Response to Documentary Information Disclosure Policy Request

To: Padmini Baruah

Date: 1 October 2015

Re: Request No. 20150901-5

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Thank you for your Request for Information dated 1 September 2015 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of The Centre for Internet & Society (CIS). For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks the disclosure of the following documents and information relating to ICANN's Contractual Compliance Department Audit Program:

(1)   "the names of the 25 people working on contractual compliance as specified by Mr. Chehadi in the briefing";

(2)   "a copy of the document that calls for appointments to the post of the contractual compliance auditor"; and

(3)   "the contracts that appoint said individuals as compliance auditors."

Response

ICANN's contractual compliance goal is to ensure that ICANN's contracted parties fulfill the requirements set forth in their agreements with ICANN. (*See* https://www.icann.org/resources/pages/compliance-2012-02-25-en.) In furtherance of this goal, the Contractual Compliance Department has implemented the following programs: Approach & Process, gTLD Registries, ICANN Accredited Registrars, Audit, and General Questions. (*See* https://www.icann.org/resources/compliance-programs.) The Contractual Compliance Department undertakes various activities to ensure compliance with contractual obligations; some of the activities are a result of complaints, some are monitoring, and others are audit-related. The Overall Contractual Compliance Approach, as well as the Informal Resolution Process and Formal Resolution Process are described at https://www.icann.org/en/system/files/files/overall-03oct14-en.pdf, https://www.icann.org/en/system/files/files/informal-resolution-03oct14-en.pdf, and https://www.icann.org/en/system/files/files/formal-resolution-19jun13-en.pdf, respectively.

The Contractual Compliance Audit Program's objective is to ensure that contracted parties, registrars and registries comply with their agreements and the consensus policies.

(*See* https://www.icann.org/resources/pages/audits-2012-02-25-en.) The goal of the
Audit Program is:

- To allow ICANN to first identify and inform the contracted parties of any
  contractual compliance deficiencies found.

- Properly manage and help remediate any deficiencies found

This process will ensure all contracted parties align and comply with their contractual
obligations, including all consensus policies that are incorporated by reference into each
of the contracts. (*See id.*)

To date, ICANN has completed the Three Year Audit Program (*see*
https://www.icann.org/resources/pages/audits-2012-02-25-en#Three-
Year_Audit_Program) and the New Registry Agreement Audit Program (*see*
https://www.icann.org/resources/pages/audits-2012-02-25-en#The_New_Registry).

The Three-Year Audit Program, was initiated in 2012 and ran for a three-year period.
The goal was to audit and baseline the ICANN-accredited registrars and the generic Top-
Level Domains (TLDs) that were launched before 2013, identify deficiencies and ensure
that as many as possible are remediated and report back to the community. Registries
and registrars were randomly selected for audit over a three-year period:

- Year one (2012) – one third (1/3) of the Registry and Registrar agreements from a
  complete list were randomly selected and audited.

- Year two (2013) – another one third (1/3) from the remaining list were randomly
  selected and audited.

- Year three (2014) – the remaining one third of all agreements (1/3) were audited.

The scope of the Three Year Audit Program was:

- All ICANN-accredited registrars on the 2001 and 2009 RAAs

- gTLD registries with which ICANN has contracts that launched before the year
  2013: .aero, .asia, .biz, .cat, .com, .coop, .jobs, .info, .mobi, .museum, .name,
  .net,.org, .post, .pro, .tel, .travel, and .xxx.

- Note that all agreements within scope incorporate by reference
  the ICANN consensus policies.

(*See* https://www.icann.org/resources/pages/audits-2012-02-25-en.)

The scope of the New Registry Audit Program includes gTLDs that signed the July 2013
base registry agreement as amended from time to time, including all its Specifications
and Public Interest Commitments. (*See*
https://www.icann.org/en/system/files/files/registry-agmt-audit-12may14-en.pdf.)

As part of its commitment to transparency, ICANN makes available a comprehensive set of materials on its website as a matter of course, including detailed information about the Contractual Compliance Programs on the Contractual Compliance webpage at https://www.icann.org/resources/pages/compliance-2012-02-25-en, including the Audit Program. Specifically, ICANN has published the following information about the Contractual Compliance Audit Program:

- Background information regarding the Audit Program:
  https://www.icann.org/resources/pages/audits-2012-02-25-en

- ICANN Three Year Audit Plan Guide – Registrar:
  https://www.icann.org/en/system/files/files/plan-guide-registrars-25oct12-en.pdf

- ICANN Three Year Audit Plan Guide – Registry:
  https://www.icann.org/en/system/files/files/plan-guide-registries-25oct12-en.pdf

- ICANN Three Year Audit Plan Guide – Policies:
  https://www.icann.org/en/system/files/files/plan-guide-policies-25oct12-en.pdf

- Audit Program Frequently Asked Questions:
  https://www.icann.org/resources/pages/faqs-2012-10-31-en

- Three Year Audit Pre-Audit Notifications:
  o Year 1 Registrar Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registrar-13nov12-en.pdf

  o Year 1 Registry Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registry-13nov12-en.pdf

  o Year 2 Registrar Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registrar-01oct13-en.pdf

  o Year 2 Registry Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registry-01oct13-en.pdf

  o Year 3 Registrar Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registrar-06oct14-en.pdf

  o Year 3 Registry Pre-Audit Notification:
    https://www.icann.org/en/system/files/files/notification-registry-06oct14-en.pdf

- New Registry Agreement Audit Program:
  https://www.icann.org/resources/pages/audits-2012-02-25-en#The_New_Registry

- New Registry Agreement Pre-Audit Notification:
  https://www.icann.org/en/system/files/files/notification-registry-01jul14-en.pdf

- Registrar Audit Notification Template:
  https://www.icann.org/en/system/files/files/registrar-audit-notification-template-30sep15-en.pdf

- Registry Audit Notification Template:
  https://www.icann.org/en/system/files/files/registry-audit-notification-template-30sep15-en.pdf

- Audit Reports for 2006 - 2015: https://www.icann.org/resources/compliance-reporting-performance

In Item No. 1 of your Request, you referenced ICANN's President and CEO's, Fadi Chehade, testimony before the House Committee on Energy and Commerce on "Internet Governance Progress After ICANN 53" and attributed the following statement to Mr. Chehade: "Mr. Chehade states with assertion that the number of people working on compliance audits has gone from '*6 people to 25 people*.'" (Request at 1 (emphasis in original).) This attribution is not accurate. Mr. Chehade did not testify that 25 people were working on compliance audits. Rather, he testified that:

> We have contracts and we enforce the contracts. And just to be clear, in 2009 when these started becoming issues, we had six people in compliance, we have 24 today.

(Hearing before House Committee on Energy and Commerce, 8 July 2015, at 59:44, http://energycommerce.house.gov/hearing/internet-governance-progress-after-icann-53.) He further testified:

> When we receive complaints, and I just mentioned that we processed thousands, tens of thousands of complaints, we act upon them. We reach out to our registries and registrars. We let them know we have a complaint, and we make sure they follow what's in the contract. And we're doing this actively. As I mentioned, we've gone from six people to 24 people in that department just in the last few years.

(*Id.* at 1:04:30.)

A list of the personnel in ICANN's Contractual Compliance Department, which contains the information responsive to Item No. 1, is publicly available on ICANN's Contractual Compliance webpage. (*See* https://www.icann.org/resources/pages/about-2014-10-10-en.) Specifically, ICANN has published a list of the Contractual Compliance staff, which includes the staff members' names, titles, and links to their biographical excerpts, including the Contractual Compliance Risk & Audit Manager. (*See id*.)

Item Nos. 2 and 3 seek documents related to any third party audit partner contracted to work with ICANN Contractual Compliance on their audits. As explained in the Frequently Asked Questions on ICANN's Contractual Compliance Audit Program webpage (https://www.icann.org/resources/pages/audits-2012-02-25-en), preparation and planning for the Audit Program began in April 2012. The methodology, approach, and

Request for Proposal (RFP) to select a third-party audit partner were designed and approved in late May 2012. The RFP was a directed RFP since the specific skillset and capabilities required for this service was found in only certain potential vendors in the marketplace during a pre-selection process. The RFP was released to five pre-selected third-party firms on 13 June 2012. ICANN identified the five audit firms based on the following criteria: knowledge of ICANN, global presence, size, expertise, and reputation. ICANN followed its normal procurement process: RFP issued, Question & Answer, Proposal Analysis, Scorecard Ratings Methodology. The RFP period closed on 27 July 2012. (*See* https://www.icann.org/resources/pages/governance/rfps-en.) A cross-functional steering committee was formed to evaluate and rank the firms. KPMG was then selected as ICANN's Contractual Compliance Audit Partner based on the steering committee's evaluation and consultation with the ICANN executive management team. (*See* https://www.icann.org/resources/pages/audits-2012-02-25-en.) As explained in the audit notices (https://www.icann.org/en/system/files/files/registrar-audit-notification-template-30sep15-en.pdf, https://www.icann.org/en/system/files/files/registry-audit-notification-template-30sep15-en.pdf) and on the Contractual Compliance Conflict Risk Mitigation webpage (https://www.icann.org/resources/pages/conflict-risk-mitigation-2013-02-06-en), KPMG's role as the Contractual Compliance Audit Partner is to assist with the collection and evaluation of documentation; KPMG does not directly contact any of the contracting parties, as ICANN is managing the Audit Program directly. (https://www.icann.org/resources/pages/conflict-risk-mitigation-2013-02-06-en.)

Item No. 2 seeks a copy of the RFP for Registrar and Registry Contractual Compliance Audit Services. For directed RFPs, ICANN publishes detailed information regarding the RFP, including the title of the RFP, a summary of the RFP, the RFP timeline, and the RFP period on the Requests for Proposals webpage at https://www.icann.org/resources/pages/governance/rfps-en. In preparing our Response to your Request, we noted that this information was not published with respect the Registrar and Registry Contractual Compliance Audit Services RFP. Accordingly, and in furtherance of our commitments to transparency and accountability, we have now published the summary information regarding the Registrar and Registry Contractual Compliance Audit Services RFP on the ICANN Requests for Proposals webpage at https://www.icann.org/resources/pages/governance/rfps-en. The RFP itself is subject to the following DIDP Defined Conditions of Nondisclosure:

- 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.

ICANN will continue to evaluate whether the public interest in disclosing the RFP outweighs the harm that may be caused by such disclosure. To the extent that we deem that disclosure is warranted, we will send you an email notification upon that publication.

Item No. 3 asks for the disclosure of the contract between ICANN and KPMG as ICANN's Contractual Compliance Audit Partner. As noted above, the services that KPMG provides with respect to contractual compliance audits have been publicly disclosed in multiple places. The contract between ICANN and KPMG is protected from disclosure under the following DIDP Defined Conditions of Nondisclosure apply to the requested contract:

- 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 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.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see http://www.icann.org/en/about/transparency/didp. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because, as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.