerning ICANN’s operational activities, and within ICANN organization’s possession, custody, or control, [are] made available to the public unless there is a compelling reason for confidentiality.”<sup>107</sup> However, the reconsideration request process is not an avenue for “instruct[ing]” ICANN staff concerning ICANN’s policies in general, where no violation of ICANN policies or procedures has been found. Because the BAMC concludes that ICANN

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<sup>103</sup> Request 16-7, § 3, Pg. 4.

<sup>104</sup> Request 17-2 § 3, Pg. 10 (marked 9).

<sup>105</sup> See ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

<sup>106</sup> Request 17-2, § 9, Pg. 13-14 (marked 12-13).

<sup>107</sup> DIDP.

organization adhered to established ICANN policies in responding to the DIDP Request, the BAMC does not recommend that the Board “instruct” ICANN staff as the Requestor asks.

Further, to the extent the Requestor is challenging the DIDP Response Process or the DIDP itself, the time to do so has passed.<sup>108</sup>

**C. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.**

The Requestor cites a litany of ICANN’s Commitments and Core Values, which the Requestor believes ICANN organization violated in the DIDP Response:<sup>109</sup>

- Introducing and promoting competition in the registration of domain names where practical and beneficial to the public interest.<sup>110</sup>
- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>111</sup>
- Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>112</sup>
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>113</sup>
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>114</sup>

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<sup>108</sup> ICANN Bylaws, 1 October 2016, Art. 4 Section 4.2(g)(i).

<sup>109</sup> Request 17-2, § 10, at Pg. 15-16 (marked 14-15). The Requestor cites the version of the Bylaws effective from 11 February 2016 until 30 September 2016. The version of the Bylaws effective on 18 June 2017, when the Requestor submitted Request 17-2, govern this Request. The substance of the Bylaws cited are not different from the current version of the Bylaws, except where otherwise noted.

<sup>110</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(iv) (emphasis in original).

<sup>111</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(i) (emphasis in original).

<sup>112</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(iv) (emphasis in original).

<sup>113</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v) (emphasis in original).

<sup>114</sup> ICANN Bylaws, 11 February 2016, Art. I, Section 2.9 (emphasis in original). The current version of the Bylaws does not include the same language. The Bylaws now state: “Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.” ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.<sup>115</sup>
- While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.<sup>116</sup>
- Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>117</sup>
- Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>118</sup>

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-2 or how ICANN organization has violated these Commitments and Core Values.<sup>119</sup> Many of them, such as ICANN’s Core Value of accounting for the public policy advice of governments and public authorities, have no clear relation to the DIDP Response. The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

The Requestor states in passing that it has “standing and the right to assert this reconsideration request” as a result of “[f]ailure to consider evidence filed,” but does not identify any evidence that it believes ICANN organization failed to consider in responding to the DIDP Request.<sup>120</sup> The Requestor similarly references “[c]onflict of interest issues,” “Breach of Fundamental Fairness,” and the need for “[p]redictability in the introduction of gTLDs” without explaining how those principles provide grounds for reconsideration here.

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<sup>115</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(vi) (emphasis in original).

<sup>116</sup> ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(vi) (emphasis in original).

<sup>117</sup> ICANN Bylaws, 1 October 2016, Art. 2 Section 2.3 (emphasis in original).

<sup>118</sup> ICANN Bylaws, 1 October 2016, Art. 3 Section 3.1 (emphasis in original).

<sup>119</sup> *See generally* Request 17-2, § 10, Pg. 13-14.

<sup>120</sup> Request 17-2, § 10, Pg. 13-14.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-2, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-2 was submitted on 19 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 18 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-2 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-2.<sup>121</sup>

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<sup>121</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).