

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestor:

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Jamie Baxter Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

**Email:** Contact Information Redacted

### **Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

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

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180115-1, in which ICANN refused to disclose certain requested documents pursuant to the DIDP.

On January 15, 2018, Requestor submitted a DIDP request (the “DIDP Request”) seeking disclosure of documentary information relating to FTI Consulting, Inc.’s (“FTI”) independent

review of the Community Priority Evaluation (“CPE”) process.<sup>1</sup> Specifically, Requestor submitted 21 document requests:

Request No. 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;<sup>2</sup>

Request No. 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;<sup>3</sup>

Request No. 3: The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”<sup>4</sup>

Request No. 4: All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;<sup>5</sup>

Request No. 5: All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[ ] the substantive 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;”<sup>6</sup>

---

<sup>1</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>2</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 3 (citing Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 3, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

<sup>3</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 3-4 (citing Exhibit 2, Scope 1 Report, p. 6; Exhibit 3, Scope 2 Report, p. 7).

<sup>4</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 10).

<sup>5</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 10).

<sup>6</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, pp. 11-12).

Request No. 6: All draft CPE Reports concerning .GAY, both with and without comments;<sup>7</sup>

Request No. 7: All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;<sup>8</sup>

Request No. 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;”<sup>9</sup>

Request No. 9: All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;<sup>10</sup>

Request No. 10: The 13 January 2017 engagement letter between FTI and ICANN;<sup>11</sup>

Request No. 11: The original Request for Proposal (RFP) pertaining to FTI’s review of the CPE process;

Request No. 12: All of the “CPE Provider’s working papers associated with” dotgay’s CPE;<sup>12</sup>

Request No. 13: “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”<sup>13</sup>

---

<sup>7</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 15).

<sup>8</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, pp. 13-16).

<sup>9</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 16).

<sup>10</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 13).

<sup>11</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p 5 (citing Exhibit 4, Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>).

<sup>12</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5(citing Exhibit 5, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>., p. 6).

<sup>13</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 7).

Request No. 14: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”<sup>14</sup>

Request No. 15: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”<sup>15</sup>

Request No. 16: FTI’s investigative plan used during its independent review;<sup>16</sup>

Request No. 17: FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”<sup>17</sup>

Request No. 18: All communications between ICANN and FTI regarding FTI’s independent review;

Request No. 19: All communications between ICANN and the CPE Provider regarding FTI’s independent review;

Request No. 20: All communications between FTI and the CPE Provider regarding FTI’s independent review; and

Request No. 21: All documents and communications regarding the scope of FTI’s independent review.

On February 14, 2018, ICANN responded to the DIDP Request (the “DIDP Response”) by denying all of the requests except for Request Nos. 10, 11, and 17—which ICANN claims “does not exist.”<sup>18</sup> ICANN reasoned that the requested documents are not appropriate for disclosure based on the Nondisclosure Conditions.<sup>19</sup>

---

<sup>14</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>15</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>16</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

<sup>17</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 9).

<sup>18</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>19</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

**4. Date of action/inaction:**

ICANN acted on February 14, 2018 by issuing the DIDP Response.

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

Requestor became aware of the action on February 14, 2018, when it received the DIDP Response.

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

Requestor is materially affected by ICANN's refusal to disclose certain documents concerning FTI's independent review of the CPE because ICANN intends to rely on FTI's three reports (the "FTI Reports") in order to make a decision on Requestor's Reconsideration Request 16-3 ("Request 16-3"), which concerns Requestor's community application for the .GAY generic Top-Level Domain ("gTLD"). The procedural and substantive problems with the FTI Reports, as discussed further below, means that ICANN's reliance on the FTI Reports will materially and adversely affect Requestor's rights regarding Request 16-3 and its community application for the .GAY gTLD. Requestor cannot even properly analyze the conclusions contained in the FTI Reports because ICANN refuses to disclose the underlying documents. ICANN's decision to deny access to these documents both prevents a proper analysis of the FTI Reports and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

**6.1 The Flaws in the Community Evaluation for .GAY and the FTI Reports**

Requestor filed a community-based application for the .GAY gTLD. However, the Economist Intelligence Unit (the "EIU") determined that Requestor failed the CPE; ICANN

resultantly rejected the application. Requestor sought reconsideration of that determination through Request 16-3, which raises several problems with dotgay’s CPE.<sup>20</sup> As explained by Prof. William N. Eskridge of Yale Law School, the CPE is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>21</sup>

In January 2017, ICANN retained FTI to review the CPE process and “the consistency in which the CPE criteria were applied” by the EIU.<sup>22</sup> It concluded its independent review based on information and materials from ICANN and the EIU, and wrote the FTI Reports. On December 13, 2017, ICANN published the FTI Reports on the CPE process.<sup>23</sup> The first report, “Communications Between ICANN Organization and the CPE” (“Scope 1 Report”), concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider.”<sup>24</sup> The “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports” (“Scope 2 Report”) found that the EIU “consistently applied the CPE criteria throughout all

---

<sup>20</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> See Exhibit 7, Letter from Arif Ali, on behalf of dotgay LLC, to the ICANN Board attaching the Expert Opinion of Prof. William N. Eskridge (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>22</sup> Exhibit 32, Letter from C. Disspain to A. Ali (10 Oct. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-to-ali-10oct17-en.pdf>.

<sup>23</sup> Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>24</sup> Exhibit 2, Scope 1 Report, p. 17.

Community Priority Evaluations.”<sup>25</sup> And, finally, the “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests” (“Scope 3 Report”) determined that the researched referenced in the CPE reports were reflected in the research materials.<sup>26</sup>

Given that FTI reviewed the CPE process and whether the EIU consistently applied the CPE criteria, its findings directly affect the outcome of Request 16-3.<sup>27</sup> This is especially concerning for Requestor because Prof. William N. Eskridge, Jr. has identified significant problems with FTI’s purported “independent” review of the CPE process.<sup>28</sup> His examination of the Scope 2 Report, for instance, reveals that the report “is long on description and conclusory statements and short on actual evaluation.”<sup>29</sup> The fact that the FTI Reports are clearly supported by no independent analysis emphasizes the problems with both the “independent” review method used by FTI and the conclusions it reached in the reports.

## **6.2 ICANN Breached its Bylaws in the DIDP Response**

Since Request 16-3 is currently pending before the ICANN Board, and the FTI Reports will likely impact the ICANN Board’s consideration of Request 16-3, Requestor filed the DIDP Request seeking various categories of documents concerning FTI’s independent review the CPE process and the FTI Report’s documentary basis. In submitting this DIDP Request, Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . , carrying out its

---

<sup>25</sup> Exhibit 3, Scope 2 Report, p. 57.

<sup>26</sup> Exhibit 5, Scope 3 Report, pp. 57-58.

<sup>27</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>28</sup> See Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

<sup>29</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), ¶ 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>30</sup> ICANN failed to do so.

### **6.2.1 ICANN Must Comply with International Law and Conventions**

The ICANN Bylaws require that it comply with international law and conventions. Pursuant to these laws and conventions, there is an “an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems.”<sup>31</sup> This principle is violated “when a decision is based upon evidence and argumentation that a party has been unable to address.”<sup>32</sup> The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.<sup>33</sup> While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the Second Expert Opinion of Professor William N. Eskridge, it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-3—the FTI Reports—and therefore threatening its due process rights.

---

<sup>30</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(a).

<sup>31</sup> Exhibit 12, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013).

<sup>32</sup> Exhibit 13, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

<sup>33</sup> Exhibit 14, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).



## 6.2.2 ICANN Must Remain Accountable, Transparent, and Open

ICANN’s Bylaws also require that ICANN hold itself to high standards of transparency, accountability, and openness.<sup>34</sup> These standards require that ICANN (1) “employ[] open and transparent policy development mechanisms;”<sup>35</sup> (2) “apply[] documented policies neutrally and objectively, with integrity and fairness;”<sup>36</sup> and (3) “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>37</sup>

ICANN has violated its transparency obligations by refusing to disclose the requested documents in lieu of hiding behind its Nondisclosure Conditions. By acting in a closed-off and non-transparent manner, ICANN only raises additional questions as to the credibility, reliability, and trustworthiness of the CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for Requestor’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>38</sup>

Instead of publishing the necessary documents for a critical analysis of the FTI Reports, and thus the basis for their erroneous conclusions regarding the CPE process, ICANN continues to try and avoid any accountability for its actions in regards to the CPE. This is most evident in its responses to the DIDP Request; ICANN, in an obvious attempt to side-step the disclosure of any responsive documents, attempts to argue that FTI’s independent review “includes the information responsive to” the requests.<sup>39</sup> However, the alleged ‘responsive information’ is the

---

<sup>34</sup> Exhibit 11, ICANN Bylaws, Arts. 1, 3-4.

<sup>35</sup> Exhibit 11, ICANN Bylaws, Art. 3, § 3.1.

<sup>36</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(v).

<sup>37</sup> Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(vi).

<sup>38</sup> Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>39</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

*exact same language stated by Requestor as the basis for its request for documents.*<sup>40</sup> The fact that “FTI provided ICANN organization with a list of search terms”<sup>41</sup> does not in any way produce “[t]he ‘list of search terms’ provided to ICANN.”<sup>42</sup>

### **6.3 The Public Interest Outweighs Any Compelling Reasons for Nondisclosure**

ICANN cannot simply circumvent its own Bylaws by hiding behind the Nondisclosure Conditions because the public interest clearly outweighs any “compelling reasons” for nondisclosure. It is surprising how ICANN maintains that it can ask everyone affected by the FTI Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports. For instance, in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.<sup>43</sup> However, it is impossible to analyze whether ICANN unduly influenced the EIU without the underlying documents; these documents are given even greater import because ICANN argued that “the CPE Provider has not agreed [to disclose the documents] . . . and has threatened litigation.”<sup>44</sup> The problem with this excuse is compounded by the simple fact that the DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential. ICANN’s failure to disclose the requested documents only underscores the serious questions that have been raised by Requestor

---

<sup>40</sup> Compare Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 4-5 with Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

<sup>41</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14 (citing Scope 1 Report, p. 10).

<sup>42</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4.

<sup>43</sup> See Exhibit 31, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>44</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 9, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

about the impartiality, independent legitimacy, and credibility of FTI's investigation. Such an action harms the global public interest, Requestor, and the entire gay community.

Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>45</sup> Instead, ICANN deliberately chooses to hide behind waivable privileges as an excuse to not disclose the documents. ICANN admits that "ICANN organization's outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law."<sup>46</sup> Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags. It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions.

In order to resolve the serious questions concerning the credibility of FTI's investigation, it is critically important that ICANN disclose the requested materials to Requestor and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by Requestor that were denied by ICANN in its DIDP Response.

---

<sup>45</sup> Exhibit 15, ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>46</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

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

ICANN's action materially affects the global gay community. Its nondisclosure has negatively impacted the fair resolution of the .GAY gTLD in accordance with the ICANN Bylaws and international law, and raises serious questions about the consistency, transparency, and fairness of FTI's review of the CPE process. Openness, transparency, and accountability are key components of ICANN's identity and ICANN is purposefully ignoring them by impeding efforts to analyze the FTI Reports. As such, ICANN has only increased the likelihood of an expensive Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requestor's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that "there are no circumstances at this point in time for which the public interest in disclosing the information [that] outweighs the harm that may be caused by the requested disclosure" is untenable.<sup>47</sup> There is significant public interest in the information underpinning the FTI Reports, which may have a significant impact on the CPE process as a whole and the future of the New gTLD Program because both the ICANN Board and the BAMC may rely upon the FTI Reports in determining reconsideration requests relating to the CPE process—including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the credibility of the FTI investigation.

---

<sup>47</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 22.

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

### **8.1 Background**

Requestor elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant.<sup>48</sup> In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the Board Governance Committee (“BGC”). The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, the Requestor’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>49</sup>

When this issue was brought before the BGC via another reconsideration request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. Requestor therefore filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>50</sup> The ICANN Board, though, remained silent in regards to Request 16-3.

Almost a year later, and after numerous letters to ICANN,<sup>51</sup> Requestor finally heard from

---

<sup>48</sup> Exhibit 16, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>49</sup> See Exhibit 17, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>50</sup> See Exhibit 18, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>51</sup> See Exhibit 19, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 7, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board->

ICANN on April 26, 2017. Requestor received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. ... The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: ... 16-3 (.GAY) ... .<sup>52</sup>

## 8.2 The Prior DIDP Requests

In response to this new information regarding the delay, on May 18, 2017, Requestor filed a DIDP request in relation to the .GAY CPE (the “First DIDP Request”).<sup>53</sup> Requestor, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>54</sup> It asked ICANN for this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>55</sup>

Prior to responding to the First DIDP Request, ICANN issued the CPE Process Review

---

redacted-13sep16-en.pdf; Exhibit 18, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 20, 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 21, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>52</sup> See Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>53</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>54</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>55</sup> Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Update on June 2, 2017.<sup>56</sup> The publication briefly described the scope of FTI’s independent review and its “two parallel tracks.”<sup>57</sup> No other information was provided to the Requestor regarding the CPE Review Process at issue in its Request until ICANN issued its inadequate formal response to the DIDP Request on June 18, 2017 (“First DIDP Response”).<sup>58</sup> The First DIDP Response disclosed none of the requested documents and instead maintained the secrecy that surrounds FTI’s “independent investigation of the CPE.”<sup>59</sup>

In response to the CPE Review Process Update, and the lack of any additional information from ICANN, the Requestor sent ICANN a joint letter with DotMusic Limited on June 10, 2017 (the “Second DIDP Request”). The letter requested more information related to FTI’s review based on the CPE Review Process Update in order “to ensure the integrity of FTI’s review.”<sup>60</sup>

However, on July 10, 2017, ICANN issued a response that simply reiterated already-provided information regarding the BGC’s decision to review the CPE Process and FTI’s independent review (“Second DIDP Response”).<sup>61</sup> ICANN further denied the requests for information.<sup>62</sup> ICANN, in providing such a response, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy.<sup>63</sup>

In response to the First DIDP Response and Second DIDP Response, Requestor initiated

---

<sup>56</sup> Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>57</sup> Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>58</sup> Exhibit 25, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>59</sup> See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

<sup>60</sup> Exhibit 27, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

<sup>61</sup> Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>62</sup> Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>63</sup> See Exhibit 29, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

separate reconsideration requests for each DIDP request.<sup>64</sup> The processes for both of these requests have concluded and the matters are currently undergoing the Cooperative Engagement Process (“CEP”) pending ICANN’s consideration of Request 16-3.<sup>65</sup>

### **8.3 The DIDP Request**

After Requestor initiated the separate reconsideration requests, FTI concluded its independent review. On December 13, 2017, ICANN published the FTI Reports.<sup>66</sup> Requestor’s expert has reviewed the FTI Reports and concluded that (1) The FTI Reports are “based on a superficial investigative methodology wholly unsuited for the purpose of an independent review;”<sup>67</sup> (2) the Scope 2 Report “is long on description and conclusory statements and short on actual evaluation;”<sup>68</sup> and (3) the Scope 3 Report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to” the Requestor’s CPE.<sup>69</sup>

Given Requestor’s concerns about the FTI Reports, it submitted a request for documents “to obtain the documents provided by ICANN to [FTI] in connection with FTI’s so-called

---

<sup>64</sup> See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 28, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

<sup>65</sup> See Exhibit 30, Cooperative Engagement and Independent Review Processes Status Update (Jan. 31, 2018), <https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf>, p. 1.

<sup>66</sup> Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>67</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 1.

<sup>68</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 2.

<sup>69</sup> Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 3.



independent review of ICANN’s [CPE].”<sup>70</sup> The specific requests, as described in **Question 3** above, sought information explicitly identified by ICANN and FTI related to the FTI Reports.<sup>71</sup>

ICANN responded to the DIDP Request on February 14, 2018.<sup>72</sup> It argued that it could not disclose the requested documents because the EIU did not consent to the disclosure of documents.<sup>73</sup> However, all of the documents that Requestor seeks from ICANN has already been disclosed to FTI; it is not seeking documents that the EIU refused to provide to FTI.<sup>74</sup> And, yet, ICANN refused Request Nos. 1-9, 12-16, and 18-21 because the “CPE Process Review Reports includes the information responsive to these Items” and based upon the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making processes by inhibiting the candid exchange of ideas and communications . . . .
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- 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. . . .
- 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[.] . . .

---

<sup>70</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

<sup>71</sup> Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>72</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>73</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>74</sup> See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceeding of internal appeal mechanisms and investigations. ...
- 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.<sup>75</sup>

As discussed in **Questions 6 and 7** above, the public interest warrants disclosure of documents related to FTI’s independent review of the CPE; disclosure is necessary to ensure that the independent review remains a fair, transparent, and independent process.

ICANN further confirmed that the three remaining document requests (Request Nos. 10, 11, and 17) do not exist: (1) “the 13 January 2017 engagement letter between FTI and ICANN;”<sup>76</sup> (2) “the original Request for Proposal (RFP) pertaining to FTI’s review of the CPE Process;”<sup>77</sup> and (3) “FTI’s follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided.”<sup>78</sup>

## **9. What are you asking ICANN to do now?**

Requestor asks ICANN to disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.

---

<sup>75</sup> See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

<sup>76</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

<sup>77</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 18.

<sup>78</sup> Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 20.

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

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

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

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

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

This is not applicable.

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

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.*

*Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



---

Arif Hyder Ali

March 15, 2018

---

Date