

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-1**

Requestor<sup>1</sup> submits this Rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Reconsideration Request 18-1 (the “Recommendation”).<sup>2</sup> The Recommendation concerns Requestor’s request that ICANN reconsider its refusal to disclose the documents requested in Requestor’s DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation’s claims, are not requests “to create or compile summaries of any documented information.”<sup>4</sup> Specifically, Requestor submitted nineteen requests:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in Requestor’s Reconsideration Request 18-1. *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>2</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>3</sup> *See* Exhibit 23, DotMusic Reconsideration Request 18-1 (Mar. 10, 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>4</sup> *See* Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 10, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN's questions "regarding the meaning the CPE Provider intended to convey;"
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the "CPE Provider's working papers associated with" Requestor's CPE;
12. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"
13. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"
15. FTI's investigative plan used during its independent review;
16. FTI's "follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;"
17. All communications between ICANN and FTI regarding FTI's independent review;
18. All communications between ICANN and the CPE Provider regarding FTI's independent review; and

19. All communications between FTI and the CPE Provider regarding FTI's independent review.<sup>5</sup>

ICANN refused to disclose these documents to Requestor. This DIDP Response is clearly improper because (1) ICANN's assertion that the responsive documents fall under of Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Condition; and (3) ICANN's decision violates its Commitments and Core Values. The BAMC's Recommendation now attempts to justify ICANN's decision, which improperly implies that several of ICANN's Commitments and Core Values are not implicated in the DIDP Response, that Requestor made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.<sup>6</sup>

### **1. The DIDP Response Must Adhere to ICANN's Commitments and Core Values**

ICANN must comply with its Commitments and Core Values, even when issuing the DIDP Response, or ICANN will violate its own Bylaws. ICANN is required to "act in a manner consistent with [its] Bylaws"<sup>7</sup> and "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values"<sup>8</sup> in performing its mission "to ensure the stable and secure operation of the Internet's unique identifier systems."<sup>9</sup> There is no exception carved out for the DIDP in the Bylaws. Therefore, ICANN must act "in conformity with relevant principles of international law and international conventions and applicable local law" during the DIDP process.<sup>10</sup>

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<sup>5</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>6</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 31, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

<sup>7</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>8</sup> *Id.* at Art. 1, §1.2.

<sup>9</sup> *Id.* at Art. 1, § 1.1(a).

<sup>10</sup> *Id.* at Art. 1, §1.2(a).

The ICANN Bylaws thus require that ICANN comply with principles of international law, which includes due process. The BAMC is attempting to circumvent the Bylaws by arguing in the Recommendation that can ignore international legal principles because (1) ICANN can establish its own accountability mechanisms<sup>11</sup> and (2) ICANN’s commitment to transparency outweighs its commitment to principles of international law. However, the ICANN Bylaws require that ICANN “carry[] out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes.”<sup>12</sup> This “puts principles of international law first, before ... local law and ICANN’s Bylaws.”<sup>13</sup> Resultantly, “any principles enshrined in California law, ICANN’s Articles ... and/or ICANN’s Bylaws will only apply to the extent that they are fully compatible with international law.”<sup>14</sup>

Hence, the BAMC’s arguments are untenable based on ICANN’s own Bylaws. While ICANN established its own corporate accountability mechanisms, its Bylaws require that these mechanisms comply with international legal principles. The principles of transparency and accountability thus cannot supersede these international principles pursuant to ICANN’s Bylaws; rather international legal principles “serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted”—including ICANN’s accountability mechanisms.<sup>15</sup> As such, neither of the BAMC’s excuses for ignoring the international principle of due process hold water.

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<sup>11</sup> The Recommendation refers to due process as a “[c]onstitutional protection” or a “constitutional right.” Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 29, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>. The BAMC may be confusing the *constitutional right* to due process, contained in the United States Constitution and applicable to the American government, with the international *principle* of due process.

<sup>12</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a).

<sup>13</sup> Exhibit 29, Flip Petition, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. 40.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 39.

## 2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness

The DIDP is “[a] principal element of ICANN's approach to transparency and information disclosure.”<sup>16</sup> This principle of transparency “is one of the essential principles in ICANN’s creation documents, and its name reverberated through its Articles and Bylaws.”<sup>17</sup> ICANN’s Articles of Incorporation commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>18</sup> ICANN’s Bylaws contain the same language<sup>19</sup> and, in addition to dedicating an entire Article on transparency,<sup>20</sup> reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”<sup>21</sup> The Recommendation even admits that the DIDP complies with the principle of transparency:

ICANN org 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 org’s approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN org’s operational activities.<sup>22</sup>

ICANN’s refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN’s other Commitments and Core Values.

However, ICANN did not adhere to its Commitment to openness and transparency when it denied Requestor’s requests for further information about the ongoing review of the CPE process.

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<sup>16</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>17</sup> Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> Exhibit 25, ICANN Articles of Incorporation, § 2.III.

<sup>19</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>20</sup> *See id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>21</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>22</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 9, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria,<sup>23</sup> drawing criticism from legal experts<sup>24</sup> and even the Council of Europe.<sup>25</sup> Yet, the actual content and scope of the review has been mired in secrecy. Despite its Commitments to transparency and openness, ICANN still has not disclosed relevant information about the independent review to the community applicants. For instance, Requestor and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents believed to be in ICANN's possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI's work for ICANN; and (3) the documents relied on by FTI in conducting its independent review. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

### **3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure**

The independent review is significant not only to Requestor but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>26</sup> This evaluation process has clearly disproportionately treated

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<sup>23</sup> See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).

<sup>24</sup> See Exhibit 26, Letter from Arif Ali to ICANN CEO Göran Marby and the BGC (Jan. 30, 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>.

<sup>25</sup> Eve Salomon & Kinanya Pijil, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>26</sup> See Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf> (listing several community applicants with pending reconsideration requests).

community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>27</sup>

It further committed itself to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>28</sup>

ICANN's DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN's own investigation of the CPE process and by the CPE Provider's lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.<sup>29</sup> This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from

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<sup>27</sup> Exhibit 4, ICANN Bylaws, Art. 3, § 3.1.

<sup>28</sup> *Id.* at Art. 1, § 1.2(a)(v).

<sup>29</sup> See Exhibit 28, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en> (“This is in large part because, despite repeated requests from ICANN 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.”).

certain community gTLDs, such as .MUSIC. Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. While trying to allay concerns about CPE Review Process and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a Nondisclosure Condition. They only state that they applied the "balancing test,"<sup>30</sup> expecting Requestor to simply accept the test's conclusions without question.

Furthermore, the BAMC suggests that rejecting the disclosure of the requested documents does not violate its Commitments. The Recommendation implies that the BAMC can ignore the ICANN Bylaws because (i) "the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues;" (ii) "the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let

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<sup>30</sup> Exhibit 24, BAMC Recommendation on Reconsideration Request 18-1 (June 5, 2018), p. 26, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf> ("[The] "balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.").



alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor;” and (iii) the Board was not required to direct FTI to “attempt[] to gather additional information and alternate explanations from community priority applicants, including Requestor, to ensure that it was conducting a fair and thorough investigation about the CPE Process or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants.”<sup>31</sup> ICANN thus suggests that Requestor should be satisfied that there was a CPE Process Review and that any requests in relation to it are irrelevant because ICANN was not obliged to conduct a CPE Review Process in the first place. This view ignores the simple fact that, regardless of whether ICANN voluntarily acted, ICANN is obligated to adhere to its Bylaws.

ICANN’s actions are in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. Given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

#### **4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness**

ICANN’s refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN’s effectiveness.”<sup>32</sup> ICANN is also committed to two Core Values: (1) “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up,

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<sup>31</sup> *Id.* at pp. 29-30.

<sup>32</sup> Exhibit 4, ICANN Bylaws, Art. 1, § 1.2(a)(vi).

multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”<sup>33</sup> and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”<sup>34</sup>

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN’s attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

## **5. Conclusion**

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 18-1. The Board should grant Request 18-1 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

June 20, 2018

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Date

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<sup>33</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>34</sup> *Id.* at Art. 1, § 1.2(b)(v).