

Reconsideration Request

Regarding Action Contrary to Established ICANN Policies Pertaining to Community Objections to New gTLD Applications

Introductory Summary

i. The Requestors identified below, as parties “adversely affected by” an “ICANN action ... that contradict[s] established ICANN policy,” respectfully submit this request for reconsideration (“Request”) to the Board Governance Committee (“BGC”). Bylaws Art. IV § 2.2(a). Requestors ask the BGC to reconsider action by ICANN staff denying a request for production of documents (“RFP”) made by Requestors pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”). The DIDP serves to implement ICANN’s charge to “operate to the maximum extent feasible in an open and transparent manner ... consistent with procedures designed to ensure fairness,” *id.* Art. III § 1, and its refusal to honor the RFP betrays that founding principle.

ii. The RFP seeks information pertaining to a report (“Report”) by an unidentified panel which performed a Community Priority Evaluation (“CPE”) concerning a community-based application (“Application”), by HOTEL Top-Level-Domain s.a.r.l. (“Hotel TLD”), for the new generic top-level domain <.HOTEL> (the “String”). In its Report, the CPE panel concluded that the Application had satisfied the CPE criteria sufficiently to earn community priority. As a consequence, Requestors – each of which also had applied for the String – became excluded from competing for it.

iii. Dismayed by this result, Requestors undertook by their RFP to ascertain the identity and qualifications of the CPE panel, information regarding panelist selection, and the panelists’ communications among themselves and/or with Hotel TLD or ICANN relating to or having any material bearing upon the Report. The RFP would determine, among other things, whether the anomalous CPE ruling resulted from improper selection or training of, or influence upon, the panel. Notwithstanding its commitment to transparency, fairness, independence and non-discrimination, ICANN attempts to shield

this important information from scrutiny by those directly and adversely affected by the CPE panel's decision. Reconsideration properly lies to remedy ICANN's obstinacy as contrary to its own documented policies.

1. Requestor Information

- a. **Name:** Despegar Online SRL
Address: Contact Information Redacted
Email: Contact Information Redacted
- b. **Name:** Radix FZC
Address: Contact Information Redacted
Email: Contact Information Redacted
- c. **Name:** Famous Four Media Limited
Address: Contact Information Redacted
Email: Contact Information Redacted
- d. **Name:** Fegistry, LLC
Address: Contact Information Redacted
Email: Contact Information Redacted
- e. **Name:** Donuts Inc.
Address: Contact Information Redacted
Email: Contact Information Redacted
- f. **Name:** Minds + Machines
Address: Contact Information Redacted
Email: Contact Information Redacted

The foregoing are referred to collectively herein as “Requestors.” This Request is submitted on behalf of Requestors by:

Counsel: John M. Genga, Don C. Moody
The IP and Technology Legal Group, P.C.
dba New gTLD Disputes

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

3.1. Requestors seek reconsideration of ICANN's denial of the RFP. As a “principal element of ICANN's approach to transparency and information disclosure,” the DIDP is “intended to ensure that information contained in documents concerning ICANN's operational activities ... is made available to the public unless there is a compelling reason for confidentiality.” See <https://www.icann.org/resources/pages/didp-2012-02-25-en>. ICANN's refusal to provide documents responsive to the RFP violates this policy and the transparency touted as a “core value” established to guide its actions. Bylaws Art. I § 7, Art. III § 1.

3.2. ICANN provided for reconsideration to remedy “staff actions” that so “contradict” such “established ICANN policies.” *Id.* Art. IV § 2.2(a). It becomes acutely important where, as here, enforcing the transparency principle would reveal whether ICANN or its agents have violated other policies, such as:

- “[S]ustain[ing] ... and promoting competition,” *id.* Art. I §§ 5, 6;
- “Making decisions by applying documented policies neutrally and objectively, with integrity and fairness,” *id.* Art. I § 8;
- “Remaining accountable to the Internet community,” *id.* Art. I § 10; and

- Not “apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment,” *id.* Art. II § 3.

Requestors urge the BGC to act to assure compliance with these critical policies by reconsidering ICANN's response to the RFP and directing that it produce all documents responsive to it.

4. Date of action:

ICANN's RFP response (the “Response”) bears the date of 3 September 2014.

5. On what date did you become aware of the action?

The URL reflects posting of the Response on 4 September 2014 – <https://www.icann.org/resources/pages/20140804-01-2014-09-04-en> – and Requestors first became aware of it on that date.

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

6.1. Under the New gTLD Applicant Guidebook (“Guidebook” or “AGB”), “a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be.” AGB § 4.2.3 at 4-9. “Qualified” in this context means an application that attains community status as a result of CPE. *Id.* Because Hotel TLD prevailed in CPE, Requestors can no longer compete for the String.

6.2. The action of the CPE panel thus materially – indeed, terminally – affected Requestors. As such, they sought reconsideration of the CPE findings, contending that “the Panel has not followed the AGB policy and process for conducting CPE” as set forth in the Guidebook. <https://www.icann.org/en/system/files/files/request-despegar-online-et-al-28jun14-en.pdf> at 5-10.

6.3. Requestors also at that time claimed breach of other ICANN principles from the Bylaws and other governing documents, including ICANN's commitments to:

- “provide a ... reasoned explanation of decisions,”

- make decisions “by applying documented policies neutrally and objectively,” and
- “operate ... in an open and transparent manner.”

Id. at 10, *citing* ICANN's Affirmation of Commitments Art. 7 and Bylaws Arts. I § 2.8 and III § 1. The CPE process violated these tenets by (i) not making available the identities or qualifications of the panelists, (ii) not disclosing all materials considered by the panel, and (iii) not giving sufficient analysis and reasons for the panel's decision. *Id.* at 10-11.

6.4. The BGC construed Requestors' position in that prior matter as contesting the substance of the panel's determination, which it held insufficient for reconsideration. See <https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf> at 7, 8, 9. It also ruled that the Guidebook does not require the panel to reveal the information that Requestors had sought, so that it did not violate any “established policy” of ICANN in not making such disclosures. *Id.* at 10-11.

6.5. Meanwhile, Requestors attempted to determine by their RFP whether the qualifications, selection, training and potential influence over the panel may have violated established ICANN policies pertaining, for example, to non-discrimination, neutrality, accountability and objective, fair application of documented policies. ICANN's refusal to provide the requested information obstructs Requestors' efforts to determine if it or the panel overstepped such policies, which would give them a basis for reconsideration or other review that this Tribunal previously had found lacking.

6.6. The overarching principle of transparency exists to ensure that ICANN and its agents comply with its other policies. Parties prevented from making such inquiries cannot enforce rights that they do not know they have or obtain remedies for violations they do not know have occurred. ICANN's sweeping rejection of the RFP has adversely affected Requestors in this material respect, entitling them to reconsideration here.

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

7.1. Without true transparency and accountability, the Internet community, for whose benefit ICANN operates,¹ can have no confidence that the organization with which it has entrusted the stewardship of the DNS in fact adheres to the principles upon which that trust rests. The DIDP process enables ICANN's multiple stakeholders to verify such compliance, and to correct transgressions and their consequences if and when they occur.

7.2. The underlying CPE determination has wiped out six capable competitors for a highly sought-after piece of Internet "real estate." Particularly when ICANN opens new swaths of the namespace, preferring a single party over another – or, as in this case, many others – not only restricts competition in that single instance, but also can discourage it in the future.

7.3. Also, a number of applicants have filed on a community basis and have gone through or await invitation to CPE. Similar results can occur and parties should have the ability – and ostensibly do, through DIDP – to discover whether the processes affecting them took place in accordance with ICANN's own foundational principles.

7.4. Nor does this concern stop with CPE or even the new gTLD program as a whole. It can arise in connection with any ICANN action or inaction that impacts any of its constituency. All such affected parties may suffer if lapses in transparency go unchecked. The potential for recurrence further supports reconsideration now.

8. Detail of Board or Staff Action – Required Information

Staff Action: Refusal to produce documents responsive to the RFP, which contravenes ICANN's transparency doctrine and may mask other potential policy violations. Pertinent facts and procedural history appear in the "Detailed Explanation"

¹ See ICANN Articles of Incorporation § 4.

portion of this section. The policy abuses constituting grounds for reconsideration are discussed at greater length in Section 10, *infra*.

Board action: Not applicable; Requestors do not seek reconsideration of any Board action of which they are aware.

Provide the Required Detailed Explanation here:

8.1. Requestors all submitted standard applications for the String, and Hotel TLD applied for it as an asserted community. <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>. Hotel TLD thereafter received and accepted an invitation to undergo CPE. <http://newgtlds.icann.org/en/applicants/cpe#status>.

8.2. According to the just-cited webpage, “application comments and letters of support or opposition must be submitted within 14 days of the CPE Invitation Date in order to be considered by the CPE Panel.” *Id.* Opposing statements are published. See <https://gtldcomment.icann.org/applicationcomment/viewcomments>. Several Requestors, voicing concerns shared by all of them, filed oppositions to awarding Hotel TLD community priority.²

8.3. Hotel TLD posted a public response to the various opposition comments. <https://gtldcomment.icann.org/applicationcomment/commentdetails/12399>. Requestors do not know if Hotel TLD had any other communications, *ex parte* or otherwise, with ICANN, the CPE panel or anyone else involved in the CPE process.

8.4. Nor do Requestors have any information as to who served on the panel, what qualifications they had, how they got selected, and what communications they had internally or with ICANN, Hotel TLD or any other person concerning their evaluation. The panel issued its Report dated 11 June 2014, posted 12 June, finding that the Hotel TLD Application had satisfied the Guidebook-prescribed community criteria sufficiently

² See, e.g., <https://gtldcomment.icann.org/applicationcomment/commentdetails/12391>; <https://www.icann.org/en/system/files/correspondence/levy-to-willett-03mar14-en.pdf>; <https://www.icann.org/resources/correspondence/patetta-to-icann-2014-03-05-en>.

to gain community priority. See **Annex A** hereto. This determination removed all of Requestors' applications from the .HOTEL contention set, AGB at 4-9, and left Hotel TLD a completely unencumbered path to delegation of the String.

8.5. As stated above, Requestors sought reconsideration of the Report as contrary to certain ICANN policies. The BGC did not agree, and denied the request. Links to the request and ruling, dated 28 June and 22 August 2014, respectively, appear in paragraphs 6.2 and 6.4, *supra*.

8.6. Requestors sent their 4 August 2014 RFP, **Annex B**, to didp@icann.org, the email address specified by ICANN for service of such requests. It sought documents identified verbatim as follows:

8.6.1. All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication ("Communications") between individual member [sic] of ICANN's Board or any member of ICANN Staff and the Economist Intelligence Unit³ or any other organization or third party involved in the selection or organisations of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated with the 12 month period preceding the date of the Report;

8.6.2. The curriculum vitaees ("CVs") of the members appointed to the CPE Panel;

8.6.3. All Communications (as defined above) between the CPE Panel and/or ICANN, directly related to the creation of the Report; and

8.6.4. All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.

³ The EIU is the third party organization selected by and contracted with ICANN to evaluate all community-based applications invited to CPE.

Id. at 1. The RFP further outlined how the information requested above, defined as the “Requested Information” in the RFP,⁴ “does not meet any of the defined conditions under the DIDP for non-disclosure ...” *Id.* at 1-2.

8.7. ICANN’s 3 September 2014 Response to the RFP, **Annex C**, posted on its website on 4 September, stated that ICANN did not have certain of the documents requested, yet admitted it had others but would not produce them due to claimed protections against disclosure specified in the DIDP. More specifically:

8.7.1. Claiming that, for the sake of “independence of the process and evaluation, ICANN ... is not involved with the selection ... of ... individual evaluators” and does not have “information about who the evaluators on any individual panel may be,” the Response represents that ICANN “does not have any CVs for the CPE Panel ... [or] ... regarding the appointment of the specific CPE Panel for the .HOTEL CPE,” responsive to the requests reproduced above in paragraphs 8.6.1 and 8.6.2. App. C at 2. However, the Response *admits* that ICANN *does* have “documentation with the EIU for the performance of its role ... as it relates to the .HOTEL CPE,” but asserts that those documents satisfy “certain of the Defined Conditions of Nondisclosure set forth in the DIDP.” *Id.*

8.7.2. Requestors do not agree with ICANN’s asserted bars to disclosure. ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. *At minimum*, the BGC should review the asserted protections and independently determine if they have any supportable grounds. Regardless, it should order production for the reasons set forth in Section 10 below.

8.7.3. With regard to the third item of the RFP, repeated at paragraph 8.6.3 above, ICANN represents that it “does not have any communications ...

⁴ Requestors define other capitalized herein, such as “Report” and “Hotel TLD,” to have the same meanings as in the RFP.

with the evaluators that identify the scoring for any individual CPE ..., [so] does not have documents of this type.” Requestors do not dispute that ICANN cannot produce what it does not have. However, again, ICANN does concede that it has some documents responsive to this RFP – namely, “communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE ...” Requestors should have access to such documentation, but ICANN again refuses to produce it on grounds *stated* in the DIDP but not *established* in the Response.

8.7.4. ICANN states that it also has documents responsive to the fourth category of the RFP, paragraph 8.6.4 above, constituting “Communications between the CPE Panel and Hotel TLD or any other party bearing on the creation of the Report.” Specifically, while ICANN claims to have “limited the ability for requestors or other interested parties to initiate direct contact with the panels,” it does concede that “the CPE Panel goes through a validation process regarding letters of support or opposition” as a matter of “direct communications,” and that “from time to time ICANN is cc’d on the CPE Panel’s verification emails.” The Requestors properly seek those direct communications. The “verification process” could conclude that such communications are not appropriate, but could also reveal that the panel accepts certain communications that it should not. Even rejected communications, if reviewed, could potentially influence the panel or expose some policy violation.

As argued more fully below, transparency demands production of the Requested Information. Without it, ICANN has no accountability to its stakeholders or the public, and offers no assurance of compliance with its own policies on which its constituents rely in maintaining ICANN’s role overseeing the DNS.

9. What are you asking ICANN to do now?

Applicant respectfully requests that the BGC:

9.1. Independently evaluate the legitimacy of ICANN's claimed grounds for withholding the Requested Information;

9.2. Regardless of whether certain protections against disclosure arguably exist, find that production of the Requested Information would serve policy interests that override any claimed basis for non-disclosure; and

9.3. Order ICANN to produce the Requested Information, subject to a protective order if the BGC deems it appropriate to facilitate production while preserving any potential confidentiality concerns.

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

10.1. Requestors have been adversely affected by the actions of ICANN staff in refusing to comply with the RFP. They have both procedural standing to make this Request and the substantive right to have it granted.

a) Requestors have standing to make this Request.

10.2. Requestors have been "adversely affected by ... one or more staff actions or inactions that contradict established ICANN policy" This fact gives it standing within the meaning of Bylaws Art. IV § 2.2(a).

10.3. According to the form reconsideration request used here, a requestor must "demonstrate material harm and adverse impact" by the following measures:

10.3.1. *A loss or injury, financial or non-financial.* Requestors have described this in Section 6, *supra*. Namely, they have shown that ICANN's refusal to produce the Requested information has deprived them of the ability to determine if the underlying CPE process for the Application violated established ICANN policies that would provide a basis for challenging the process and either (i) redoing it with a properly constituted, trained, neutral and independent panel

free from undue influence, or (ii) reversing the result altogether as unsupported and resulting from improper conduct (if that is found to be the case).

10.3.2. *A direct and causal connection between the loss or injury and the staff action or inaction that is the basis of the Request.* Staff's rejection of the RFP has directly caused the injury. Without the Requested Information, Requestors cannot determine if they have a basis for review of the CPE under Article IV of the Bylaws.

10.3.3. *The relief requested must be capable of reversing the harm alleged.* Ordering disclosure directly reverses the harm stemming from nondisclosure.

By all measures, Requestors have standing to make this Request. They satisfy the procedural threshold of "material" and "adverse" impact in the form of specific injury, causation of that injury by ICANN staff action, and the ability of this proceeding to remedy that harm.

b) ICANN's obstinate Response to the RFP violates its own transparency policy and potentially conceals transgressions of other established policies.

10.4. As part of its "core values," ICANN provides for "[e]mploying open and transparent policy development mechanisms that ... promote well-informed decisions based on expert advice" Bylaws Art. I § 7. The Bylaws devote the entirety of their Article III to the subject of transparency.

10.5. As Article I, section 7 expressly acknowledges, transparency has as a key purpose the promotion of well-informed decisions. Requestors do not find the decision of the CPE panel in the underlying case well-informed, could only communicate their opposition to community priority in a public forum, and now know by ICANN's Response to the RFP that certain non-public communications did occur involving it, the EIU, the panel and other parties pertaining to the panel's role and its Report.

10.6. What do those communications show? Only ICANN and the other parties to them know. Requestors certainly do not. Nor does the public, which needs ICANN to act transparently to assure itself that ICANN is faithfully discharging its duties to:

- Promote competition, Bylaws Art. I §§ 2.5, 2.6;
- Apply polices documented in the AGB for the introduction of new TLDs and the determination of community priority neutrally, objectively and fairly, *id.* §§ 2.7, 2.8, Articles § 3;
- Apply controlling standards equitably, without singling out anyone for disparate and adverse treatment, Bylaws Art. II § 3;
- Act without bias, Bylaws Art. IV § 3.4.a, c; and
- Operate for the benefit of and remain accountable to the Internet community as a whole, Articles § 4, Bylaws Art. I § 10.

Transparency helps assure adherence as much as possible to all polices relevant to a particular situation, and the correction of lapses in such observances if and to the extent they occur.

10.7. Regardless of what the Requested Information may show, it should be disclosed. If it reveals anything from a “hiccup” to a “smoking gun,” accountability dictates that Requestors have the opportunity to use that information to obtain whatever relief it may make available. If it establishes the Report and process leading up to it as “squeaky clean,” transparency will have served the purpose of maintaining the parties’ and others’ confidence in ICANN and its systems.

10.8. Given the essential function of transparency and the many other policies implicated by it, this matter meets the substantive standards for reconsideration. The Response to the RFP as it stands now does not satisfy that threshold policy, making this Request proper and remedial action appropriate as set forth in Section 9 above.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Yes; all have lost the opportunity to compete for the String, and ICANN's withholding of information – which could reveal a policy violation giving them a basis for review of the CPE determination – harms them all equally.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

