

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 17-4
11 OCTOBER 2017**

The Requestors, dotgay LLC (dotgay) and DotMusic Ltd. (DotMusic), seek reconsideration of ICANN organization’s response to the Requestors’ request (Joint DIDP Request), pursuant to ICANN’s Documentary Information Disclosure Policy (DIDP), for documents relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).¹ Specifically, the Requestors claim that, in declining to produce certain requested documents and information, ICANN organization violated its Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment, transparency, and accountability.²

I. Brief Summary.

dotgay and DotMusic submitted community-based applications for .GAY and .MUSIC, respectively; both applications participated in CPE and neither prevailed.³ In October 2015, dotgay sought reconsideration of the CPE outcome (Request 15-21),⁴ which the Board Governance Committee (BGC)⁵ denied.⁶ In February 2016, dotgay sought reconsideration of the

¹ Request 17-4, § 3, at Pg. 1-2.

² Request 17-4, § 6, at Pg. 5-8.

³ CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>; CPE Report on DotMusic, 10 February 2016, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁴ 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>.

⁵ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. 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>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on 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>.

⁶ BGC Determination on Request 15-21, at Pg. 1.

BGC's denial of Request 15-21 (see Request 16-3).⁷ In February 2016, DotMusic sought reconsideration of the CPE determination and approval of DotMusic's application (Request 16-5).⁸

The ICANN Board thereafter directed ICANN organization to undertake the CPE Process Review to evaluate how ICANN organization interacted with the CPE provider. Later, the 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 of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending reconsideration requests concerning CPE. The BGC also put the eight pending reconsideration requests relating to CPE on hold, including Requests 16-3 and 16-5, pending completion of the CPE Process Review.

On 10 June 2017, the Requestors submitted the Joint DIDP Request seeking documents and information relating to the CPE Process Review, some of which the Requestors had sought in prior DIDP requests. ICANN organization's response (Response to Joint DIDP Request) explained that, except for certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all other responsive documents had been published and identified in response to the Requestors' prior DIDP requests.⁹ The Response to Joint DIDP Request provided hyperlinks to the responses to the prior DIDP requests, which in turn provided hyperlinks to publicly available responsive documents.¹⁰ The Response to Joint DIDP Request further explained that two Items (Item Nos. 2 and 4) did not seek documentary information in

⁷ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

⁸ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

⁹ ICANN Responses to DIDP Requests No. 20170505-1 (DotMusic Ltd.), and 20170518-1 (dotgay LLC), incorporated by reference in ICANN's Response to DIDP Request No. 20170610-1 at Pg. 2.

¹⁰ Response to Joint DIDP Request, at Pg. 2.

existence within ICANN.¹¹ Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated responsive documents subject to Nondisclosure Conditions to determine if the public interest in disclosing them outweighed the harm of disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.¹²

The Requestors then filed Reconsideration Request 17-4 (Request 17-4) challenging the Response to Joint DIDP Request. The Requestors suggest that ICANN organization violated ICANN's Core Values, established DIDP policies and the Bylaws concerning non-discriminatory treatment, transparency, and accountability.¹³

As required, ICANN organization transmitted Request 17-4 to the Ombudsman for consideration, and the Ombudsman recused himself.¹⁴

The BAMC has considered Request 17-4 and all relevant materials and recommends that the Board deny Request 17-4 because ICANN organization adhered to established policies and procedures in the Response to Joint DIDP Request. Specifically, ICANN organization followed the DIDP Response Process because it: (i) identified responsive documents; (ii) provided hyperlinks to those that were already publicly available; and (iii) for the remaining documents, it considered whether the documents were subject to Nondisclosure Conditions. Because ICANN organization determined that certain documents were subject to Nondisclosure Conditions, ICANN then considered whether the public interest in disclosing the documents outweighed the harm of disclosure, and found that it did not.

¹¹ *Id.*

¹² DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

¹³ Request 17-4, § 8, at Pg. 21.

¹⁴ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

II. Facts.

A. Background Facts.

1. CPE Process Review

The Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by dotgay,¹⁵ and by DotMusic,¹⁶ during their respective presentations to the BGC, as well as issues identified in the Final Declaration from the Independent Review Process (IRP) initiated by Dot Registry, LLC.¹⁷ As a result, 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. Later, the BGC decided that the CPE Process Review should also include a request for materials and research relied upon by the CPE panels.¹⁸ 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).¹⁹

2. DotMusic Limited

DotMusic submitted a community-based application for .MUSIC. DotMusic's Application participated in CPE,²⁰ and in February 2016, the CPE panel issued a CPE Report,

¹⁵ 15 May 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

¹⁶ 17 September 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

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

¹⁸ 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>.

¹⁹ 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2.

²⁰ CPE is a way of resolving string contention and will occur only if a community application is in contention and the applicant elects to pursue CPE for that application. See <https://newgtlds.icann.org/en/applicants/cpe>.

concluding that DotMusic’s application did not qualify for community priority.²¹ On 24 February 2016, DotMusic filed Request 16-5 seeking reconsideration of the CPE Report.²²

In April 2016, DotMusic submitted a DIDP request seeking documents relating to the CPE Report (2016 DotMusic DIDP Request).²³ In May 2016, ICANN organization responded to the 2016 DotMusic DIDP Request,²⁴ providing links to all the responsive, publicly available documents, furnished an email not previously publicly available,²⁵ explained that it did not possess documents responsive to several of the items, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.²⁶ DotMusic thereafter filed Request 16-7 challenging ICANN organization’s response to the 2016 DotMusic DIDP Request. In June 2016, the BGC denied Request 16-7.²⁷

In May 2017, DotMusic submitted another DIDP request, seeking 10 categories of documents relating to the CPE Process Review (2017 DotMusic DIDP Request), including some items previously sought in the 2016 DotMusic DIDP Request.²⁸ Among other things, the 2017 DotMusic DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 2), “[t]he materials provided to the evaluator by the EIU” (Item No. 5),

²¹ See CPE Report on DotMusic at 1.

²² Request 16-5.

²³ See 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

²⁴ Response to 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

²⁵ 2016 DIDP Response at 3, 12, Attachment.

²⁶ *Id.*, Pgs. 1-7, 11-12.

²⁷ BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. DotMusic has now filed four reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DotMusic DIDP Request), Request 17-2 (challenging the response to another DIDP Request), and the instant request, Request 17-4 (challenging the response to the DIDP Request filed by DotMusic and dotgay).

²⁸ DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board,” (Item No. 6), which are repeated in the Joint DIDP Request, the response to which is at issue in the instant Request 17-4.²⁹

In June 2017, ICANN organization responded to the 2017 DotMusic DIDP Request,³⁰ providing 21 hyperlinks to publicly available responsive documents, noting that it did not have possession, custody, or control over certain requested documents, and explaining that certain other requested documents were subject to identified Nondisclosure Conditions and not appropriate for disclosure.³¹

On 18 June 2017, DotMusic sought reconsideration of ICANN organization’s response to several items requested in the 2017 DotMusic DIDP Request, including Item Nos. 2, 5, 6, and 8 (see Request 17-2).³² On 23 August 2017, the BAMC recommended that ICANN’s Board deny Request 17-2 because ICANN organization’s response to the 2017 DotMusic DIDP Request adhered to the DIDP Response Process and did not violate ICANN’s Mission, Commitments, Core Values or established policies.³³ The Board denied Request 17-2 on 23 September 2017.³⁴

3. dotgay LLC

dotgay submitted a community-based application for .GAY, and in early 2014, dotgay’s application was invited to and did participate in CPE. In October 2014, the CPE panel issued a “First CPE report,” concluding that dotgay’s application did not qualify for community

²⁹ *Id.*

³⁰ Response to 2017 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

³¹ *Id.*

³² Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

³³ BAMC Recommendation on Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

³⁴ ICANN Board Resolution 2017.09.23.08, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.a>.

priority.³⁵ dotgay filed Reconsideration Request 14-44, seeking reconsideration of the First CPE report.³⁶ The BGC granted reconsideration and at the BGC’s direction, the CPE provider conducted a “Second CPE” of dotgay’s application for .GAY; again it did not prevail.³⁷

On 22 October 2015, dotgay sought reconsideration of the Second CPE report (Request 15-21).³⁸ On the same day, dotgay filed a DIDP request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 dotgay DIDP Request).³⁹ The 2015 dotgay 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.”⁴⁰ ICANN organization responded to the 2015 dotgay DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly 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.⁴¹ On 4 December 2015, dotgay revised Request 15-21 to challenge

³⁵ See CPE Report on dotgay, 6 October 2014, at 1, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

³⁶ 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>.

³⁷ *Id.*; see also CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

³⁸ BGC Determination on Request 15-21, at Pg. 1

³⁹ DIDP Request No. 20151022-1 (2015 dotgay DIDP Request), at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

⁴⁰ *Id.* at Pg. 2. dotgay made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 dotgay 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 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁴¹ Response to 2015 dotgay DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

the response to the 2015 dotgay DIDP Request in addition to the Second CPE report.⁴²

In February 2016, the BGC denied Request 15-21,⁴³ which dotgay later challenged (Request 16-3); dotgay did not challenge the BGC's determination concerning the response to the 2015 dotgay DIDP Request.⁴⁴ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.⁴⁵ The Board was scheduled to consider Request 16-3 on 17 September 2016, but just four days earlier, dotgay submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.⁴⁶ Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.⁴⁷

On 18 May 2017, dotgay submitted a second DIDP Request, which included the same 10 categories of documents requested in the 2017 DotMusic DIDP Request, and three additional categories of documents relating to the CPE Process Review (2017 dotgay DIDP Request).⁴⁸ Among other things, the 2017 dotgay DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 5), “[t]he materials provided to the evaluator by the EIU” (Item No. 8), and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board,” (Item No.

⁴² Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

⁴³ BGC Determination on Request 15-21, at Pg. 1.

⁴⁴ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

⁴⁵ BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

⁴⁶ 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>.

⁴⁷ Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

⁴⁸ 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

9),⁴⁹ which, as discussed below, are repeated in the Joint DIDP Request at issue in the instant Request 17-4.

On 18 June 2017, ICANN organization responded to the 2017 dotgay DIDP Request and explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight of the 13 categories already have been published. The response to the 2017 dotgay DIDP Request further explained that the documents responsive to the remaining five categories were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.⁵⁰

On 30 June 2017, dotgay filed Request 17-3, challenging ICANN organization's determination not to produce certain responsive documents that were subject to Nondisclosure Conditions.⁵¹ dotgay did not challenge the response to Item No. 5 in Request 17-3.⁵²

On 23 August 2017, the BAMC recommended that ICANN's Board deny Request 17-3 because ICANN organization's response to the 2017 dotgay DIDP Request adhered to the DIDP Response Process and did not violate ICANN's Mission, Commitments, Core Values or established policies.⁵³ The Board denied Request 17-3 on 23 September 2017.⁵⁴

4. Request 17-4

The Joint DIDP Request "requests that ICANN":

⁴⁹ *Id.*

⁵⁰ ICANN Response to 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

⁵¹ Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

⁵² *Id.*

⁵³ BAMC Recommendation on Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

⁵⁴ ICANN Board Resolution 2017.09.23.09, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>.

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.⁵⁵

As noted above, Item Nos. 1 and 3 were previously requested in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.⁵⁶ On 10 July 2017, ICANN organization responded to the Joint DIDP Request,⁵⁷ explaining that, with the exception of certain documents that were subject to Nondisclosure Conditions set forth in the DIDP, all the remaining documents responsive to the Joint DIDP Request already had been published and identified in response to the Requestors’ prior 2017 DIDP requests.⁵⁸ The Response to Joint DIDP Request provided hyperlinks to the DIDP Responses to the Requestors’ prior DIDP requests, which provided hyperlinks to those publicly available responsive documents.⁵⁹ The Response to Joint DIDP Request further explained that two of the Items (Item Nos. 2 and 4) improperly sought

⁵⁵ DIDP Request No. 20170610-1, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>; Request 17-4, Exhibit 1.

⁵⁶ Item No. 1 is very similar to Item No. 6 of the 2017 DotMusic DIDP Request and Item No. 9 of the 2017 dotgay DIDP Request. As noted above, both of those items sought documents containing information about the materials that ICANN provided to FTI to facilitate the CPE Process Review. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>. Item No. 3 is a subset of Item No. 2 of the 2017 DotMusic DIDP Request and Item No. 5 of the 2017 dotgay DIDP Request. Both items sought documents containing information about “[t]he selection process . . . in relation to the appointment” of FTI. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁵⁷ Response to Joint DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁵⁸ ICANN Responses to 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, incorporated by reference in ICANN’s Response to DIDP Request No. 20170610-1 at Pg. 2.

⁵⁹ Response to Joint DIDP Request, at Pg. 2.

information not found in documents already in existence within ICANN and were not appropriate DIDP requests.⁶⁰ Notwithstanding this requirement, ICANN organization identified documents that contain information responsive to the requests and provided hyperlinks to those documents.⁶¹ Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.⁶²

On 25 July 2017, the Requestors filed Request 17-4, seeking reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request and determination not to produce certain documents responsive to Item Nos. 1 through 4. The Requestors assert that the materials that ICANN organization identified are not responsive to Item Nos. 1 and 3, that ICANN has provided other requestors with information derived from documents in response to DIDP requests without providing underlying documents, and that the information the Requestors asked for "is more than likely contained in ICANN documents."⁶³ The Requestors argue that withholding materials containing information responsive to the Items increases the likelihood that "anyone attempting to understand" the CPE process will resort to IRP, which is "expensive and time-consuming," to safeguard their interests.⁶⁴

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

⁶³ Request 17-4, § 8, at Pg. 12, 22.

⁶⁴ Request 17-4, § 7, at Pg. 7.

On 23 August 2017, the BAMC concluded that Request 17-4 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.⁶⁵

On 23 August 2017, ICANN organization transmitted Request 17-4 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.⁶⁶ Accordingly, the BAMC reviews Request 17-4 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

B. Relief Requested

The Requestors asks the BAMC to disclose the documents requested in the Joint DIDP Request.⁶⁷

III. Issues Presented.

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the Joint DIDP Request.
2. Whether ICANN organization complied with its Core Values, Mission, and Commitments in responding to the Joint DIDP Request.⁶⁸

The BAMC notes that the Requestors indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-4 seeks reconsideration of staff and Board action or inaction.⁶⁹ The only subsequent discussion of Board action is the Requestors' passing reference to Article 4, Section 4.2(o) of ICANN's Bylaws, which states that the BAMC "shall . . . provide[] to the Requestor" any information "collected by ICANN from third parties" that is

⁶⁵ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

⁶⁶ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

⁶⁷ Request 17-4, § 9, at Pg. 22.

⁶⁸ Request 17-4, § 9, at Pg. 22.

⁶⁹ Request 17-4, § 2, at Pg. 1.

relevant to the Reconsideration Request.⁷⁰ The Requestors make no arguments concerning the BAMC's actions or inactions, and do not ask ICANN organization to take any action concerning this issue. Rather, the Requestors focus on ICANN organization's response to the Requestors' Joint DIDP Request.⁷¹ Accordingly, the BAMC understands Request 17-4 to seek reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request, and *not* reconsideration of Board action or inaction.⁷²

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.⁷³

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and

⁷⁰ ICANN Bylaws, Art. 4, § 4.2(o).

⁷¹ Request 17-4, §§ 6, 8-9 at Pg. 3-7, 9-22.

⁷² Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

⁷³ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

consideration.⁷⁴ Pursuant to the 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.⁷⁵ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁷⁶

On 23 August 2017, the BAMC determined that Request 17-4 is sufficiently stated and sent Request 17-4 to the Ombudsman for review and consideration.⁷⁷ The Ombudsman thereafter recused himself from this matter.⁷⁸ Accordingly, the BAMC has reviewed Request 17-4 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.⁷⁹ 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

⁷⁴ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁷⁵ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

⁷⁶ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁷⁷ Ombudsman Action Regarding Request 17-4, Pg. 1-2.

⁷⁸ Ombudsman Action Regarding Request 17-4, Pg. 1.

⁷⁹ See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

organization make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.⁸⁰

The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization’s operational activities, and within ICANN organization’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁸¹

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).⁸² 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].”⁸³

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-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁸³ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;

- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.⁸⁴

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.⁸⁵

V. Analysis and Rationale.

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

1. The Response to Joint DIDP Request Complies With Applicable Policies And Procedures.

The Response to Joint DIDP Request identified documentary information responsive to all four items. For Item Nos. 1 and 3, ICANN organization determined that all of the responsive documentary information already had been published on ICANN's website, and provided to the

⁸⁴ DIDP.

⁸⁵ *Id.*

Requestors in response to prior DIDP requests.⁸⁶ The DIDP responses to those requests identified and provided the hyperlinks to 21 publicly available documents and websites compiling documents that contain information responsive to Item Nos. 1 and 3.⁸⁷

The Response to Joint DIDP Request also explained that technically Item Nos. 2 and 4 were requests for information rather than documents, and therefore not appropriate DIDP requests. Notwithstanding this requirement, ICANN organization provided significant information responsive to Item Nos. 2 and 4 in the Status Update and in an earlier CPE Process Review update, and provided hyperlinks to those updates.⁸⁸ Finally, the Response to Joint DIDP Request explained that some of the documents responsive to Item Nos. 2 and 4 were subject to certain identified Nondisclosure Conditions.⁸⁹ The Response to Joint DIDP Request 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.⁹⁰

The Requestors claim that ICANN organization's responses to Item Nos. 1 through 4 violated established policies and procedures.⁹¹ However, the Requestors do not demonstrate that ICANN organization violated any established policy or procedure.⁹² Instead, the Requestors focus on the *outcome* of the Joint DIDP Request. The Reconsideration Request process provides an opportunity to re-examine the *process* by which ICANN organization takes or foregoes action;

⁸⁶ See Response to Joint DIDP Request at Pg. 2.

⁸⁷ Response to DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; and response to DIDP Request No. DIDP20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

⁸⁸ Response to Joint DIDP Request at Pg. 2.

⁸⁹ *Id.* at Pg. 2-3.

⁹⁰ Response to Joint DIDP Request at Pg. 3.

⁹¹ Request 17-4, § 8, Pg. 21-22.

⁹² *Id.*

the Requestors' general dissatisfaction with the outcome of the DIDP process is not grounds for reconsideration. Further, and as demonstrated below, ICANN organization's responses to Item Nos. 1 through 4 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.”⁹³ 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.⁹⁴ 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.⁹⁵

a. ICANN organization's response to Item No. 1 adhered to established policies and procedures.

Item No. 1 asked ICANN organization to “[c]onfirm 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.”⁹⁶ In its response, and consistent with the DIDP Response Process, ICANN organization referred the Requestors to ICANN's responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request. Those responses addressed requests that captured the same information sought in the instant Item No. 1 and

⁹³ DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ DIDP Request at Pg. 3.

provided information and hyperlinks to the documents appropriate for disclosure that are also responsive to the instant Item No. 1.⁹⁷

The Requestors argue that information responsive to Item No. 1 “was not previously provided to Requestors,” because “ICANN [organization] has not confirmed ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests.’”⁹⁸ The Requestor’s claim is unsupported. In its Responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, ICANN organization identified all the documents that it provided to FTI. The Response to Joint DIDP Request referred the Requestors to these documents.⁹⁹ FTI’s will determine what information is relevant to the CPE Process Review it is conducting. ICANN does not have possession, custody, or control of any documents that would “confirm[] ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests’” because no such documents exist. FTI’s final CPE Process Review report may indicate the documents that FTI reviewed in the course of its evaluation, but the CPE Process Review is ongoing. Therefore, any request for the report or information that may be in the report is premature. ICANN organization’s response is consistent with the DIDP Response Process: it identified all responsive materials currently in existence and in its possession, custody, or control, and provided hyperlinks to the documents appropriate for disclosure. ICANN organization is not required to do more under the DIDP Response Process.

The Requestors disagree with ICANN organization’s response to Item No. 1, but they do not suggest that the response is contrary to the DIDP Response Process, nor do the Requestors

⁹⁷ Response to Joint DIDP Request at Pg. 2.

⁹⁸ Request 17-4 § 8, Pg. 21.

⁹⁹ Response to Joint DIDP Request at Pg. 2.

provide anything to demonstrate how the response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration is not warranted on these grounds.

b. ICANN organization’s response to Item No. 3 adhered to established policies and procedures.

Item No. 3 asked ICANN organization to “[d]isclose the details of FTI’s selection process, including the Requests for Proposals Process, and the terms under which FTI currently operates for ICANN.”¹⁰⁰

The Requestors previously asked ICANN organization for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI” in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.¹⁰¹ In response, ICANN organization identified and provided the hyperlink to the Status Update, which explained that FTI “was chosen to assist in the CPE review following consultation with various candidates.... because FTI has the requisite skills and expertise to undertake this investigation.”¹⁰² The Response to Joint DIDP Request adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.¹⁰³ The only other documents in ICANN’s possession relating to the selection process are communications with ICANN organization’s outside counsel, and ICANN’s contract with FTI, which the Requestors indicate that they seek.¹⁰⁴ Those documents are not appropriate for disclosure under the DIDP because they comprise:

¹⁰⁰ *Id.*

¹⁰¹ *See* 2017 DotMusic DIDP Request at Pg. 4; 2017 dotgay DIDP Request at Pg. 5.

¹⁰² Status Update

¹⁰³ DIDP; Response to Joint DIDP Request at Pg. 2.

¹⁰⁴ Request 17-4, § 6, at Pg. 22.

- 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.¹⁰⁵

As with Item No. 1, the Requestors do not suggest that ICANN organization’s response to Item No. 3 is contrary to the DIDP Response Process, nor do the Requestors provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration of the Response to Joint DIDP Request on Item No. 3 is not warranted.

c. ICANN organization’s responses to Item Nos. 2 and 4 adhered to established policies and procedures.

Item Nos. 2 and 4 sought the disclosure of the identities of “ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purpose[] of completing its ‘first track’ review” (Item No. 2) and “[c]onfirm[ation] that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review” (Item No. 4).¹⁰⁶ ICANN organization responded as follows:

[T]he DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the [CPE Process] Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update.¹⁰⁷

The Requestors argue that information responsive to Item Nos. 2 and 4 “is more than likely contained in ICANN documents” and it “is in the public’s interest to disclose” those documents.¹⁰⁸ This argument misapplies the DIDP Response Process. Even if Item Nos. 2 and 4 were to be interpreted as requests for documents, the Response to Joint DIDP Request adhered to

¹⁰⁵ DIDP.

¹⁰⁶ DIDP Request, at Pg. 4.

¹⁰⁷ Response to Joint DIDP Request at Pg. 2.

¹⁰⁸ Request 17-4, § 8, at Pg. 22.

the DIDP Response Process, because ICANN organization searched for and identified documents responsive to Item Nos. 2 and 4, reviewed those materials, and determined that they were subject to certain Nondisclosure Conditions discussed below.¹⁰⁹ Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.¹¹⁰

The Requestors also argue that “ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.”¹¹¹ The Requestors recognize that the DIDP Response Process “does not require ICANN to create or compile summaries of any documented information,” but argue that because ICANN organization has provided information in response to other DIDP Requests, ICANN organization should be required to do so here.¹¹² First, the DIDP Response Process does not *require* ICANN organization to document information not already available in documentary form. In some instances, ICANN organization has compiled documents in response to a DIDP request as part of ICANN’s efforts of improving upon the levels of reporting where feasible.¹¹³ However, the fact that ICANN organization has summarized documentary information in response to other DIDP Requests does not obligate ICANN organization to summarize information *not* otherwise

¹⁰⁹ DIDP Response Process.

¹¹⁰ Response to Joint DIDP Request at Pg. 3.

¹¹¹ Request 17-4, § 8, Pg. 12.

¹¹² *Id.*

¹¹³ *E.g.*, in ICANN’s response to DIDP Request No. 20141222-1, the requestor sought detailed reports of ICANN’s income and revenue from domain names for the years 1999 to 2014. No responsive document existed at the time ICANN organization provided its response to the DIDP request, but ICANN organization was in the process of preparing several reports that, once completed, would be responsive to the DIDP request and would increase the transparency of ICANN organization’s financial reporting. Accordingly, the response explained that once the report was complete and available in a publishable format, it would be published on ICANN’s website. Response to DIDP Request No. 20141222-1 at Pg. 2, <https://www.icann.org/en/system/files/files/cis-response-21jan15-en.pdf>.

contained in any documents in its possession, custody, or control in response to the Joint DIDP Request. Second, FTI has not yet completed its final report on the CPE Process Review; therefore, that document is not yet in ICANN organization's possession, custody, or control and therefore the request for its distribution is premature. Third, and as discussed below, the information requested in Item Nos. 2 and 4 is subject to Nondisclosure Conditions and not appropriate for disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process.

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.¹¹⁴ 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.¹¹⁵ In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the Response to Joint DIDP Request.

In response to Item Nos. 2 and 4, ICANN organization determined that any documents in its possession responsive to the Items were not appropriate for disclosure because they comprised:

¹¹⁴ DIDP.

¹¹⁵ *Id.*

- 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.¹¹⁶

It is understandable why these Nondisclosure Conditions apply to the materials responsive to Item Nos. 2 and 4. Those Items request documents that go to the heart of the CPE Process Review deliberative and decision-making process and comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process”.¹¹⁷ The DIDP specifically carves out documents revealing the deliberative and decision-making process as exempt from disclosure pursuant to the Nondisclosure Conditions and the potential harm of disclosing that information was deemed to outweigh any potential benefit of disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process in finding the materials subject to the Nondisclosure Conditions.

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.

¹¹⁶ Response to Joint DIDP Request at Pg. 2-3.

¹¹⁷ DIDP Request at Pg. 5.

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.”¹¹⁸ 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.¹¹⁹

DotMusic previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.”¹²⁰ Nevertheless, the Requestors suggest reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”¹²¹ However, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.¹²²

As the Amazon EU S.A.R.L. IRP Panel noted in June of this year:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

¹¹⁸ *See id.*

¹¹⁹ Response to Joint DIDP Request at Pg. 3.

¹²⁰ Request 16-7, § 3, Pg. 4.

¹²¹ Request 17-4 § 7, Pg. 8.

¹²² *See* ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

(*Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.) To enable ICANN organization to balance its transparency commitment with the need to protect certain communications, the DIDP gives ICANN organization the discretion to decide whether the public interest (including transparency and fairness concerns) outweighs the potential harm of disclosure. Here, ICANN organization determined in its discretion that the public interest in disclosure did not outweigh the potential harm of disclosing documents that reflect the deliberative processes of ICANN, and documents that are subject to the attorney-client, attorney work product privilege, or any other applicable privilege. Accordingly, the argument does not support reconsideration.

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

The Requestors argue that ICANN “failed to adhere to its Bylaws by acting ‘through open and transparent processes’ when it issued the DIDP Response . . . and did not produce the requested information,” thereby violating certain Commitments and Core Values:¹²³

- Operating in a manner consistent with [ICANN’s] Articles [of Incorporation] and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets;¹²⁴
- Employing open and transparent policy development mechanisms;¹²⁵
- Applying documented policies neutrally and objectively, with integrity and fairness;¹²⁶
- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.¹²⁷

¹²³ Request 17-4, § 6, at Pg. 5-7.

¹²⁴ ICANN Amended and Restated Articles of Incorporation, 9 August 2016, § 2(III), <https://www.icann.org/resources/pages/governance/articles-en>. The Requestors also cite ICANN’s Bylaws, 22 July 2017, Art. 1, § 1.2(a), which similarly states that ICANN commits to “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole.” Request 17-4, § 6, at Pg. 5.

¹²⁵ ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

¹²⁶ *Id.*, Art. 1, § 1.2(a)(v).

However, the Requestors provide no explanation for how these Commitments and Core Values relate to the Response to Joint DIDP Request or how ICANN organization has violated these Commitments and Core Values.¹²⁸ The Requestors have not established grounds for reconsideration through its list of Commitments and Core Values.

VI. Recommendation

The BAMC has considered the merits of Request 17-4, 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 the Response to Joint DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-4.

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 17-4 was submitted on 25 July 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 August 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-4 is 11 October 2017, which is within the requisite 90 days of receiving Request 17-4.¹²⁹

(continued...)

¹²⁷ *Id.*, Art. 1, § 1.2(a)(vi).

¹²⁸ *See generally* Request 17-4, § 6, Pg. 5-7.

¹²⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).