

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 17-3
23 AUGUST 2017**

The Requestor, dotgay LLC, 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).¹ 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.²

I. Brief Summary.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with three other .GAY applications. The Requestor was invited to, and did, participate in CPE, but did not prevail.

On 22 October 2015, the Requestor sought reconsideration of the CPE report (Request 15-21). The BGC denied Request 15-21. On 17 February 2016, the Requestor sought reconsideration of the BGC's determination on Request 15-21 (Request 16-3).³

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 also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation

¹ Request 17-3, § 3, at Pg. 1.

² Request 17-3, § 10, at Pg. 16.

³ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.⁴ The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-3, pending completion of the CPE Process Review.

On 18 May 2017, the Requestor submitted the DIDP Request. The Requestor sought 13 categories of documents and information relating to the CPE Process Review.⁵ On 18 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 eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response further explained that the documents responsive to Items No. 1-3, 8, and 13 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

⁴ 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>.

⁵ Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited in May 2017. *Compare* DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request. DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging both DIDP Requests. *See* Reconsideration Request 17-2; Request 17-3. Reconsideration Request 17-2 raises many of the same arguments that the Requestor raises in Request 17-3. *Compare* Reconsideration Request 17-2, with Request 17-3.

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 17-3 (Request 17-3), 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 concerning non-discriminatory treatment and transparency by: (1) determining not to produce certain documents responsive to Item No. 9; and (2) determining not to produce any documents responsive to Items No. 1-3, 8, and 13.⁶

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration, and the Ombudsman recused himself.⁷

The BAMC has considered Request 17-3 and all relevant materials and recommends that the Board deny Request 17-3 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 .GAY, which was placed in a contention set with other .GAY applications. On 23 February 2014, the Requestor's Application was invited to participate in CPE.⁸ The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.⁹

⁶ Request 17-3, § 3, at Pg. 3.

⁷ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 17-3, Pg. 1.

⁸ 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>

⁹ *See Id.*

On 6 October 2014, the CPE panel issued a “First CPE report,” concluding that the Application did not qualify for community priority.¹⁰ The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE report.¹¹ The BGC granted reconsideration on Request 14-44 on the grounds that the CPE provider had inadvertently failed to verify 54 letters of support for the Application.¹² At the BGC’s direction, the CPE provider conducted a “Second CPE” of the Application. The Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requestor sought reconsideration of the Second CPE report (Request 15-21).¹⁴ On the same day, the Requestor filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).¹⁵ The 2015 DIDP Request sought, among other things, “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered ‘policy’ under ICANN by-laws.”¹⁶ ICANN organization responded to the 2015 DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly

¹⁰ See CPE Report at 1.

¹¹ BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

¹⁶ *Id.* at Pg. 2. The Requestor made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 DIDP Request), at Pg. 2, <https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf>.

ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.¹⁷ On 4 December 2015, the Requestor revised Request 15-21 to challenge the response to the 2015 DIDP Request in addition to the Second CPE report.¹⁸

On 1 February 2016, the BGC denied Request 15-21.¹⁹ On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.²⁰ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.²¹ The Board was scheduled to consider Request 16-3 on 17 September 2016. On 13 September 2016, the Requestor submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.²² Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.²³

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

¹⁷ Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

¹⁸ Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

¹⁹ BGC Determination on Request 15-21, at Pg. 1

²⁰ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

²² Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

²³ Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²⁴ 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.²⁵ 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).²⁶

On 18 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:²⁷

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;"
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

²⁴ Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²⁵ 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>.

²⁶ 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>.

²⁷ DIDP Request at Pg. 4, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

- determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request;
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;
 4. The identity of the individual or firm undertaking the CPE Process Review;
 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
 6. The date of appointment of the evaluator;
 7. The terms of instructions provided to the evaluator;
 8. The materials provided to the evaluator by the EIU;
 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board;
 10. The materials submitted by affected parties provided to the evaluator;
 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
 12. The most recent estimates provided by the evaluator for the completion of the investigation; and
 13. All materials provided to ICANN by the evaluator concerning the CPE Process Review.²⁸

Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited on 5 May 2017.²⁹ DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging the DIDP Requests.³⁰

²⁸ *Id.* at Pg. 5-6.

²⁹ Compare DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>, with the DIDP Request.

³⁰ See Reconsideration Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>; Request 17-3.

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).³¹ 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.³² 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, which was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.³³

On 18 June 2017, ICANN organization responded to the DIDP Request.³⁴ 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 eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.³⁵ The DIDP Response further explained that all the documents responsive to Items No. 1-3, 8, and 13, and certain documents responsive to Item No. 9, were subject to Nondisclosure Conditions and were not appropriate for disclosure.³⁶ 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

³¹ Status Update, <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

³² *Id.*

³³ *Id.*

³⁴ DIDP Response, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>

³⁵ *See generally id.*

³⁶ *Id.* at Pg. 3-7.

determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.³⁷

On 30 June 2017, the Requestor filed Request 17-3, seeking reconsideration of ICANN organization's determination not to produce certain documents responsive to Item No. 9 and all documents responsive to Items. No. 1-3, 8, and 13 because they were subject to Nondisclosure Conditions.³⁸ The Requestor asserts that withholding the materials "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." The Requestor also argues that denial of the DIDP is inappropriate because it "increases the likelihood of [community members] resorting to" IRP, which is "expensive and time-consuming."³⁹

On 19 July 2017, the BGC concluded that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.⁴⁰

On 19 July 2017, ICANN organization transmitted Request 17-3 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.⁴¹ Accordingly, the BAMC reviews Request 17-3 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

³⁷ DIDP Response at Pg. 7.

³⁸ The BAMC notes that the Requestor does not seek reconsideration of the response to Items No. 5, 7, or 11, although DotMusic, represented by the same counsel as the Requestor here, challenged ICANN organization's response to identical requests (to which ICANN organization provided an identical response to the one provided to the Requestor here) in Request 17-2. *See* Request 17-2, § 3, Pg. 9-10 (incorrectly marked 8-9).

³⁹ Request 17-3, § 6, at Pg. 6-8.

⁴⁰ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-3 was pending. The BGC was tasked with reviewing Request 17-3 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 17-3.

⁴¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-3, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-response-ombudsman-19jul17-en.pdf>.

B. Relief Requested

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.”⁴²

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 complied with its Core Values, Mission, and Commitments.⁴³

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-3 seeks reconsideration of staff and Board action or inaction.⁴⁴ The only subsequent discussion of Board action is the Requestor’s passing reference to its view that the BGC was required to provide materials it requested from CPE panels for use in its evaluation of pending reconsideration requests to the Requestor.⁴⁵ 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 ICANN organization’s response to the Requestor’s DIDP request.⁴⁶ Accordingly, the BAMC understands Request 17-3 to seek reconsideration of ICANN organization’s response to the Requestor’s DIDP Request, and *not* reconsideration of BGC action or inaction.⁴⁷

⁴² Request 17-3, § 9, at Pg. 15.

⁴³ Request 17-3, § 3, at Pg. 3; *id.*, §§ 6-7, Pg. 5-8.

⁴⁴ Request 17-3, § 2, at Pg. 1.

⁴⁵ Request 17-3, § 6, at Pg. 5.

⁴⁶ Request 17-3, §§ 8-9, at Pg. 9-15.

⁴⁷ Further, we note that the BAMC has not completed its consideration of Request 16-3, 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.

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
- (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.⁴⁸

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-3 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁹ That substantive provision did not change when ICANN's Bylaws regarding reconsideration 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.⁵⁰ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

⁴⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l).

⁵⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵¹

On 19 July 2017, the BGC determined that Request 17-3 is sufficiently stated and sent Request 17-3 to the Ombudsman for review and consideration.⁵² The Ombudsman thereafter recused himself from this matter.⁵³ Accordingly, the BAMC has reviewed Request 17-3 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 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.⁵⁴ 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.⁵⁵ The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's

⁵¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁵² Ombudsman Action Regarding Request 17-3, Pg. 1-2.

⁵³ Ombudsman Action Regarding Request 17-3, Pg. 1.

⁵⁴ See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁵⁵ *Id.*

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.⁵⁶

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 Disclosure Policy (DIDP) Requests” (DIDP Response Process).⁵⁷ 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].”⁵⁸

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

⁵⁶ *Id.*

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

⁵⁸ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

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.⁵⁹

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁶⁰

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 nine of the 13 items. For Items No. 4 through 7 and 9 through 12, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.⁶¹ Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,⁶² ICANN organization identified and provided the hyperlinks to 18 publicly available categories of documents that contain information responsive to Items No. 4 through 7 and 9-12.⁶³

⁵⁹ DIDP.

⁶⁰ *Id.*

⁶¹ *See generally* DIDP Response.

⁶² DIDP <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁶³ DIDP Response at Pg. 4-7.

The DIDP Response also explained that some of the documents responsive to Item No. 9, as well as all documents responsive to Items No. 1-3, 8, and 13, 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.⁶⁴

The Requestor claims that ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 violated established policies and procedures. However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.⁶⁵ As demonstrated below, ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 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.”⁶⁶ 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.⁶⁷ 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.⁶⁸

⁶⁴ DIDP Response at Pg. 7.

⁶⁵ Request 17-3, § 3, Pg. 3.

⁶⁶ DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.*

a. ICANN organization’s response to Items No. 1, 2, 3, 8, and 13 adhered to established policies and procedures.

Items No. 1, 2, 3, 8, and 13 sought the disclosure of documents relating to the CPE

Process Review, including:

- [D]ocuments 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” (Item. No. 1);
- 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,” and (b) all communications between the EIU and ICANN regarding the request (Item No. 2);
- 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 (Item No. 3);
- The materials provided to the evaluator by [the CPE provider] (Item No. 8)
- The materials provided to ICANN by the evaluator concerning the review (Item No. 13)⁶⁹

With respect to these Items, ICANN organization explained that documents responsive to the requests “are not appropriate for disclosure” based on certain Nondisclosure Conditions.⁷⁰

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Items No. 1, 2, 3, 8, and 13, then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.⁷¹

Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

⁶⁹ Request 17-3, § 3, at Pg. 9 (marked 8).

⁷⁰ DIDP Response at Pg. 4.

⁷¹ DIDP Response Process.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.⁷²

b. ICANN organization’s response to Item No. 9 adhered to established policies and procedures.

Item No. 9 sought the disclosure of “materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN’s Board or any subcommittee of the Board.”⁷³ In response to Item No. 9, 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 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 2015 DIDP Request, which sought the same documentary information.⁷⁴ The BGC previously denied the Requestor’s Request 16-7, which challenged ICANN organization’s response to the 2015 DIDP Request.⁷⁵

⁷² DIDP Response at Pg. 7.

⁷³ DIDP Request at Pg. 5.

⁷⁴ DIDP Response at Pg. 5-6, *citing* Response to 2015 DIDP Request. The 2015 DIDP Request in turn cites the Response to the Requestor’s 2014 DIDP Request. *See* Response to 2015 DIDP Request, at Pg. 5; *see also* Response to 2014 DIDP Request, at Pg. 4-5.

As noted in footnote 5, ICANN organization previously provided the same response to DotMusic Limited’s DIDP request for the same documents. *See* DIDP Response to Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

⁷⁵ BGC Determination on Request 15-21, at Pg. 29-32 (reviewing challenge to the 2015 DIDP Request).

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.⁷⁶ Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the 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.⁷⁷ 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 Item No. 9, ICANN organization determined that the internal correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because, as ICANN organization previously explained in response to the 2014 and 2015 DIDP Requests, 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

⁷⁶ DIDP.

⁷⁷ *Id.*

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.⁷⁸

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Item No. 9. Those items request correspondence between ICANN organization and the CPE Provider.⁷⁹ 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 15-21 without success.⁸⁰ The BAMC recommends that Request 17-3 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.

Items No. 1, 2, 3, 8, and 13 seek materials shared between FTI, EIU, and ICANN organization concerning the CPE Process Review. In response to Items No. 1, 2, 3, 8, and 13, ICANN organization noted that it was in possession of 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:

⁷⁸ DIDP Response at Pg. 6, citing Response to 2015 DIDP Request at Pg. 6, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁷⁹ DIDP Request at Pg. 5.

⁸⁰ BGC Determination on Request 15-21, at Pg. 29-32, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

- 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; and
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁸¹

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 failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”⁸² 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

⁸¹ DIDP Response at Pg. 4; *see also* ICANN Defined Conditions for Nondisclosure. <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁸² Request 17-3, § 6, at Pg. 6.

reasons for not disclosing the materials.⁸³ There is no policy or procedure requiring that ICANN organization to provide *additional* justification for nondisclosure.

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.”⁸⁴ 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.⁸⁵

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

The Requestor argues that ICANN violated the following Commitments and Core Values in the DIDP Response:⁸⁶

- Operating in a manner consistent with the [] Bylaws for the benefit of the Internet community as a whole;⁸⁷
- Employing open and transparent policy development mechanisms;⁸⁸
- Applying documented policies neutrally and objectively, with integrity and fairness;⁸⁹

⁸³ DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

⁸⁴ *See id.*

⁸⁵ DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

⁸⁶ Request 17-3, § 6, at 5).

⁸⁷ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a).

⁸⁸ The Requestor cites ICANN Bylaws, 1 October 2016, Art. 3, Section 3.1 in support; that Bylaw states that ICANN “shall operate to the maximum extent feasible in an open and transparent manner . . . including implementing procedures to . . . “encourage fact-based policy development work.”

⁸⁹ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(v).

- Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.⁹⁰

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-3 or how ICANN organization has violated these Commitments and Core Values.⁹¹ The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

VI. Recommendation

The BAMC has considered the merits of Request 17-3, 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 17-3.

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 17-3 was submitted on 30 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 30 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-3 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-3.⁹²

⁹⁰ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(vi).

⁹¹ See generally Request 17-3, § 10, Pg. 13-14.

⁹² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).