

Exhibit 19

dotgay LLC Reconsideration Request (“RR”)

1. Requester Information

Requester:

Name: dotgay LLC (“dotgay”)

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requester is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Review.²

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

4. Date of action/inaction:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.¹¹ ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.¹²

⁵ ICANN Bylaws, Art. 1, § 1.2(a).

⁶ *Id.*, Art. 4, § 4.2(o).

⁷ *Id.*, Art. 1, § 1.2(a).

⁸ *Id.*, Art. 3, § 3.1.

⁹ *Id.*, Art. 1, § 1.2(v).

¹⁰ *Id.*, Art. 1, § 1.2(vi).

¹¹ *See id.*, Arts. 1, 3-4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.1 Background

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

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

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

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

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

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

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

8.2 The DIDP Request

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

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

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

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

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

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

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

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

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

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

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

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

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

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.²⁹

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

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

²⁸ *Id.*

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

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

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

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

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

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

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

8.3 ICANN’s Response to the Request

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

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

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

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

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

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

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

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

*ICANN provided the same response as for Item 1.*³³

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

*ICANN provided the same response as for Item 1.*³⁴

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

*ICANN provided the same response as for Item 1.*³⁵

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

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

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

*ICANN provided the same response as for Item 1.*³⁸

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

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

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

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

9. What are you asking ICANN to do now?

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

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

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

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

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

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

This is not applicable.

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

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

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



Arif Hyder Ali

June 30, 2017

Date

Exhibit 20

**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).

Exhibit 21

ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN (Internet Corporation for Assigned Names and Numbers)'s website, unless there are exceptional circumstances requiring further redaction.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN (Internet Corporation for Assigned Names and Numbers)'s operational activities, and within ICANN (Internet Corporation for Assigned Names and Numbers)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at www.icann.org, numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – <http://www.icann.org/en/about/annual-report>
([/en/about/annual-report](http://www.icann.org/en/about/annual-report))
- Articles of Incorporation – <http://www.icann.org/en/about/governance/articles>
([/en/about/governance/articles](http://www.icann.org/en/about/governance/articles))

- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings> (/en/groups/board/meetings)
- Budget – <http://www.icann.org/en/about/financials> (/en/about/financials)
- Bylaws (current) – <http://www.icann.org/en/about/governance/bylaws> (/en/about/governance/bylaws)
- Bylaws (archives) – <http://www.icann.org/en/about/governance/bylaws/archive> (/en/about/governance/bylaws/archive)
- Correspondence – <http://www.icann.org/correspondence/> (/correspondence/)
- Financial Information – <http://www.icann.org/en/about/financials> (/en/about/financials)
- Litigation documents – <http://www.icann.org/en/news/litigation> (/en/news/litigation)
- Major agreements – <http://www.icann.org/en/about/agreements> (/en/about/agreements)
- Monthly Registry reports – <http://www.icann.org/en/resources/registries/reports> (/en/resources/registries/reports)
- Operating Plan – <http://www.icann.org/en/about/planning> (/en/about/planning)
- Policy documents – <http://www.icann.org/en/general/policy.html> (/en/general/policy.html)
- Speeches, Presentations & Publications – <http://www.icann.org/presentations> (/presentations)
- Strategic Plan – <http://www.icann.org/en/about/planning> (/en/about/planning)
- Material information relating to the Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) – <http://aso.icann.org/docs> (<http://aso.icann.org/docs/>) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) – <http://gns0.icann.org> (<http://gns0.icann.org>) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <http://gns0.icann.org/reference-documents.htm> (<http://gns0.icann.org/reference-documents.htm>)), and council

administration documents (see <http://gnso.icann.org/council/docs.shtml> (<http://gnso.icann.org/council/docs.shtml>)).

- Material information relating to the [Country Code Names Supporting Organization \(Supporting Organization\) \(ccNSO \(Country Code Names Supporting Organization\)\)](http://ccnso.icann.org) – <http://ccnso.icann.org> (<http://ccnso.icann.org>) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the [At Large Advisory Committee \(Advisory Committee\) \(ALAC \(At-Large Advisory Committee\)\)](http://atlarge.icann.org) – <http://atlarge.icann.org> (<http://atlarge.icann.org>) – including correspondence, statements, and meeting minutes
- Material information relating to the [Governmental Advisory Committee \(Advisory Committee\) \(GAC \(Governmental Advisory Committee\)\)](http://gac.icann.org/web/index.shtml) – <http://gac.icann.org/web/index.shtml> (<http://gac.icann.org/web/index.shtml>) – including operating principles, [gTLD \(generic Top Level Domain\) principles](http://gac.icann.org/web/index.shtml), [ccTLD \(Country Code Top Level Domain\) principles](http://gac.icann.org/web/index.shtml), principles regarding [gTLD \(generic Top Level Domain\) Whois issues](http://gac.icann.org/web/index.shtml), [communiqués](http://gac.icann.org/web/index.shtml), and meeting transcripts, and agendas
- Material information relating to the [Root Server Advisory Committee \(Advisory Committee\) \(RSSAC \(Root Server System Advisory Committee\)\)](http://www.icann.org/en/groups/rssac) – <http://www.icann.org/en/groups/rssac> ([/en/groups/rssac](http://www.icann.org/en/groups/rssac)) – including meeting minutes and information surrounding ongoing projects
- Material information relating to the [Security \(Security – Security, Stability and Resiliency \(SSR\)\) and Stability \(Security, Stability and Resiliency\) Advisory Committee \(Advisory Committee\) \(SSAC \(Security and Stability Advisory Committee\)\)](http://www.icann.org/en/groups/ssac) – <http://www.icann.org/en/groups/ssac> ([/en/groups/ssac](http://www.icann.org/en/groups/ssac)) – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](http://www.icann.org) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](http://www.icann.org) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If [ICANN \(Internet Corporation for Assigned Names and Numbers\)](http://www.icann.org) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'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 (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be 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.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at [http://www.icann.org/en/about/governance/bylaws \(/en/about/governance/bylaws\)](http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws)).

DIDP Requests and Responses

Request submitted under the DIDP and [ICANN \(Internet Corporation for Assigned Names and Numbers\)](http://www.icann.org/en/about/transparency) responses are available here:

[http://www.icann.org/en/about/transparency \(/en/about/transparency\)](http://www.icann.org/en/about/transparency)

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at [http://www.icann.org/en/groups/board/meetings \(/en/groups/board/meetings\)](http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings))) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at [http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm \(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\)](http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm (/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm)).

To submit a request, send an email to [didp@icann.org \(mailto:didp@icann.org\)](mailto:didp@icann.org)

Exhibit 22

Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization

Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board Operations), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

- **Update on Community Priority Evaluation Process Review (Review)** - The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.
 - Action:
 - ICANN (Internet Corporation for Assigned Names and Numbers) organization to follow up with FTI on what documents are outstanding from the CPE provider in response to FTI's document request.
 - ICANN (Internet Corporation for Assigned Names and Numbers) organization to continue providing the BGC with updates on the status of the review, and publish update(s) as appropriate.
- **Board Committee and Leadership Selection Procedures** - The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that

Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.

- Action:

- BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.

- **Discussion of Board Committees and Working Groups Slate** – The BGC discussed the Board Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.

- Action:

- ICANN (Internet Corporation for Assigned Names and Numbers) organization to revise the Committee charters in accordance with the discussion regarding composition of the Committees for consideration by the BGC at its next meeting.

- **Any Other Business**

- Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership
– The BGC noted that it is anticipated that the interview process for the NomCom 2018 Chair and Chair-Elect Leadership will be completed by the next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.