

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-39**

11 OCTOBER 2014

The Requesters—Despegar Online SRL; Radix FZC; Famous Four Media Limited; Fegistry, LLC; Donuts Inc.; and Minds + Machines—seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”). The Requesters sought documents relating to a Community Priority Evaluation Panel’s Report finding that HOTEL Top-Level Domain S.à.r.l.’s community application for the New gTLD .HOTEL prevailed in Community Priority Evaluation.

I. Brief Summary.

The Requesters each applied for .HOTEL. Hotel Top-Level-Domain S.à.r.l. (“Applicant”) filed a community application for .HOTEL. Because the Applicant participated and prevailed in Community Priority Evaluation (“CPE”), none of the Requesters’ applications for .HOTEL will proceed.

The Requesters subsequently filed a request pursuant to ICANN’s DIDP (“DIDP Request”), seeking documents relating to the CPE Panel’s Report finding that the Applicant had prevailed in CPE. In its response to the DIDP Request (“DIDP Response”), ICANN identified and provided links to all publicly available documents responsive to the DIDP Request and further noted that many of the requested documents did not exist or were not in ICANN’s possession. With respect to those requested documents that were in ICANN’s possession and not already publicly available, ICANN explained that those documents were not produced

because they were subject to certain of the Defined Conditions of Nondisclosure (“Nondisclosure Conditions”) set forth in the DIDP.

On 22 September 2014, the Requesters filed Request 14-39, seeking reconsideration of ICANN’s Response to the DIDP Request. The Requesters do not identify any policy or procedure that ICANN staff violated with respect to the DIDP Response, but simply disagree with ICANN staff’s determination that certain requested documents were subject to one or more of the DIDP Nondisclosure Conditions and therefore not appropriate for public disclosure. Because the Requesters have failed to demonstrate that ICANN staff acted in contravention of established policy or procedure in responding to the DIDP Request, the BGC concludes that Request 14-39 be denied.

II. Facts.

A. Background Facts.

All six Requesters applied for .HOTEL.

The Applicant filed a community application for .HOTEL (*i.e.*, a seventh application for .HOTEL).

On 19 February 2014, the Applicant was invited to participate in the CPE process for HOTEL. The Applicant elected to participate in the process, and its .HOTEL community application (“Application”) was forwarded to the CPE Panel (“Panel”) assembled by the Economist Intelligence Unit (“EIU”).

On 11 June 2014, the Panel issued its Report. The Panel determined that the Application sufficiently met the requirements specified in the Applicant Guidebook to achieve the necessary scores to prevail in CPE. Because the Application prevailed in CPE, none of the Requesters’ applications in the .HOTEL contention set will proceed. (*See* Guidebook, § 4.2.3.)

On 28 June 2014, the Requesters filed Request 14-34, seeking reconsideration of the Panel's determination that the Application prevailed in CPE.

On 4 August 2014, the Requesters filed their DIDP Request, seeking:

1. All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication ("Communications") between individual member[s] of ICANN's Board or any member[s] of ICANN Staff and the Economist Intelligence Unit or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;
2. The curriculum vitas ("CVs") of the members appointed to the CPE Panel;
3. All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and
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.

(See DIDP Request, Pgs. 1-2, *available at* <https://www.icann.org/en/system/files/files/request-donuts-et-al-04aug14-en.pdf>.)

On 22 August 2014, the BGC denied Request 14-34, determining that the Requesters "d[id] not identify any misapplication of a policy or procedure [with respect to the Report], but instead challenge[d] the merits of the Panel's Report, which is not a basis for reconsideration."

(14-34 Determination, Pg. 1, *available at*

<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf>.)

The BGC also determined that "the Requesters' allusions to the broad fairness principles expressed in ICANN's Bylaws [could not] serve as a basis for reconsideration, as the Requesters d[id] not specify any specific Panel action that contravene[d] those principles." (*Id.*, Pgs. 1-2.)

On 3 September 2014, ICANN responded to the Requesters' DIDP Request. (*See* DIDP Response, *available at* [https://www.icann.org/en/system/files/files/response-donuts-et-al-](https://www.icann.org/en/system/files/files/response-donuts-et-al-03sep14-en.pdf)

[03sep14-en.pdf](https://www.icann.org/en/system/files/files/response-donuts-et-al-03sep14-en.pdf).) ICANN identified and provided links to all publicly available documents

responsive to the DIDP Request. ICANN noted that many of the requested documents, such as “CVs for the CPE Panel,” “documentation regarding the appointment of the specific CPE Panel for the .HOTEL CPE,” and “communications . . . with the evaluators that identify the scoring for any individual CPE,” did not exist or were not in ICANN’s possession. (*Id.*, Pg. 2.) With respect to those requested documents that were in ICANN’s possession and were not already publicly available, ICANN explained that those documents would not be made publicly available because they were subject to certain DIDP Nondisclosure Conditions. (*Id.*, Pgs. 2-3.)

On 22 September 2014, the Requesters filed Request 14-39, seeking reconsideration of the DIDP Response.

B. The Requester’s Claims.

The Requesters contend that reconsideration is warranted because ICANN staff violated established policy and procedure by withholding from production certain documents determined to be subject to certain DIDP Nondisclosure Conditions. (Request, § 10, Pgs. 12-13.)

C. Relief Requested.

The Requesters ask the Board to: (i) “independently evaluate the legitimacy of ICANN’s claimed grounds for withholding the Requested Information”; (ii) “[r]egardless 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 (iii) “[o]rder ICANN to produce the Requested Information, subject to a protective order if the BGC deems it appropriate.” (Request, § 9, Pg. 11.)

III. Issues.

In view of the claims set forth in Request 14-39, the issues for reconsideration are whether ICANN staff violated established policy or procedure by declining to produce certain

documents sought through the DIDP Request and determined to be subject to certain DIDP Nondisclosure Conditions.

IV. The Relevant Standards for Evaluating Reconsideration Requests and the Documentary Information Disclosure Policy.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

ICANN considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multi-stakeholder operating model remains effective and that outcomes of its decision-making are in the public benefit and are derived in a manner accountable to all stakeholders. A principal element of ICANN's approach to transparency and information disclosure is the commitment to make publicly available on its website a comprehensive set of materials concerning ICANN's operational activities. In that regard, ICANN has identified many categories of documents that are made public as a matter of due course. (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) In addition to ICANN's practice of making so many documents public as a matter of course, the DIDP allows community members to request that ICANN make public documentary information "concerning ICANN's operational

¹ Article IV, § 2.2 of ICANN's Bylaws states 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:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

activities, and within ICANN's possession, custody, or control," that is not already publicly available. (*Id.*)

In responding to a request for documents submitted pursuant to ICANN's DIDP, ICANN adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests," which is available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>. Following the collection of potentially responsive documents, the DIDP process provides that "[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 at <http://www.icann.org/en/about/transparency/didp>." (*Id.*)

Pursuant to the DIDP, ICANN reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others: (i) "[i]nformation provided by or to a government or international organization . . . in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party;" (ii) "[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process [...];" (iii) "[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...];" and (iv) "[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege." (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) In addition, ICANN may refuse "[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive or vexatious purpose or by a vexatious or querulous individual." (*See id.*)

The DIDP process also provides that “[t]o the extent that any responsive documents fall within any [Nondisclosure Conditions], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.” (See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.) It is within ICANN’s sole discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure. (*Id.*) Finally, the DIDP does not require ICANN staff to “create or compile summaries of any documented information,” including logs of documents withheld under one of the Nondisclosure Conditions. (*Id.*)

V. Analysis and Rationale

The Requesters disagree with ICANN staff’s determination that certain requested documents were subject to DIDP Nondisclosure Conditions, as well ICANN’s determination that, on balance, the potential harm from the release of the documents subject to the Nondisclosure Conditions outweigh the public interest in disclosure. (Request, § 8.7.2, Pg. 9 (“Requestors do not agree with ICANN’s asserted bars to disclosure.”).) The Requesters claims do not support reconsideration.

A. ICANN Staff Adhered To The DIDP Process In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

The Requesters identify no policy or procedure that ICANN staff violated with respect to the DIDP Response. Instead, Requesters disagree with ICANN staff’s application of the DIDP

Nondisclosure Conditions, and claim that ICANN, in declining to produce such documents, violated ICANN's core commitment to transparency. (Request, § 10, Pgs. 12-13.)²

Specifically, the Requesters object to ICANN's determination to withhold: (1) "documentation with the EIU for the performance of its role ... as it relates to the .HOTEL CPE"; (2) "communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE [...]"; and (3) certain emails sent to the CPE Panel for the purpose of validating letters of support or opposition to an application, on which ICANN from time to time is copied. (Request, § 8, Pgs. 9-10.) The Requesters state that as to those categories of documents, they "do not agree with ICANN's asserted bars to disclosure." (*Id.*, § 8, Pg. 9.) The Requesters, however, fail to demonstrate that ICANN contravened the DIDP process.

The DIDP identifies a number of "conditions for the nondisclosure of information," such as documents containing "[i]nformation subject to the attorney-client [privilege], attorney work product privilege, or any other applicable privilege" and/or containing "[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." (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) It is ICANN's responsibility to determine whether requested documents fall within those Nondisclosure Conditions.

Specifically, pursuant to the DIDP process, "a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified at <http://www.icann.org/en/about/transparency/didp>." (See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> (Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests).)

² The Requesters do not challenge the DIDP Response insofar as it states that certain documents do not exist within ICANN's custody.

Specifically, pursuant to the DIDP process, “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified at <http://www.icann.org/en/about/transparency/didp>.” (*See* <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.)

Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analyzed the Requesters’ requests in view of the DIDP Nondisclosure Conditions. ICANN determined that the requested documents were subject to several Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.” (DIDP Response, Pg. 3.)³ As to the validation emails, ICANN determined that those documents were subject to the Nondisclosure Condition covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes.” (*Id.*)

As ICANN noted in the DIDP Response, notwithstanding the fact that Requesters’ “analysis in [their DIDP] Request concluded that no Conditions for Nondisclosure should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply.” (Response, Pg. 4.) In conformance with the publicly posted DIDP process (*see* <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>), ICANN

³ ICANN also noted that at least some of these documents were draft documents and explained that drafts not only fall within a Nondisclosure Condition but also are “not reliable sources of information regarding what actually occurred or standards that were actually applied.” (DIDP Response, Pgs. 3-4.) In their DIDP Request, the Requesters acknowledged that there were not seeking disclosure of drafts. (DIDP Request, Pg. 2.)

undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN's determination that certain Nondisclosure Conditions apply here, the Requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters' substantive disagreement with that determination is not a basis for reconsideration.

B. ICANN Staff Adhered To The DIDP Process In Determining That The Potential Harm Caused By Disclosure Outweighed the Public Interest In Disclosure.

The DIDP states that if documents have been identified within the Nondisclosure Conditions, they “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.” (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) The Requesters appear to argue that the publication of the documents they wished for ICANN to have made public through the DIDP “would serve policy interests that override any claimed basis for nondisclosure.” (Request, § 9, Pg. 11.) Here again, the Requesters' disagreement with the determination made by ICANN in responding to the DIDP Request does not serve as a basis for reconsideration.

The fact that the Requesters believe that in this case the public interest in disclosing information outweighs any harm that might be caused by such disclosure does not bind ICANN to accept the Requesters' analysis. Here, in accordance with the DIDP process, ICANN conducted a review of all responsive documents that fell within the Nondisclosure Conditions, and determined that the potential harm did outweigh the public interest in the disclosure of certain documents. (DIDP Response, Pg. 4.) Specifically, ICANN stated that “ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships

and its contractors' deliberative processes by the requested disclosure.” (*Id.*) Indeed, as noted above, many of the items in the DIDP Request seek documents whose disclosure “would or would be likely to compromise the integrity of . . . [the] deliberative and decision-making process.” (*Id.* at Pg. 2.) Again, the Requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters' substantive disagreement with that determination is not a basis for reconsideration.

Finally, the BGC notes that the Requesters refer to their DIDP Requests as “Requests for Production,” which is terminology typically used in discovery requests in litigation and wholly inapplicable in the DIDP context. The use of that terminology reflects a misunderstanding of the purpose and intent of the DIDP. The DIDP is not a litigation tool, but rather “is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, 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>.) The suggestion that the BGC could or should require the use of a litigation tool such as a protective order “to facilitate production while preserving any confidentiality concerns” further illustrates the Requesters' misunderstanding of the DIDP. The DIDP is not about making pieces of information available to specific interested parties; it is about whether requested items of information are proper for public disclosure.

In this case, ICANN staff properly followed all policies and procedures with respect to the Requesters' DIDP Request—they assessed the request in accordance with the guidelines set forth in the DIDP and determined, pursuant to those guidelines, that certain categories of requested documents were not appropriate for disclosure.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 14-39. As there is no indication that ICANN violated any policy or procedure with respect to its response to the Requesters' DIDP Request, Request 14-39 should not proceed. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-39 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.