

Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-2

Requestor¹ submits this rebuttal to the BAMC’s Recommendation on Request 18-2 (the “**Recommendation**”), which affirms the 24 February 2018 DIDP Response² and raises several issues that Requestor will address in this rebuttal. Particularly, Requestor will explain that Reconsideration Request 18-2 (“**Request 18-2**”) is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and Recommendation violate ICANN’s commitments and core values.

I. Requestor Properly Sought Reconsideration of the DIDP Request

The Recommendation asserts that Request 18-2 is outside the scope of the reconsideration process. According to the BAMC, Request 18-2 “represented a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted.”³ However, the Bylaws do not limit reconsideration requests to contesting “the *process* by which ICANN reached that conclusion.”⁴ Rather, reconsideration requests provide for the review of “*actions or inactions* that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)” and adversely affect the requestor.⁵ In accordance with the Bylaws, Requestor submitted Request 18-2 to seek reconsideration of ICANN’s decision to deny certain document requests in the DIDP Response—an action that contradicts ICANN’s Commitments and Core Values. Request 18-2 is thus properly within the purview of the reconsideration request process pursuant to ICANN’s Bylaws.

¹ This rebuttal adopts the same exhibits and terms as in Reconsideration Request 18-2. *See* Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018).

² *See* Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

³ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 13.

⁴ *Id.*

⁵ Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 4, § 4.2(c)(i) (emphasis added).

II. ICANN Must Recognize and Apply the Principal of Due Process

The ICANN Bylaws 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 mechanisms⁶ 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.”⁷ This “puts principles of international law first, before ... local law and ICANN’s Bylaws.”⁸ 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.”⁹

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.¹⁰ As such, neither of the BAMC’s excuses for ignoring the international principle of due process hold water.

⁶ The Recommendation refers to due process as a “[c]onstitutional protection” or a “constitutional right.” Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 32. 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.

⁷ Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a).

⁸ Exhibit 35, Flip Petition, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. 40.

⁹ *Id.*

¹⁰ *Id.* at p. 39.

III. ICANN's DIDP Response Violates its Commitments and Core Values

Although the BAMC argues otherwise,¹¹ ICANN clearly violated its Commitments and Core Values by rejecting the disclosure of certain requested documents.¹² The DIDP Response is nontransparent, unfair, and a blatant attempt by ICANN to avoid accountability for its actions. It must therefore be reconsidered by the ICANN Board.

A. ICANN Must Acknowledge its Commitment to Transparency

The DIDP Response violates the principle of transparency. This principle “is one of the essential principles in ICANN’s creation documents, and its name reverberate[s] through its Articles and Bylaws.”¹³ ICANN’s Articles of Incorporation (“**Articles**”) 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.”¹⁴ ICANN’s Bylaws reaffirm this commitment,¹⁵ dedicate an entire article on transparency,¹⁶ and emphasize that 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 accountable and transparent.”¹⁷ The DIDP is “[a] principal element of [this] approach to transparency and information disclosure.”¹⁸ As the Recommendation states,

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

¹¹ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 34.

¹² See Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018), pp. 7-10.

¹³ Exhibit 31, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101.

¹⁴ Exhibit 36, ICANN Articles of Incorporation (Oct. 3, 2016), § 2.III.

¹⁵ Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a) (“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.”).

¹⁶ 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.

¹⁷ *Id.* at Art. 1, § 1.2(b)(ii).

¹⁸ Exhibit 15, ICANN Documentary Information Disclosure Policy (last visited June 29, 2017).

publically available a comprehensive set of materials concerning ICANN org’s operational activities.¹⁹

Despite its commitments to transparency, the DIDP Response rejected the DIDP Request in violation of the principle of transparency.

The Recommendation blames its lack of compliance with the principle of transparency on the CPE Provider, which refuses to let ICANN disclose documents containing alleged “Confidential Information.”²⁰ First, ICANN cannot be allowed to avoid compliance with its own Bylaws through third-party contracts with provisions violating its Core Values; this renders the principle of transparency impotent. Second, the contractually protected “Confidential Information”²¹ from the CPE Provider cannot possibly encompass every requested document. Requestor has, for instance, asked that ICANN disclose its “communications regarding the scope of FTI’s independent review.”²² This request, and many others in the DIDP Request, does not concern the CPE Provider’s confidential information.²³ ICANN is clearly using its agreement with the CPE Provider to avoid disclosing most, if not all, of the requested documents—regardless of whether the agreement actually applies to the request.

ICANN further justifies its lack of transparency by claiming that some of the requested documents from the DIDP Request are subject to the DIDP’s Nondisclosure Conditions.²⁴ However, instead of identifying the responsive documents and applicable Nondisclosure Conditions, both the DIDP Response and Recommendation just list several Nondisclosure

¹⁹ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 9.

²⁰ *Id.* at 15.

²¹ *Id.*

²² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 5-6.

²³ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 29 (defining “Confidential Information” as “materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI”).

²⁴ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

Conditions that apparently apply to several categories of requested documents.²⁵ In doing so, ICANN has prevented Requestor from properly challenging the applicability of the Nondisclosure Conditions to the responsive documents; it is impossible to challenge whether a condition applies to a document that the Requestor *cannot even identify*.²⁶ Somehow, both ICANN and the BAMC expect Requestor to understand how these conditions apply to unknown documents and to simply accept that these documents are apparently covered by the Nondisclosure Conditions.

Even if the Nondisclosure Conditions applied to these unidentified responsive documents, they should still be disclosed because the public interest clearly outweighs any potential harm.²⁷ There is a clear public interest in both ICANN's adherence to its transparency obligations and the content of the requested documents. ICANN's Articles and Bylaws recognize the public's interest in transparency.²⁸ The public is specifically interested in the requested documents because they will permit the public to evaluate the FTI Reports.²⁹ The FTI Reports will affect how the BAMC determines community gTLD applicants' pending reconsideration requests, and could have affected the CPE process.³⁰ The validity of the FTI Reports is therefore significant to Requestor, the other community gTLD applicants, and the entire Internet community—all of which will be

²⁵ *See id*; *see also* Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018).

²⁶ The Recommendation misquotes Requester's 'concession' that "the materials FTI relied on in the CPE Process Review reflect 'ICANN's deliberate and decision-making process concerning the CPE process.'" *Id.* at p. 15. The DIDP Request states that "[f]ull disclosure of the documents FTI used during that review will serve the global public interest, further ICANN's transparency obligations, and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process." Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), p. 3 (emphasis added). There is no concession in this statement; rather, it affirms that disclosure of the documents will protect ICANN's decision-making process.

²⁷ Exhibit 15, ICANN Documentary Information Disclosure Policy (last visited June 29, 2017) (stating that "[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").

²⁸ Exhibit 36, ICANN Articles of Incorporation (Oct. 3, 2016), § 2.III; Exhibit 11, ICANN Bylaws (July 22, 2017), Art.1, § 1.2(a).

²⁹ The current CPE evaluation process has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. *See* Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016).

³⁰ *See* Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests).

indisputably affected by the ICANN's decisions on the community gTLDs. Yet, ICANN is refusing to disclose the documents in the DIDP Request.

This public interest is compounded by the clear flaws with FTI's independent review.³¹ The Recommendation attempts to cure FTI's deficiencies, asserting that "the Requestor's belief that the conclusions in the [FTI] Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is not more than that—a belief—and it is immaterial."³² This assertion is both materially incorrect and mischaracterizes the *Dot Registry* IRP Declaration. The *Dot Registry* IRP Panel did not conclude that "ICANN staff *appeared to be* 'intimately involved in the [CPE] process.'"³³ Rather, it concluded that the "EIU *did not act on its own* in performing the CPEs that are the subject of this proceeding. ICANN staff *was* intimately involved in the process."³⁴ FTI, without accounting for the verbal communications between ICANN and the CPE Provider, arrived at the opposite conclusion.³⁵ This inconsistency is not the Requestor's belief but a supported fact. The public has a right to analyze the inconsistencies in the CPE Process Review Reports, which will affect ICANN's determination on several community applications and therefore impact the public interest.

These public interests warrant disclosure of the requested documents because they clearly outweigh the harm of disclosure. The DIDP Response simply stated that "there are no circumstances at this point in time for which the public interest in disclosing the information

³¹ The FTI Reports are both methodologically flawed and substantively incomplete. Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 37, Letter from the EBU to dotgay LLC (Mar. 6, 2018); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018).

³² Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 23.

³³ *Id.* (emphasis added).

³⁴ Exhibit 31, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 93.

³⁵ Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 3 ("FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.").

outweighs the harm that may be used by the requested disclosures.”³⁶ The BAMC has identified a single harm in its Recommendation: the “[w]eakening [of] the attorney-client privilege.”³⁷ This harm, however, does not apply to all of the document requests as ICANN stated that *only* “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”³⁸ Requestor not only requested “FTI’s draft and working materials” but also other categories of documents—such as “[a]ll documents and communications regarding the scope of FTI’s independent review.”³⁹ These other categories of materials are, by ICANN’s own definition, not covered by the attorney-client privilege; the strong public interest in disclosure thus outweighs the general claim that there is an unidentified “harm” in disclosing them.

Even the documents that ICANN alleges are covered by the attorney-client privilege should be disclosed to the public. *First*, ICANN alleges that it will suffer significant harm if a third party can to force it to waive the attorney-client privilege because this threatens ICANN’s “ability to trust that its future communications with its counsel will be protected.”⁴⁰ This allegation is irrelevant. Requestor cannot force ICANN to waive the attorney-client privilege through the DIDP; Requestor is instead asking ICANN to voluntarily waive that privilege in order to comply with its own transparency obligations. In fact, Requestor is not even asking ICANN to disclose its communications with Jones Day but to disclose communications with other ICANN personnel, the CPE Provider, and FTI.⁴¹ Therefore, the harm that ICANN alleges—the weakening of the attorney-client privilege by threatening ICANN’s confidential communications with Jones Day—is not applicable to the DIDP Request. *Second*, ICANN cannot be permitted to hide behind the

³⁶ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 22.

³⁷ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 26.

³⁸ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11.

³⁹ See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 3-6.

⁴⁰ Exhibit 34, BAMC Recommendation on Reconsideration Request 18-2 (June 5, 2018), p. 26.

⁴¹ See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), pp. 3-6.

attorney-client privilege to avoid its disclosure obligations. Requestor has asked ICANN to publically disclose documents that were created *before Jones Day retained FTI*, which ICANN sent to FTI as part of its independent review. ICANN is now attempting to use the attorney-client privilege to avoid disclosing documents that do not involve Jones Day and any of its agents.

Thus, in rejecting the DIDP Request, ICANN has not adhered to the balancing test inherent in its own Nondisclosure Conditions as (1) there is little harm in disclosing the documents, and (2) there is significant public interest in disclosing the requested documents. ICANN cannot avoid disclosing documents on FTI's independent review without violating its own stated Commitment to and Core Value of transparency.

B. ICANN Must Act Fairly in Administering the DIDP

ICANN also violated its Commitment to and Core Value supporting fairness. ICANN has specifically agreed 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 ... (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.⁴²

It further committed to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”⁴³

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

⁴² Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 3, § 3.1.

⁴³ *Id.* at Art. 1, § 1.2(a)(v).

applicants by inconsistently and unfairly applying criteria between applicants.⁴⁴ FTI was supposed to conduct an independent evaluation of this discriminatory treatment, but instead performed a methodologically and substantially flawed review.⁴⁵ Yet, ICANN continues to unfairly exclude community applicants and the Internet community from critically examining the independent review process to verify or dispute FTI's conclusions, even though the applicants will be and are affected by the FTI Reports and the improperly administered CPE. Instead of welcoming additional commentary and contributions to the review of an important gTLD process, ICANN has instead restricted interested parties' access to information 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 therefore contravene the principle of fairness, and its dedication to neutrality, objectiveness, integrity, and openness.

C. ICANN Cannot Avoid Accountability for Its Decisions

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."⁴⁶ 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

⁴⁴ See Exhibit 20, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016); Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 37, Letter from the EBU to dotgay LLC (Mar. 6, 2018); Exhibit 39, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018).

⁴⁵ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018); Exhibit 38, DotMusic Limited' Correspondence and Analysis of Community Priority Evaluation Process & FTI Reports to ICANN Board (Feb. 2, 2018),.

⁴⁶ Exhibit 11, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a)(vi).

bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”⁴⁷ 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.”⁴⁸

The DIDP Response, and the Recommendation supporting it, contradicts these Commitments and Core Values. By denying the DIDP Request, ICANN is operating in near complete secrecy regarding FTI’s independent review and the basis for the FTI Reports. This prevents ICANN from operating in a fully effective manner as its secrecy prevents a large community from analyzing the integrity of the independent review, and forces community applicants to continually seek information from ICANN through DIDP requests. By retaining its nontransparent stance, ICANN is avoiding all accountability for its acceptance of FTI’s flawed independent review in violation of its Commitments and Core Values.

IV. 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 18-2. In addition to the reasons stated in the Request 18-2,⁴⁹ the Board should grant Request 18-2 and produce the requested documents on FTI’s independent review.

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Arif Hyder Ali

_____ 20 June 2018

Date

⁴⁷ *Id.* at Art. 1, § 1.2(b)(ii).

⁴⁸ *Id.* at Art. 1, § 1.2(b)(v).

⁴⁹ Exhibit 33, Reconsideration Request 18-2 (Mar. 15, 2018).