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Contact Information Redacted

January 15, 2018

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning the Independent Review of the Community Evaluation Process by FTI Consulting**

Dear ICANN:

We write on behalf of our client dotgay LLC ("dotgay") to request documents from ICANN pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP"). dotgay submits this request to obtain the documents provided by ICANN to FTI Consulting ("FTI") in connection with FTI's so-called independent review of ICANN's Community Priority Evaluation ("CPE"), which purports to encompass the CPE review of dotgay's community application for the .GAY gTLD.

ICANN published the results of FTI's review on 13 December 2017 in the form of three reports. ICANN did not, however, publish the documents supporting the discussion or conclusions in those reports. "Transparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."<sup>1</sup> ICANN is therefore required to act in a transparent manner under the Articles and Bylaws,<sup>2</sup> and must disclose the materials and research used by FTI in its independent review.

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<sup>1</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>2</sup> ICANN Articles of Incorporation, Art. 2(III); ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a), Art. 3(3.1), Art. 4(4.1).

Therefore, dotguy requests the materials identified below pursuant to ICANN's DIDP. The DIDP is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."<sup>3</sup> None of the reasons for nondisclosure of these documents are applicable here.<sup>4</sup>

For instance, the attorney-client privilege does not bar disclosure of any requested document.<sup>5</sup> Under California law, ICANN waived the attorney-client privilege when it sent the documents to FTI, a third party.<sup>6</sup> The disclosure was part of the ICANN Board's decision "to have some additional information with respect to the CPE Provider's CPE reports" and not based on any legal consultation.<sup>7</sup> Hence, the disclosure was not "reasonably necessary to accomplish the purpose for which a lawyer was consulted" and the attorney-client privilege does not bar ICANN from complying with the DIDP request.<sup>8</sup>

Even if any requested document falls within a Nondisclosure Condition, ICANN must still disclose the documents if "the public interest in disclosing the information outweighs the

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<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*. ICANN staff first identifies all documents responsive to the DIDP request, and then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions. *Process for Responding to DIDP Requests*, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

<sup>5</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en> (identifying attorney-client privilege as a Nondisclosure Condition).

<sup>6</sup> Cal. Evid. Code § 912 (West) (stating that the privilege is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication" and noting that a "disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client). . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer. . . was consulted, is not a waiver of the privilege."); see *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236 (2004) ("[C]ourts of this state have no power to expand [the attorney-client privilege] or to recognize implied exceptions. . . . [E]videntiary privileges should be narrowly construed.").

<sup>7</sup> See Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>8</sup> *Behunin v. Superior Court*, 9 Cal. App. 5th 833, 845 (Ct. App. 2017), *review denied* (June 14, 2017).

harm that may be caused by such disclosure.”<sup>9</sup> We believe that there is significant relevant public interest in disclosure of the information sought in this request, which outweighs any (minimal) harm caused by disclosure of the documents. We are requesting documents that ICANN has already collected and disclosed to FTI as part of its independent review – a review that ICANN has already published<sup>10</sup> – that concerns a significant part of ICANN’s gTLD application process and affects all current and future stakeholders. Full 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. ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and further compromise the integrity of FTI’s independent review.

Furthermore, this request does not place an undue burden on ICANN. The requested documents have already been collected by ICANN for FTI and therefore are already organized and under ICANN’s complete control. ICANN must simply copy the same documents it provided to FTI for dotgay.

Therefore, pursuant to the DIDP, we request that ICANN provide the following documents:

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>11</sup>
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and

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<sup>9</sup> ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>.

<sup>10</sup> ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>11</sup> 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>; 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>.

evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;<sup>12</sup>

3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”<sup>13</sup>
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;<sup>14</sup>
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>15</sup>
6. All draft CPE Reports concerning .GAY, both with and without comments;<sup>16</sup>
7. All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;<sup>17</sup>
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>18</sup>
9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;<sup>19</sup>

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<sup>12</sup> Scope 1 Report, p. 6; Scope 2 Report, p. 7.

<sup>13</sup> Scope 1 Report, p. 10.

<sup>14</sup> Scope 1 Report, p. 10.

<sup>15</sup> Scope 1 Report, pp. 11-12.

<sup>16</sup> Scope 1 Report, p. 15.

<sup>17</sup> Scope 1 Report, pp. 13-16.

<sup>18</sup> Scope 1 Report, p. 16.

<sup>19</sup> Scope 1 Report, p. 13.

10. The 13 January 2017 engagement letter between FTI and ICANN;<sup>20</sup>
11. The original Request for Proposal (RFP) pertaining to FTI's review of the CPE process;
12. All of the "CPE Provider's working papers associated with" dotgay's CPE;<sup>21</sup>
13. "The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;"<sup>22</sup>
14. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant ICANN organization personnel;"<sup>23</sup>
15. All notes, transcripts, recordings, and documents created in response to FTI's interviews of the "relevant CPE Provider personnel;"<sup>24</sup>
16. FTI's investigative plan used during its independent review;<sup>25</sup>
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>26</sup>
18. All communications between ICANN and FTI regarding FTI's independent review;

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<sup>20</sup> 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>21</sup> Scope 3 Report, p. 6.

<sup>22</sup> Scope 2 Report, p. 7.

<sup>23</sup> Scope 2 Report, p. 8.

<sup>24</sup> Scope 2 Report, p. 8.

<sup>25</sup> Scope 2 Report, p. 8.

<sup>26</sup> Scope 2 Report, p. 9.

19. All communications between ICANN and the CPE Provider regarding FTI's independent review;
20. All communications between FTI and the CPE Provider regarding FTI's independent review; and
21. All documents and communications regarding the scope of FTI's independent review.

We reserve the right to request additional documents based on the prompt provision of the above documents. Please promptly disclose the requested documents pursuant to the DIDP.

Sincerely,



Arif Hyder Ali  
Partner