

Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-4

DotMusic¹ and dotgay (collectively, “Requestors”) submit this rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Request 17-4 (the “Recommendation”).² The Recommendation affirmed ICANN’s DIDP Response of 10 July 2017 (“DIDP Response”),³ which failed to disclose certain documents sought in Requestors’ DIDP Request of 10 June 2017 (“DIDP Request”),⁴ and raised several issues that Requestors will address in this rebuttal. Particularly, Requestors will explain that Reconsideration Request 17-4 (“Request 17-4”)⁵ is within the scope of the reconsideration process and that the DIDP Response violates ICANN’s Commitments and Core Values.

Requestors’ DIDP Request sought documents related to the independent review process by FTI.⁶ The DIDP Request asked ICANN for the following:

Request No. 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;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

¹ This rebuttal adopts the same exhibits and terms as in DotMusic and dotgay’s Reconsideration Request 17-4. *See* Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

² Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

³ Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁴ Exhibit 1, Request No. 20170610-1, dotgay and DotMusic DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁵ Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

⁶ Requestors previously sought documents regarding the independent review process in separate DIDP requests. *See* Exhibit 6, DotMusic’s DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; Exhibit 7, dotgay’s DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Request No. 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”

Request No. 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.”⁷

As explained in Request 17-4, ICANN improperly refused to disclose these documents because it claimed that (1) the responsive information was previously provided⁸ and (2) the documents are protected from disclosure by the DIDP Conditions of Non-Disclosure.⁹

1. Requestors Properly Sought Reconsideration of the DIDP Request

In the Recommendation, the BAMC criticized Request 17-4 as outside the scope of the reconsideration process. It asserted that the “Reconsideration Request process provides an opportunity to re-examine the *process* by which ICANN organization takes or forgoes action; the Requestors’ general dissatisfaction with the outcome of the DIDP process is not grounds for reconsideration.”¹⁰ This not only incorrectly described the reconsideration request process but also the purpose of Request 17-4.

The reconsideration process permits review of an action or inaction—not just the process used to take the action. Under ICANN’s Bylaws, a “Requestor may submit a request for reconsideration or review of an ICANN *action or inaction* to the extent that the Requestor has been adversely affected by . . . [o]ne or more Board or Staff *actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)*.”¹¹ The

⁷ Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁸ *Id.* at p. 2.

⁹ *Id.* at pp. 2-3.

¹⁰ Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 17-8, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

¹¹ ICANN Bylaws, Art. 4, Section 4.2(c)(i) (emphasis added).

Bylaws do not limit the reconsideration process to re-examining “the *process* by which ICANN organization takes or foregoes an action.”¹² Rather, reconsideration requests provide an opportunity to re-examine an *action or inaction*. This is exactly what Requestors seek through Request 17-4. They seek reconsideration ICANN’s decision to deny certain document requests in the DIDP Response—an action that contradicts ICANN’s Commitments and Core Values.

Requestors did not simply submit Request 17-4 because of some “general dissatisfaction”¹³ with the DIDP Response. As described in further detail below, the Board clearly violated its Commitments and Core Values by not disclosing certain documents requested in the DIDP Request. Request 17-4 asks ICANN to reconsider this decision because of this violation. It is thus properly within the purview of the reconsideration request process pursuant to ICANN’s Bylaws.¹⁴

2. ICANN’s DIDP Response Violates its Commitments, and Core Values

ICANN and the BAMC violated ICANN’s Commitments and Core Values by rejecting the disclosure of certain requested documents. According to the BAMC, “Requestors provide no explanation for how these Commitments and Core Values relate to the Response to joint DIDP or how ICANN organization has violated these Commitments and Core Values.”¹⁵ These claims are clearly unfounded.¹⁶ Regardless, Requestors will clarify their position.

¹² Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), p. 17, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

¹³ *Id.* at p. 18.

¹⁴ See ICANN Bylaws, Art. 4, Section 4.2(c)(i).

¹⁵ Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), p. 27, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

¹⁶ See Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

A. The Commitments and Core Values Relate to the DIDP Response

The DIDP relates to ICANN’s Commitments and Core Values, which require transparency. ICANN is committed to operating “through open and transparent processes.”¹⁷ One of ICANN’s Core Values is to “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”¹⁸ The DIDP is clearly related to these Commitments and Core Values supporting transparency. In fact, it is “[a] principal element of ICANN’s approach to transparency and information disclosure.”¹⁹ As the BAMC explained in the Recommendation, the DIDIP is the direct result of ICANN’s commitment to transparency:

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 addition to ICANN organization’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information ‘concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,’ that is not already publically available.*²⁰

ICANN’s Commitments and Core Values thus clearly relate to the DIDP, and therefore to the DIDP Request and DIDP Response as well.

¹⁷ ICANN Bylaws, Art. 1, § 1.2(a).

¹⁸ *Id.* at Art. 1, § 1.2(b)(ii).

¹⁹ Exhibit 37, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁰ Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 14-5, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf> (emphasis added).

Further, ICANN must comply with its Commitments and Core Values during the DIDP. ICANN, when performing its mission “to ensure the stable and secure operation of the Internet’s unique identifier systems,”²¹ must “act in a manner consistent with [its] Bylaws”²² and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”²³ These requirements apply to the DIDP as there is no exception carved out for the DIDP in ICANN’s Bylaws or Articles of Incorporation (the “Articles”)²⁴ and ICANN has not contested that its actions here are governed by these Commitments and Core Values.²⁵ The DIDP is therefore not only related to ICANN’s Commitments and Core Values but must also comply with both.

B. ICANN Violated Its Commitments and Core Values

Yet, in responding to the DIDP Request, ICANN’s issued a DIDP Request in direct contravention of its Commitments and Core Values. The DIDP Response violated the principle of transparency; in making this decision, ICANN did not act in a fair and objective manner and avoided accountability through its refusal to disclose documents.

First, the DIDP Response violates ICANN’s Commitment and Core Values supporting the principle of transparency. This principle “is one of the essential principles in ICANN’s creation documents, and its name reverberated through its Articles and Bylaws.”²⁶ The Articles commit ICANN 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.”²⁷ ICANN’s Bylaws

²¹ ICANN Bylaws, Art. 1, § 1.1(a).

²² *Id.* at Art. 1, § 1.2(a).

²³ *Id.* at Art. 1, §1.2.

²⁴ *See id.*; *see also* ICANN Articles of Incorporation.

²⁵ *See generally* Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

²⁶ Exhibit 15, *Dot Registry, LLC 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/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²⁷ ICANN Articles of Incorporation, § 2.III.

reaffirm the same Commitment, explicitly stating that “ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”²⁸ And, in addition to dedicating an entire Article on transparency,²⁹ the Bylaws reaffirm that the processes for policy development, such as the evaluation of a CPE provider, must be “accountable and transparent.”³⁰

ICANN, despite its commitments to transparency, refuses to disclose relevant information about the independent review. The DIDP Response again rejected an attempt to obtain additional information about FTI’s independent review. Even though the DIDP remains the only mechanism for applicants to obtain this information from ICANN, yet again ICANN has stymied its Commitment to transparency by refusing to disclose documents pursuant to the DIDP.

ICANN maintained this lack of transparency by claiming that some of the requested documents from the DIDP Request are subject to the DIDP Nondisclosure Conditions.³¹ However, rather than identifying the documents subject to those conditions and explaining how the Nondisclosure Conditions apply, ICANN simply listed several conditions that apparently apply to the requested documents.³² Somehow, both ICANN and the BAMC expect Requestors to understand how these conditions apply to unknown documents and to simply accept that these documents are apparently covered by the Nondisclosure Conditions.

Yet, even if the Nondisclosure Conditions applied to the documents, the documents should still be disclosed because the public interest clearly outweighs any potential harm. Under the

²⁸ ICANN Bylaws, Art. 1, § 1.2(a).

²⁹ *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.

³⁰ *Id.* at Art. 1, § 1.2(b)(ii).

³¹ Exhibit 2, ICANN’s DIDP Response (July 10, 2017), p. 2, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

³² *Id.* The BAMC further admits that there are documents responsive to all four requests. *See* Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 20-2, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

Nondisclosure Conditions, “[i]nformation that falls within any of the conditions. . . may still be made public if ICANN determined, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”³³ ICANN’s secretive review of the CPE process will affect the evaluation process for community gTLD applications.³⁴ It could change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.³⁵ The independent review is therefore significant to Requestors, the other gTLD applicants that have applied for community gTLDs, and the entire Internet community, which will be indisputably affected by whether ICANN approves community gTLDs. The public is clearly interested in the information that ICANN is refusing to disclose through the DIDP Response. And there is little harm in disclosure of documents related to the independent review, given that the DIDP Request only asks for documents related to the conduct of a review that concerns the public. Yet, ICANN has refused to disclose the information.

Thus, in rejecting the DIDP Request, ICANN has improperly closed-off the possibility of obtaining additional information on the independent review in clear contradiction of its own stated Commitment to and Core Value of transparency.

³³ Exhibit 37, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³⁴ The current CPE evaluation process, which is currently mired with complaints, has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. *See* Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>. And, yet, ICANN summarily accepted the CPE determinations.

³⁵ *See* Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Second, ICANN violated its Commitment to and Core Value supporting fairness. The principle of fairness not only requires the disclosure of documents connected with an unfair CPE process but also those documents covered by the Nondisclosure Conditions because of the public interest. ICANN’s refusal to disclose documents fails to uphold the principle of fairness. ICANN has 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).³⁶

ICANN further made the Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”³⁷

ICANN’s DIDP Response is therefore in clear violation of its Commitment to fairness. The CPE process is currently facing a myriad of complaints regarding its unfair treatment of community gTLD applicants because it has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants.³⁸ Yet, ICANN continues to unfairly exclude community applicants and the Internet community from the

³⁶ ICANN Bylaws, Art. 3, § 3.1.

³⁷ *Id.* at Art. 1, § 1.2(a)(v).

³⁸ See Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

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 a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding the integrity of the independent review itself.

ICANN's actions are therefore in contravention of its Commitments to and Core Values of fairness, and its dedication to neutrality, objectiveness, integrity, and openness. In all 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 Conditions.

Third, ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community in violation of its Commitments and Core Values. Through its Bylaws, ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness.”³⁹ It has adopted two significant Core Values that reaffirm this Commitment: (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, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”⁴⁰ and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable

³⁹ ICANN Bylaws, Art. 1, § 1.2(a)(vi).

⁴⁰ *Id.* at Art. 1, § 1.2(b)(ii).

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.”⁴¹

The DIDP Response, and the Recommendation supporting it, contradicts these Commitments and Core Values. As explained prior, ICANN has prohibited informed participation in the review by the Internet Community. It is operating in near complete secrecy regarding the independent review process. This secrecy permits ICANN to avoid all accountability for its actions during the review in violation of its Commitments and Core Values.⁴²

3. Conclusion

Therefore, it is clear that ICANN failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC further perpetuated this violation by recommending that the Board deny Request 17-4. In addition to the reasons stated in the Request 17-4,⁴³ the Board should grant Request 17-4 and produce the requested documents regarding the CPE independent review.



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October 26, 2017

Date

⁴¹ *Id.* at Art. 1, § 1.2(b)(v).

⁴² ICANN will be unable to operate in a fully effective manner as its secrecy 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.

⁴³ Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.