

REFERENCE MATERIALS – BOARD PAPER NO. 2018.11.06.2a

TITLE: **Consideration of Reconsideration Request 18-8**

Documents

The following attachments are relevant to the Board's consideration of Reconsideration Request 18-8.

Attachment A is [Reconsideration Request 18-8](#), submitted on 22 June 2018.

Attachment B is the [Ombudsman Action on Request 18-8](#), dated 20 July 2018.

Attachment C is the [BAMC Recommendation on Request 18-8](#), issued 28 August 2018.

Background Links

The following links are relevant to the Board's consideration of Reconsideration Request 18-8.

Exhibits 1 to 34 submitted in support of the Request 18-6 are available at

<https://www.icann.org/en/system/files/files/reconsideration-18-8-afilias-exhibits-1-redacted-22jun18-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 18 September 2018

Email: amy.stathos@icann.org

Afilias Domains No. 3 Limited Reconsideration Request (“RR”)

1. Requestor Information

Requestor:

Name: Afilias Domains No. 3 Limited

Address: Contact Information Redacted

Email: Scott Hemphill, Contact Information Redacted

Requestor is represented by:

Counsel: Dechert LLP

Address: Contact Information Redacted

Email: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

Afilias Domains No. 3 Limited (“**Afilias**” or “**Requestor**”) seeks reconsideration of ICANN’s 23 May 2018 response to Requestor’s Documentary Information Disclosure Policy (“**DIDP**”) request, which denied disclosure of certain categories of documents pursuant to ICANN’s DIDP.¹

¹ Requestor seeks reconsideration of the 23 May 2018 response to its DIDP request in accordance with the Board Accountability Mechanisms Committee’s (“**BAMC**”) Determination on Reconsideration Request 18-7. Exhibit 1, Determination of the BAMC Reconsideration Request 18-7 (5 June 2018), p. 10 (“ICANN organization

On 23 February 2018, Requestor submitted to ICANN a DIDP request seeking the disclosure of certain documentary information related to the .WEB contention set (the “**DIDP Request**”).² Specifically, the Requestor submitted 10 requests as follows:

Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information;

Request 02: Ruby Glen’s Notice of Independent Review, filed on 22 July 2016;

Request 03: All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;

Request 04: All applications, and all documents submitted with applications, for the rights to .WEB;

Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services;

Request 06: All documents concerning any investigation or discussion related to (a) the .WEB contention set, (b) NDC’s application for the .WEB gTLD, (c) Verisign’s agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign’s involvement in the .WEB contention set, including all communications with NDC or Verisign;

Request 07: Documents sufficient to show the current status of NDC’s request to assign .WEB to Verisign;

Request 08: Documents sufficient to show the current status of the delegation of .WEB;

Request 09: All documents relating to the Department of Justice, Antitrust Division’s (“**DOJ**”) investigation into Verisign becoming the registry operator for .WEB (“**DOJ Investigation**”), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal

provided a response to the DIDP Reply on 23 May 2018. To the extent the Requestor wishes to seek reconsideration of that response, the Requestor has the option to submit a new reconsideration request.”).

² Exhibit 2, DIDP Request No. 20180223-1 (23 Feb. 2018).

communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and

Request 10: All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation.³

Subsequently, on 24 March 2018, ICANN responded to the DIDP Request by issuing a response (the “**Prior DIDP Response**”).⁴ Of Requestor’s ten requests, ICANN stated that it was fully disclosing requested documents for only two requests (Requests 07, 08), and asked Requestor to revise an additional two requests (Requests 05, 06(a, b)).⁵ ICANN denied one request in whole (Request 01) and three requests in part (Requests 04, 06(c, d), and 09(a-c, e)) based on its assertion that the requested documents are subject to the DIDP’s Nondisclosure Conditions.⁶ ICANN stated that it has no documents responsive to four requests (Requests 02, 03, 09(d), 10).⁷

Requestor subsequently submitted to ICANN a letter addressing and responding to ICANN’s stated concerns in the Prior DIDP Response on 23 April 2018 (the “**DIDP Reply**”) in order to facilitate the timely disclosure of responsive documents.⁸ The DIDP Reply proposes that Requestor will limit the disclosure of any material identified by ICANN as “highly confidential” to only Requestor’s outside counsel pursuant to a confidentiality agreement.⁹ It also proposed modified document requests based on the DIDP Response. In accordance with the DIDP Reply, Requestor’s outstanding and amended document requests are as follows:

Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information, and their email responses to ICANN that indicate whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information.

³ *Id.* at pp. 3-5 (emphasis added).

⁴ Exhibit 3, Response to DIDP Request No. 20180223-1 (24 Mar. 2018).

⁵ *Id.* at pp. 7-11.

⁶ *Id.* at pp. 5-7, 9-15.

⁷ *Id.* at pp. 6, 15.

⁸ Exhibit 4, Letter from A. Ali to ICANN Board (23 Apr. 2018).

⁹ *Id.* at p. 2.

Request 04: NDC's responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.

Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services.

Request 06(a): Documents sufficient to show (1) the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 27-28 July 2016 auction, and (2) the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.

Request 6(b): All documents (1) reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, and (2) concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012.

Request 6(c): All documents concerning any investigation or discussion related to Verisign's agreement with NDC to assign the rights to .WEB to Verisign.

Request 6(d): All documents concerning Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign.

Request 09: All documents relating to the DOJ Investigation, excluding those documents that ICANN has reasonably identified as already being in Afilias' possession, including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board.¹⁰

Each of these requests plainly seeks documents relevant to Requestor's concerns, including: the impact on competition if Verisign obtains the .WEB license; whether Verisign and NDC violated, *inter alia*, provisions of the New gTLD Applicant Guidebook ("AGB") and

¹⁰ See *id.* at 2-5; Exhibit 2, DIDP Request No. 20180223-1 (23 Feb. 2018), pp. 3-5.

ICANN’s Auction Rules; and whether ICANN’s handling of these matters has been consistent with its Bylaws and Articles of Incorporation (“**Articles**”).

On 23 May 2018, ICANN responded to the DIDP Reply (the “**DIDP Response**”).¹¹ The DIDP Response rejected Requestor’s suggested compromise.¹² Of the eight amended requests, ICANN refused to disclose any documents in response.¹³ Rather, ICANN simply (1) identified previously public information already available to Requestor when it submitted both the DIDP Request and the DIDP Reply, and (2) reasoned that the requested documents are not appropriate for disclosure based on the DIDP’s Nondisclosure Conditions.¹⁴ ICANN’s response is the subject of this Reconsideration Request.

4. Date of action/inaction:

ICANN acted on 23 May 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 23 May 2018, when it received the DIDP Response from ICANN.

¹¹ Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018).

¹² Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018), p. 1.

¹³ Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018), pp. 5-14.

¹⁴ Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018), pp. 5-14. ICANN further noted that Item 6 “and each of its subparts do not concern ICANN’s operational activities and are therefore beyond the scope of the DIDP.” *Id.* at p. 8. Item 6, however, requests information regarding one of ICANN’s important operational activities—the New gTLD Program—and ICANN’s actions in administering the program for the .WEB/.WEBS contention set.

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 documentary information concerning the .WEB contention set, as requested in the DIDP Request and amended in the DIDP Reply.

As described with more detail in **Section 8** below, Requestor submitted to ICANN an application to operate the .WEB gTLD as part of ICANN's New gTLD Program. Requestor consequentially became a member of the .WEB contention set.¹⁵ All of the members of the contention set agreed to resolve the contention set through a private auction. However, at the eleventh hour, one member—Nu Dot Co LLC (“**NDC**”)—suddenly withdrew from the private auction after having previously consented to that process. As a result of NDC's withdrawal, the .WEB contention set was resolved through an ICANN-administered auction (“**ICANN Auction**”) pursuant to the AGB. NDC won the auction.¹⁶

After the ICANN Auction, Verisign, Inc. (“**Verisign**”), which had not applied for the .WEB license and was not part of the contention set, announced that it had entered into a secret agreement with NDC at some time prior to the auction. Pursuant to the terms of that secret agreement, Verisign had agreed to step into NDC's shoes by funding NDC's bid in exchange for NDC's agreement to “assign the [.WEB] Registry Agreement to Verisign.”¹⁷ This secret agreement, and ICANN's failure to address it, violates ICANN's documented policies, including, without limitation, the AGB, ICANN's Auction Rules, and ICANN's mandate to promote competition. ICANN consequently cannot permit the delegation of .WEB to NDC or to Verisign.¹⁸

¹⁵ Exhibit 6, “New gTLD Contention Set Status,” ICANN (last visited 16 Feb. 2018) (listing all seven applicants for the .WEB gTLD).

¹⁶ Exhibit 7, “ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS” ICANN (listing results of and bid amounts for the .WEB auction).

¹⁷ Exhibit 8, Verisign, “Verisign Statement Regarding .Web Auction Results” (1 Aug. 2016).

¹⁸ *See, e.g.*, Exhibit 9, Letter from S. Hemphill to A. Atallah (8 Aug. 2016) (listing problems with Verisign's involvement in the .WEB auction).

ICANN’s investigation of the matter, if any, has been entirely nontransparent. After Requestor raised concerns about the manner in which NDC had secretly acted as Verisign’s agent to obtain the .WEB license for the benefit of Verisign, ICANN sent Requestor a lengthy list of questions, purporting to seek information about Requestor’s concerns.¹⁹ Although Requestor provided detailed responses to ICANN on 7 October 2016, Requestor has received no meaningful information about ICANN’s investigation or how ICANN intends to address the subterfuge by which NDC acquired the .WEB license on Verisign’s behalf. Indeed, Requestor still has no information about ICANN’s investigation of .WEB, NDC, and Verisign.

6.1 ICANN Violated its own Bylaws in Refusing to Disclose the Requested Documents

In response to the lack of information from ICANN, Requestor filed the DIDP Request to obtain documents relevant to ICANN’s investigation of the .WEB contention set. ICANN, however, did not produce documents in response to certain requests—specifically Requests 01, 04-06, and 09.²⁰ ICANN thereby failed to “operate in a manner consistent with [its] Bylaws,” which require that it operate with transparency and openness.²¹

The DIDP is intended to promote transparency in accordance with ICANN’s Bylaws and Articles. ICANN implemented the DIDP as part of its “approach to transparency and information disclosure,” as codified in both ICANN’s Bylaws and Articles.²² These governing documents require that ICANN operate “through open and transparent processes”²³ and “to the maximum extent feasible in an open and transparent manner.”²⁴ More specifically, they state that ICANN must:

¹⁹ Exhibit 10, Letter from C. Willett to J. Kane (16 Sep. 2016).

²⁰ Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018); Exhibit 4, Response to DIDP Request No. 20180223-1 (24 Mar. 2018).

²¹ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a).

²² Exhibit 12, “ICANN Documentary Information Disclosure Policy” ICANN (last visited 27 Feb. 2018).

²³ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a), (a)(iv); Exhibit 13, Amended and Restated Articles of Incorporation (3 Oct. 2016), Art. 4.

²⁴ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1.

- “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . **through open and transparent processes that enable competition** and open entry in Internet-related markets;”²⁵
- “operate to the maximum extent feasible in an open and transparent manner and consistency with procedures designed to ensure fairness;”²⁶
- “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector;”²⁷ and
- “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole.”²⁸

Yet, ICANN did not operate with openness or transparency in the DIDP Response. Requestor asked for information on ICANN’s investigation of NDC, Verisign, and the .WEB contention set.²⁹ ICANN denied the requests for documentary information, choosing instead to maintain a veil of secrecy over its investigation, by unreasonably and illegitimately applying the DIDP’s Nondisclosure Conditions.³⁰ These actions are not consistent with ICANN’s obligations to operate in “an open and transparent manner.”³¹ Resultantly, ICANN is not operating “in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole.”³²

Allowing NDC/Verisign to carry out this subterfuge which will result in Verisign’s acquisition of the .WEB license, is inconsistent with ICANN’s Core Value to promote competition.

²⁵ Exhibit 13, Amended and Restated Articles of Incorporation (3 Oct. 2016), Art. 2(III) (emphasis added).

²⁶ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1.

²⁷ *Id.* at Art. 1, § 1.2 (a)(iv).

²⁸ *Id.* at Art. 1, § 1.2(a).

²⁹ Exhibit 4, Letter from A. Ali to ICANN Board (23 Apr. 2018); Exhibit 2, DIDP Request No. 20180223-1 (23 Feb. 2018).

³⁰ *See* Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018). ICANN disclosed only one ‘new’ document pursuant to the DIDP Request, which simply listed the public documents that ICANN provided the DOJ. Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), Attachment A.

³¹ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1.

³² *Id.* at Art. 1, § 1.2(a).

Verisign exercises substantial market power through its exclusive licenses to operate the .COM and .NET registries, as evinced by ICANN’s continued subjugation of those registries to price controls.³³ The .WEB gTLD, however, threatens Verisign’s long-entrenched monopoly.³⁴ Moreover, ICANN’s intended course of conduct also sanctions NDC/Verisign’s secretive, unfair, and deceptive strategy that undermined not only the process set forth in the AGB, but also ICANN’s mandate to operate openly and transparently.

It is vitally important that ICANN disclose the requested documents—either publicly or pursuant to a confidentiality agreement—to Requestor.³⁵ Disclosure will benefit the entire Internet community by providing Requestor with information that is important to contest Verisign’s underhanded attempt to protect its competition-stifling monopoly.

6.2 The Public Interest Warrants Disclosure of the Requested Documents

Furthermore, pursuant to the DIDP, ICANN can disclose documents that are governed by the DIDP’s Nondisclosure Conditions. Indeed, ICANN must disclose a document covered by a Nondisclosure Condition if “the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”³⁶ Here, there is a significant public interest in providing for a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the DIDP Reply.

³³ See Exhibit 14, Letter from the United State Senate to the Personal Data Redacted (12 Aug. 2016), p. 2, (“Verisign’s government-approved control of the .com registry allows it to operate as a monopoly.”).

³⁴ Exhibit 15, Personal Data Redacted, “Verisign likely \$135 million winner of .web gTLD,” DOMAININCITE (1 Aug. 2016) (“.web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com.”); Exhibit 16, Personal Data Redacted, “Why Verisign paid \$135 million for the .web top level domain,” DOMAIN NAME WIRE (29 Jul. 2016) (“It views it as competitive to .com – a handful of industry watchers and top level domain name companies have said that .web is the one domain that could unseat .com.”); Exhibit 17, Personal Data Redacted, “Inside the High Stakes Auction for .Web,” THEHOSTINGFINDERS (25 Jul. 2016) (explaining how .WEB could become the new .COM).

³⁵ Exhibit 4, Letter from A. Ali to ICANN Board (23 Apr. 2018), p. 2 (proposing that ICANN disclose the requested documents to Requestor pursuant to a confidentiality agreement).

³⁶ Exhibit 12, “ICANN Documentary Information Disclosure Policy” ICANN (last visited 27 Feb. 2018).

First, the subterfuge by which Verisign secretly obtained its asserted rights to the .WEB license seriously undermines core ICANN principles, including “open and fair processes that enable competition and open entry in Internet-related markets” and the application of documented policies in a consistent, neutral, objective, fair, and transparent manner.³⁷ Verisign, contrary to these bedrock principles, used NDC as a straw man in order to compete secretly for and obtain the .WEB license. Investigating and rectifying such unfair and deceptive conduct is plainly in the public interest.

Second, Verisign’s secretive scheme to obtain the .WEB license for itself was not only unfair, deceptive, and lacking in transparency but was also carried out specifically to stifle ICANN’s efforts to promote competition. Competition is vital to the maintenance of the DNS and the promotion of competition is one of ICANN’s Core Values. Indeed, ICANN emphasizes its mandate to promote competition several times in its Bylaws—and has even expressly granted itself permission to discriminate against a party in order to “promot[e] effective competition.”³⁸ ICANN implemented the New gTLD Program to “encourage competition” in the DNS³⁹ because a more competitive environment in the DNS will “result in greater innovation, consumer choice, and satisfaction in the long run.”⁴⁰ As explained in Requestor’s 16 April 2018 letter to ICANN, allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC is inconsistent with the promotion of competition, contrary to ICANN’s mandate, and constitutes a

³⁷ Exhibit 13, Amended and Restated Articles of Incorporation (3 Oct. 2016), Art. 2(III) (emphasis added).

³⁸ Exhibit 11, ICANN Bylaws (22 Jul. 2017), Art. 2, § 2.3 (“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”). ICANN has identified a core value as “introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest,” and committed to operating “through open and transparent processes that enable competition.” *Id.* at Art. 1, § 1.2.

³⁹ Exhibit 18, gTLD Applicant Guidebook (4 Jun. 2012), Preamble.

⁴⁰ Exhibit 19, United States Department of Commerce, “Statement of Policy on the Management of Internet Names and Addresses” (5 Jun. 1998).

serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN's Bylaws. The public's interest in competition outweighs any compelling reason for ICANN to refuse documentary disclosure to Requestor—especially since Requestor is willing to protect the disclosed documents through a confidentiality agreement.

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

The entire Internet community is materially affected by ICANN's refusal to disclose the requested documents.

Requestor submitted the DIDP Request and the DIDP Reply in order to gain information to protect the legitimacy by which ICANN awards gTLD licensing rights, as well as to protect competition in the DNS by contesting the delegation of .WEB to NDC and, consequentially, Verisign. If Verisign obtains the rights to operate .WEB, then, as described in **Section 6.2** above, the entire Internet community will be affected by the continued lack of material competition at the heart of the DNS. Verisign will continue to stifle innovation, restrict consumer choice, and ensure that it maintains its monopoly.⁴¹ Moreover, Verisign will have maintained and further entrenched its monopoly in a manner that shatters ICANN's stated principles, including (without limitation) fairness, transparency, and the neutral, objective, and consistent application of documented policies. The deception and subterfuge deployed by Verisign and NDC have made a mockery of those principles.

If ICANN allows NDC and/or Verisign to succeed in obtaining the .WEB license through such deceptive means, ICANN will have established a disastrous precedent. Any person or

⁴¹ Exhibit 20, United States Department of Commerce, "Improvement of Technical Management of Internet Names and Addresses" (20 Feb. 1998).

company seeking a gTLD will be able to disguise its true identity and avoid the objection period set forth in the AGB by secretly funding a putative applicant to obtain gTLD rights on its behalf. Basic requirements for applicants—*e.g.*, that they disclose their parent companies, affiliates and partners; that they provide true, accurate, and complete background information; and that they disclose their funding sources and how they intend to finance and operate the operation of the gTLD—will be rendered meaningless. The dangers posed by such a precedent are readily apparent in this case, where Verisign, the entrenched monopolist, looks to maintain its substantial market power by circumventing the entire AGB process that was designed to promote transparency, fairness, and competition.

There can be no mincing of words concerning the fundamentally dishonest scheme carried out by Verisign and NDC. They affirmatively concealed the identity of the true party seeking the .WEB license from ICANN, the rest of the contention set, and, indeed, every person with any interest in the .WEB gTLD. They intentionally deceived all stakeholders, and denied them of a meaningful opportunity to object to Verisign's participation in an auction for its greatest potential competitor. Of course, the mere fact that Verisign and NDC were willing to engage in such a scheme that undermines every principle that underlies the AGB should in itself be disqualifying. That ICANN does not appear to have taken any serious action to address the deception and subterfuge carried out by Verisign and NDC—which took place in mid-2016 (nearly two years ago)—adversely affects the entire Internet community. Allowing such underhanded conduct to succeed would seriously undermine the legitimacy and integrity of ICANN. Given the principles at stake, ICANN's refusal to provide the documents sought by the DIDP will adversely affect numerous other stakeholders—including, in particular, the numerous consumers of gTLD registry services.

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

8.1 The .WEB Contention Set

Requestor submitted its application for the .WEB gTLD on 13 June 2012 pursuant to the policies and rules set forth in the AGB.⁴² Six other entities also applied to become the registry operator for .WEB: NDC; Google, through Charleston Road Registry Inc.; Web.com Group, Inc.; Radix FZC, through DotWeb Inc.; Ruby Glen, LLC (“**Ruby Glen**”), through Donuts, Inc.; and Schlund Technologies GmbH.⁴³ Since ICANN encourages the private settlements of contention sets,⁴⁴ all of the .WEB applicants agreed to resolve the contention set through a private auction. However, NDC suddenly withdrew its support for the private auction, thereby forcing all of the .WEB applicants to participate in an ICANN Auction.⁴⁵

NDC’s withdrawal concerned Ruby Glen. In subsequent discussions, NDC implied to Ruby Glen that it underwent a change in ownership, which might explain NDC’s withdrawal from the private auction.⁴⁶ Ruby Glen raised with ICANN its belief that NDC underwent a change in control without having notified ICANN of such change, as required by the AGB.⁴⁷ However, both ICANN and its Ombudsman claimed that they investigated Ruby Glen’s concern and found that there was no change

⁴² Exhibit 21, Afiliis Domains No. 3 Limited, “New gTLD Application Submitted to ICANN” (13 Jun. 2012).

⁴³ Exhibit 6, “New gTLD Contention Set Status,” ICANN (last visited 16 Feb. 2018) (identifying members of the .WEB contention set).

⁴⁴ Exhibit 18, gTLD Applicant Guidebook (4 Jun. 2012), p. 4-6 (“Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention.”).

⁴⁵ *Id.* at p. 4-19 (“It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.”).

⁴⁶ Exhibit 22, Email exchange between Personal Data Redacted (6 Jun. 2016); Exhibit 23, NU DOT CO LLC, “New gTLD Application Submitted to ICANN” (13 Jun. 2012), p. 2.

⁴⁷ Exhibit 24, Email exchange between Personal Data Redacted ICANN (June 2016); Exhibit 25, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016). Other applicants expressed their support for Ruby Glenn’s request that ICANN investigate. Exhibit 26, Email from B. Joshi to ICANN (11 Jul. 2016) (supporting postponement of .WEB auction to permit ICANN to investigate NDC); Exhibit 27, Email from T. Moerz to ICANN (11 Jul. 2016) (same).

in control.⁴⁸ In fact, it appears that ICANN and its Ombudsman did little more than ask NDC if it had undergone a change in ownership or corporate control, to which NDC answered ‘no.’⁴⁹ Taking NDC’s answer at face value, and apparently asking no further questions, ICANN decided to proceed with the ICANN auction. Ruby Glen protested this decision by initiating both the IRP process and a lawsuit against ICANN, but neither delayed the ICANN Auction.⁵⁰

Requestor, along with the other .WEB applicants, participated in the ICANN Auction on 27 July 2016. NDC prevailed at the auction with an unexpectedly high bid of \$142 million.⁵¹ The source of NDC’s funding was revealed four days later: Verisign.⁵² NDC had entered into an agreement with Verisign where, in exchange for Verisign funding NDC’s bid for .WEB, NDC agreed to assign the .WEB Registry Agreement to Verisign.⁵³

Verisign had failed to apply for the gTLD in 2012 and was therefore not part of the contention set. Instead of publicly applying for the rights to the .WEB registry, Verisign secretly arranged with NDC to obtain the .WEB license. As a result of Verisign’s secret funding, NDC was able to make an unexpectedly high bid and win the .WEB license. By virtue of its secret arrangement with NDC, Verisign is now poised to take on the .WEB license and further consolidate its dominant position within the DNS by acquiring the gTLD with the unique potential to challenge Verisign’s dominance.⁵⁴

⁴⁸ Exhibit 28, Email exchange between NDC and ICANN (June 2016) (documenting ICANN’s inquiry regarding NDC’s change in ownership or control); Exhibit 29, Letter from ICANN to Members of the .WEB/.WEBS Contention Set (13 Jul. 2016), p. 1.

⁴⁹ Exhibit 28, Email exchange between NDC and ICANN (June 2016).

⁵⁰ Exhibit 25, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016), ¶ 55 (“On July 22, 2016, Plaintiff initiated ICANN’s Independent Review Process by filing ICANN’s Notice of Independent Review. The IRP remains pending.”); see Exhibit 30, Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 22 Jul. 2016).

⁵¹ Exhibit 7, “ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS” ICANN (listing results of and bid amounts for the .WEB auction).

⁵² Exhibit 8, Verisign, “Verisign Statement Regarding .Web Auction Results” (1 Aug. 2016).

⁵³ Exhibit 8, Verisign, “Verisign Statement Regarding .Web Auction Results” (1 Aug. 2016).

⁵⁴ Exhibit 14, Letter from the United State Senate to the Personal Data Redacted (12 Aug. 2016), p. 4 (“Verisign’s bid to secure the .web registry may have been undertaken to protect its position in the .com market from additional competition.”).

ICANN did nothing in response to Verisign’s announcement about its agreement with NDC. Requestor voiced its concerns about Verisign’s involvement in the ICANN Auction to ICANN on both 8 August 2016 and 9 September 2016.⁵⁵ It received no response from ICANN until 16 September 2016, when ICANN asked for “additional information” from Requestor, Ruby Glen, Verisign, and NDC to “help facilitate informed resolution” of Requestor’s “questions regarding, among other things, whether [NDC] should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC’s application for the .WEB gTLD should be rejected.”⁵⁶ Requestor submitted a detailed response to ICANN’s inquiries within the requested timeframe that further articulated Requestor’s concerns about Verisign and NDC.⁵⁷ ICANN, though, did not respond until nearly a year and a half later. When ICANN finally contacted Requestor on 31 March 2018, it simply requested permission to disclose Requestor’s response to the 16 September 2016 letter.⁵⁸ ICANN has still provided no substantive response or meaningful information to address Requestor’s serious concerns.

8.2 The DIDP Request

Requestor has waited over a year and a half to learn from ICANN the results of its supposed investigation into NDC and Verisign. Given the significant delay, Requestor sought to obtain some information from ICANN regarding its investigation through the DIDP. As described in **Section 3** above, on 23 February 2018, Requestor submitted to ICANN the DIDP Request.⁵⁹ The

⁵⁵ See Exhibit 9, Letter from S. Hemphill to A. Atallah (8 Aug. 2016) (listing problems with Verisign’s involvement in the .WEB auction); Exhibit 31, Letter from S. Hemphill to A. Atallah (9 Sep. 2016) (reiterating concerns about the .WEB auction to ICANN). The next communication from ICANN occurred over a week after Requestor’s 8 August 2016 letter to ICANN, and it simply notified Requestor that the .WEB contention set was placed “on-hold” because of “a pending ICANN Accountability Mechanism initiated by another member of the contention set.” Exhibit 32, Letter from A. Atallah to S. Hemphill (30 Sep. 2016).

⁵⁶ Exhibit 10, Letter from C. Willett to J. Kane (16 Sep. 2016).

⁵⁷ See Exhibit 33, Letter from J. Kane to C. Willett (7 Oct. 2016) (providing responses to ICANN’s request for information).

⁵⁸ Exhibit 34, Email from C. Willett to J. Kane (31 Mar. 2018).

⁵⁹ Exhibit 2, DIDP Request No. 20180223-1 (23 Feb. 2018).

Initial DIDP Response determined that (1) most of the requests were subject to the Nondisclosure Conditions and (2) Requestor should “clarify or narrow” several requests.⁶⁰ In response to the Initial DIDP Response, Requestor submitted a revised DIDP request to ICANN: the DIDP Reply.⁶¹

ICANN’s response to the DIDP Reply did not provide Requestor with any significant new information regarding NDC, Verisign, or the .WEB contention set. Rather, for the majority of the requests, ICANN refused to disclose the requested documents pursuant to the DIDP’s Nondisclosure Conditions.⁶² ICANN’s refusal to disclose documents in the DIDP Response is the basis for this reconsideration request, as described in **Section 6** above.

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose the documents requested in the DIDP Request, as amended by the DIDP Reply.

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 described in **Section 8** above, Requestor is a member of the .WEB contention set and the entity that submitted both the DIDP Request and the DIDP Reply to ICANN. It is therefore materially affected by ICANN’s decision to deny its requests for documentary information, which directly relate to the .WEB contention set.

⁶⁰ See Exhibit 3, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), p. 8.

⁶¹ Exhibit 4, Letter from A. Ali to ICANN Board (23 Apr. 2018).

⁶² Exhibit 5, DIDP Response to Request No. 20180423-1 (23 May 2018), pp. 5-14.

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

June 22, 2018

Date

Subject: Re: [Reconsideration Request] Reconsideration Request 18-8
Date: Friday, July 20, 2018 at 8:57:22 AM Pacific Daylight Time
From: reconsider on behalf of Herb Waye
To: Reconsideration
CC: ombudsman
Attachments: ATT00001.txt

Reconsideration Request 18-8

-
Please accept my apologies for the delay as this decision required extensive evaluation of past actions by the Office of the Ombudsman.

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-8.

Best regards,

Herb Waye
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]
<https://www.facebook.com/ICANNOmbudsman> [facebook.com]
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

From: Reconsideration <Reconsideration@icann.org>
Date: Friday, July 13, 2018 at 10:20 PM
To: ombudsman <ombudsman@icann.org>
Cc: Reconsideration <Reconsideration@icann.org>
Subject: Reconsideration Request 18-8

Dear Herb,

On 22 June 2018, Afilias Domains No. 3 Limited (Requestor), submitted the attached Reconsideration Request 18-8 (Request 18-8) seeking reconsideration of ICANN organization's response to its amended request, pursuant to ICANN org's Documentary Information Disclosure Policy (DIDP), for documents relating to the .WEB contention set.

Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated its Commitments established in the Bylaws concerning accountability, transparency, and openness. Exhibits 1 to 34 submitted by the Requestor in support of Request 18-8 are available at <https://www.icann.org/en/system/files/files/reconsideration-18-8-afiliis-exhibits-1-redacted-22jun18-en.pdf>.

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 18-8 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated.

Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

- (l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
 - (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
 - (ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.
 - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-8 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-8 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of the Request.

Best regards,
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-8
28 AUGUST 2018**

The Requestor, Afilias Domains No. 3 Ltd. (Afilias), seeks reconsideration of ICANN organization's response to the Requestor's request for documents, pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the .WEB contention set.¹ Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Core Values and commitments established in the Bylaws concerning transparency and openness.²

I. Brief Summary.

The Requestor submitted an application for the .WEB generic top-level domain (gTLD), which was placed in a contention set with other .WEB applications. The Requestor was invited to, and did, participate in an auction to secure the right to operate the .WEB gTLD. The Requestor did not prevail at the auction; another applicant, Nu Dot Co, LLC (NDC), placed the prevailing bid.

On 23 February 2018, the Requestor submitted a DIDP Request to ICANN org requesting documents related to the .WEB contention set (First DIDP Request).³ ICANN org responded on 24 March 2018 (First DIDP Response).

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org's responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a Reply to the First DIDP Response, in which

¹ Reconsideration Request 18-8, § 3, at Pgs. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-8-afiliias-request-redacted-22jun18-en.pdf>.

² *Id.*, § 6, at Pgs. 6-11.

³ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

it revised Items 1, 4, 5, 6(a-b), and 9(a). With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP request (Second DIDP Request), with an effective submission date of 23 April 2018. On 23 May 2018, ICANN organization responded to the Second DIDP Request in accordance with the DIDP Process (Second DIDP Response).

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) summarily dismissed Reconsideration Request 18-7.⁴

On 22 June 2018, the Requestor submitted Reconsideration Request 18-8 (Request 18-8). The Requestor claims that ICANN org's application of certain Defined Conditions for Nondisclosure (Nondisclosure Conditions) in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org's commitment under the Bylaws to operate with transparency and openness.⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.⁶

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Request 18-8 because ICANN org adhered to established policies and procedures in its Second DIDP Response; and ICANN org did not violate its commitments established in the Bylaws concerning transparency and openness.

⁴ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afilias-bamc-determination-request-05jun18-en.pdf>.

⁵ Reconsideration Request 18-8, § 6.1, at Pg. 7.

⁶ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afilias-ombudsman-action-20jul18-en.pdf>.

II. Facts.

A. Background Facts.

1. The New gTLD Program and String Contention

In 2012, ICANN org opened the application window for the New gTLD Program and created the new gTLD microsite,⁷ which provides detailed information about the Program. ICANN org received seven applications for the .WEB string, including an application from the Requestor (Application), which were placed into a contention set together with one application for the .WEBS string.⁸ Module 4 of the Guidebook describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving such contention sets, including through community priority evaluation or through voluntary agreement among the involved applicants.⁹

Should resolution not occur through these processes, the contention set will proceed to an ICANN facilitated auction of last resort.¹⁰ The auction procedures are set forth in the Guidebook, and were developed with extensive community consultation.¹¹ Additionally, the auction is governed by the Auction Rules that were developed with community consultation via the public comment processes for both direct and indirect contention set auctions.¹² As part of ICANN's commitment to transparency, ICANN org established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process.¹³

⁷ <https://newgtlds.icann.org/en/>.

⁸ See Applicant Guidebook (Guidebook), §1.1.2.10 (String Contention); see also <https://gtldresult.icann.org/applicationstatus/applicationdetails/292>; <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

⁹ Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).

¹⁰ See *id.*

¹¹ See *id.* at § 4.3.1.

¹² See Auctions webpage, at News Archive section, WEB string, <https://newgtlds.icann.org/en/applicants/auctions>.

¹³ <https://newgtlds.icann.org/en/applicants/auctions>.

2. Resolution of .WEB/.WEBS Contention Set

Following the procedures set forth in the Guidebook, ICANN org first scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction).¹⁴ On or about 22 June 2016, Ruby Glen LLC (Ruby Glen), one of the applicants for the .WEB string, asserted that changes had occurred in NU DOT CO LLC's (NDC's) application for .WEB. In particular, Ruby Glen claimed that changes had occurred to NDC's management and ownership, and that the Auction should be postponed pending further investigation.¹⁵

ICANN org investigated Ruby Glen's allegations. After completing its investigation, ICANN org sent a letter to all of the members of the .WEB/.WEBS contention set stating, among other things, that "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the [A]uction."¹⁶

Ruby Glen then invoked one of ICANN org's accountability mechanisms by submitting a reconsideration request on an urgent basis (Reconsideration Request 16-9), seeking postponement of the Auction and requesting a more detailed investigation.¹⁷ After carefully considering the information related to Reconsideration Request 16-9, ICANN's Board Governance Committee (BGC) denied Reconsideration Request 16-9 on 21 July 2016.¹⁸

The next day Ruby Glen filed a lawsuit against ICANN¹⁹ and, at the same time applied for a temporary restraining order (TRO Application) seeking to stop ICANN org from

¹⁴ See <https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf>.

¹⁵ See <https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amended-complaint-26oct16-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members13jul16-en.pdf>.

¹⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-requestredacted-17jul16-en.pdf>.

¹⁸ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glenradix-bgc-determination-21jul16-en.pdf>.

¹⁹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf>.

conducting the Auction on the scheduled date.²⁰ The Court denied the TRO Application²¹ and the Auction took place on 27 and 28 July 2016. NDC secured the winning bid.²²

On 28 November 2016, the Court dismissed Ruby Glen's complaint and entered judgment in ICANN organization's favor.²³ Ruby Glen appealed that decision, and the appeal is currently pending.²⁴

3. The Requestor's DIDP Requests

On 23 February 2018, the Requestor submitted the First DIDP Request to ICANN organization requesting the following ten categories of documents related to the .WEB contention set.²⁵

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
 - a. The .WEB contention set,
 - b. NDC's application for the .WEB gTLD,
 - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
 - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;

²⁰ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parteapplication-tro-memo-points-authorities-22jul16-en.pdf>.

²¹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-courtorder-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf>.

²² <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults>.

²³ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf>.

²⁴ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regarding-dismissal-20dec16-en.pdf>.

²⁵ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
 - a. Document productions to the DOJ,
 - b. Communications with the DOJ,
 - c. Submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions,
 - d. Communications with Verisign or NDC relating to the investigation, and
 - e. Internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ investigation.²⁶

On 24 March 2018, ICANN org provided the First DIDP Response. ICANN org responded individually to each of the ten items (and their subparts) by providing links to the publicly available documents responsive to the requests; objecting to certain requests as vague, overbroad, or unrelated to ICANN's operational activities; and/or confirming that documents responsive to the items do not exist. With respect to certain requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org considered whether the public interest in disclosure of the information subject to these conditions outweighed the harm that may be caused by such disclosure and determined that there were no current circumstances for which the public interest in disclosing the information outweighed the harm of disclosure.²⁷ With respect to requests that were vague, ICANN org indicated that the Requestor could amend its DIDP Request to clarify, if it so wished.²⁸

²⁶ *Id.*

²⁷ 24 March 2018 Response to DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

²⁸ *Id.*

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org’s responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a letter replying to the First DIDP Response.²⁹ In its letter, the Requestor offered to enter into a confidentiality agreement with ICANN org under which the Requestor would limit disclosure of any material produced by ICANN org in response to Requests 1, 4, 6, and 9 and designate such material as “highly confidential” and accessible only to the Requestor’s outside counsel. The Requestor also revised Items 1, 4, 5, 6(a-b), and 9(a) of the First DIDP Request as follows:

Request	First DIDP Request	Second DIDP Request
1	All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information.	Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter.
4	All applications, and all documents submitted with the applications, for the rights to .WEB.	NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.
5	All documents discussing the importance of .WEB to bringing competition to the provision of registry services.	Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs.
6(a-b)	All documents concerning any investigation or discussion related to a. The .WEB contention set,	Documents related to the .WEB Investigation, including: 1. All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012,

²⁹ 23 April 2018 Reply to DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

Request	First DIDP Request	Second DIDP Request
	b. NDC’s application for the .WEB gTLD.	2. All documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 3. Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (<i>sic</i>) auction, and 4. Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.
9(a)	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ.	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias’ possession.

The Requestor acknowledged in Request 18-7 that it had submitted the Second DIDP Request and that Request 18-7 was premature. Specifically, the Requestor stated:

Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the [First] DIDP Response should ICANN and Requestor fail to reach an agreement based on the [Second] DIDP [Request]. Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the [Second] DIDP [Request]. Requestor is prepared to discuss an appropriate “tolling” agreement that would allow Requestor and ICANN to attempt to

reach an agreement concerning the First DIDP Request and the [Second] DIDP [Request].³⁰

On 27 April 2018, ICANN org responded to the Requestor's letter of 23 April 2018.³¹

Regarding the Requestor's offer to enter into a confidentiality agreement, ICANN org stated:

The concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make public documents concerning ICANN organization's operations unless there is a compelling reason for confidentiality. (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) Moreover, your proposal is asking ICANN organization to treat Afilias differently than other requestors, and to act in a manner that is contrary to what is set forth in the DIDP Process, which as you know would be in contravention of ICANN's Bylaws.³²

With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP Request, with an effective submission date of 23 April 2018. ICANN org confirmed that it would respond to the Second DIDP Request in accordance with the DIDP Process.³³

On 23 May 2018, ICANN org provided the Second DIDP Response.³⁴ With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org also "considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure . . . [and] determined that there are no current circumstances for

³⁰ Reconsideration Request 18-7, § 3, at Pg. 5.

³¹ See Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

³² *Id.*

³³ *Id.*

³⁴ See DIDP Response to Request No. 20180423-1, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”³⁵

On 5 June 2018, the BAMC summarily dismissed Request 18-7 because Afilias had not sufficiently stated a Reconsideration Request.³⁶

On 22 June 2018, the Requestor submitted Request 18-8. The Requestor claims that ICANN org’s application of certain Nondisclosure Conditions in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org’s commitment to “‘operate in a manner consistent with [its] Bylaws,’ which require that it operate with transparency and openness.”³⁷

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.³⁸

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Reconsideration Request 18-8 because ICANN org adhered to established policies and procedures in the Second DIDP Response.

B. Relief Requested.

The Requestor asks the BAMC to “disclose the documents requested in the DIDP Request, as amended by the [Second] DIDP [Request].”³⁹

III. Issues Presented.

The issues are as follows:

³⁵ *Id.* at 14.

³⁶ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afili-as-bamc-determination-request-05jun18-en.pdf>.

³⁷ Reconsideration Request 18-8, § 6.1, at Pg. 7.

³⁸ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afili-as-ombudsman-action-20jul18-en.pdf>.

³⁹ Reconsideration Request 18-8, § 9, at Pg. 16.

1. Whether ICANN org complied with established ICANN policies in responding to the Second DIDP Request; and
2. Whether ICANN org complied with its Core Values and commitments established in the Bylaws concerning transparency and openness.⁴⁰

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.”⁴¹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Reconsideration Request is sufficiently stated, the Reconsideration Request is sent to the Ombudsman for review and consideration.⁴² Where the Ombudsman has recused himself from the consideration of a Reconsideration Request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁴³ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

⁴⁰ Reconsideration Request 18-8.

⁴¹ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(a), (c).

⁴² ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(k), (l).

⁴³ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴⁴

On 13 July 2018, the BAMC determined that Request 18-8 is sufficiently stated and sent Reconsideration Request 18-8 to the Ombudsman for review and consideration.⁴⁵ The Ombudsman thereafter recused himself from this matter.⁴⁶ Accordingly, the BAMC has reviewed Request 18-8 and all relevant materials, and issues this Recommendation.

B. The DIDP.

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 publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.⁴⁷ In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available is made available to the public unless there is a compelling reason for confidentiality.⁴⁸

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and

⁴⁴ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e)(vi), (q), (r).

⁴⁵ Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afili-as-ombudsman-action-20jul18-en.pdf>.

⁴⁶ *Id.* at Pg. 1.

⁴⁷ See ICANN Documentary Information Disclosure Policy (DIDP), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁴⁸ *Id.*

transparency within ICANN org, which included extensive public comment and community input.⁴⁹

Neither the DIDP nor ICANN org’s commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org’s possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁵⁰

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).⁵¹ The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org’s website].”⁵²

The Nondisclosure Conditions identify circumstances for which ICANN org’s other commitments or Core Values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and that the *Amazon EU S.A.R.L.*

⁴⁹ See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁵⁰ <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>, at pg. 17.

⁵¹ See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁵² *Id.*; see also “Defined Conditions for Nondisclosure,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). They include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents (Internal Deliberative Process);
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications (Constituent Deliberative Process);
- iii. 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 proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. 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 (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and
- vii. 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 (Privilege/Investigation).⁵³

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN org determines, under the

⁵³ DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁴

V. Analysis and Rationale.

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Second DIDP Request.

1. The Response to the Second DIDP Request Complies with Applicable Policies and Procedures.

The Requestor's Second DIDP Request sought the disclosure of documents relating to the .WEB/.WEBS contention set. As an initial matter, the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in ICANN org's Second DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁵ This represents 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. However, the BAMC has reviewed the Second DIDP Response and, for the reasons discussed below, concludes that the Second DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

Items No. 1, 4, 5, 6(a-b), and 9(a) in the Second DIDP Request sought the disclosure of documents and information relating to the .WEB contention set:

- “Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter” (Item No. 1);

⁵⁴ *Id.*

⁵⁵ Reconsideration Request 18-8, § 6, at Pg. 9-11. While the Requestor summarily concludes that the Nondisclosure Conditions were “unreasonably and illegitimately appl[ied]” (*see* Reconsideration Request 18-8, § 6, Pg. 8), the Requestor does not explain how that is so. Without more, the Requestor’s unsupported assertions do not support reconsideration.

- “NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items” (Item No. 4);
- “Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs” (Item No. 5);
- “Documents related to the .WEB Investigation, including: (1) All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (2) all documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (3) Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (*sic*) auction, and (4) Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party” (Item No. 6(a-b)); and
- “All documents relating to the Department of Justice, Antitrust Division’s (DOJ) investigation into Verisign becoming the registry operator for .WEB (DOJ Investigation), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afiliat’s possession” (Item No. 9(a)).⁵⁶

Consistent with the DIDP Response Process, ICANN org responded individually to each of the five items (and their subparts) by providing links to the publicly available documents responsive to the requests. ICANN org also identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;

⁵⁶ 23 April 2018 Reply to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

- Confidential Business Information;
- Trade secrets;
- Drafts; and
- Privilege/Investigation.⁵⁷

Notwithstanding the applicable Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.⁵⁸ Accordingly, the BAMC finds that ICANN org complied with the DIDP Response Process when it responded to the Second DIDP Request.

The Requestor does not challenge the applicability of the Nondisclosure Conditions identified by ICANN org. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁹ For the reasons set forth below, the Requestor's claims do not support reconsideration.

2. ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public's Interest in Disclosing the Information.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.⁶⁰ Information subject to these Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public

⁵⁷ See DIDP Response to Request No. 20180423-1, 23 May 2018, at Pgs. 5-14, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁵⁸ *Id.* at Pg. 14.

⁵⁹ Reconsideration Request 18-8, § 6, at Pg. 9-11.

⁶⁰ DIDP.

interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.⁶¹ In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in Second DIDP Response.⁶²

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in the Second DIDP Request. Instead, the Requestor claims that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.⁶³ According to the Requestor, “there is a significant public interest in providing for a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the [Second DIDP Request].”⁶⁴ The Requestor’s claims do not support reconsideration.

As an initial matter, as ICANN org previously explained to the Requestor, and the BAMC agrees,⁶⁵ the concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make *public* documents concerning ICANN org’s operations unless there is a compelling reason for confidentiality.⁶⁶ Moreover, the Requestor’s proposal asks ICANN org to treat the Requestor differently than other requestors,

⁶¹ *Id.*

⁶² See DIDP Response to Request No. 20180423-1, at Pg. 14, 23 May 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁶³ Reconsideration Request 18-8, § 6, at Pgs. 8-11.

⁶⁴ Reconsideration Request 18-8, § 6, Pg. 9.

⁶⁵ Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

⁶⁶ See DIDP.

and to act in a manner that is contrary to what is set forth in the DIDP Response Process, which could be in contravention of ICANN's Bylaws. Further, by proposing that the documents be made available only to the Requestor's outside counsel via a "confidentiality agreement," it appears that the Requestor concedes that the requested information is *not* appropriate for public disclosure. In short, the Requestor's proposal to enter into a confidentiality agreement to protect the information contained in the requested materials does not support reconsideration.

The Requestor otherwise lodges various unsupported allegations regarding Verisign's intentions and conduct in connection with the .WEB gTLD. The Requestor alleges that Verisign engaged in a "secretive scheme to obtain the .WEB license for itself [which] was not only unfair, deceptive, and lacking in transparency but was also carried out specifically to stifle ICANN's efforts to promote competition."⁶⁷ As a result, the Requestor claims, "allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC is inconsistent with the promotion of competition, contrary to ICANN's mandate, and constitutes a serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN's Bylaws."⁶⁸ The Requestor, however, does not provide any evidence or other support for its assertions; instead, all the Requestor offers is its own personal view. Nor does the Requestor explain how its unsubstantiated claims concerning Verisign's alleged conduct demonstrate that ICANN org violated a policy or procedure when it responded to the Requestor's Second DIDP Request. Without more, reconsideration is not warranted.

The BAMC further notes that, on 1 February 2017, the Antitrust Division of the United States Department of Justice (DOJ), issued a Civil Investigative Demand (CID) to ICANN org in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual

⁶⁷ Reconsideration Request 18-8, § 6, Pg. 10.

⁶⁸ *Id.* at Pgs. 10-11.

rights to operate .WEB. ICANN org provided DOJ with information responsive to the CID. ICANN org understands that Verisign also received a CID from DOJ requesting certain material related to Verisign's involvement with .WEB.⁶⁹ To ICANN org's knowledge, the DOJ closed its investigation in early 2018 without further action.

Ultimately, the BAMC does not agree that ICANN org violated the DIDP Response Process when it determined that the public interest does not outweigh the potential harm in the disclosure of the confidential and privileged documents. ICANN org takes seriously its commitment "where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market."⁷⁰ However, ICANN's Bylaws also recognize that "[s]ituations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."⁷¹

Two competing Core Values are relevant here. First, the BAMC concludes that ICANN org followed the DIDP Response Process in determining that the requested materials that are subject to Nondisclosure Conditions include sensitive information that, if disclosed, could result in serious harm to ICANN org as well as its constituents and contracting entities. The BAMC further finds that ICANN org followed the DIDP Response Process by concluding that disclosure could, among other things, undermine ICANN org's deliberative processes, materially prejudice the interests of ICANN org and other third parties, violate the attorney-client privilege, and

⁶⁹ See Verisign, Inc. Form 10-K for Year 2017, at Pg. 23, available at: <https://investor.verisign.com/static-files/0563ca8c-4bd1-48c6-8b37-fb338664dfa4>.

⁷⁰ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(iii).

⁷¹ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(c).

invade personal privacy; and that as a result, disclosure would run afoul to ICANN org’s Core Value of “[o]perating with efficiency and excellence.”⁷² Second, the BAMC concludes that ICANN org did not violate the DIDP Response Process in determining that because many of the materials requested reflect confidential business information of third parties, disclosure would subvert ICANN’s commitment to “striv[e] to achieve a reasonable balance between the interests of different stakeholders....”⁷³ Indeed, disclosure of third party information that was shared with ICANN org in confidence would not reflect a reasonable balance at all, but rather would reflect a one-sided decision to the detriment of the third party whose sensitive information was disclosed. Further, if ICANN org disclosed third party confidential information, community stakeholders would thereafter be hesitant to participate in the bottom-up, multistakeholder model that ICANN org has committed to support.

The DIDP, which was developed through the multistakeholder process with significant community input, specifically permits ICANN org to balance applicable competing Core Values and commitments in any given situation. Here, ICANN org’s commitment to promote competition in the DNS is in tension with its commitment to operate with efficiency and excellence, as well as ICANN org’s commitment to reasonably balance the interests of different stakeholders, and to support the multistakeholder process. Pursuant to the DIDP, ICANN org may exercise its discretion to withhold materials under these circumstances without violating its commitment to promoting competition.

⁷² ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(v).

⁷³ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(vii).

B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the Second DIDP Request.

The Requestor asserts that ICANN org’s determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to “operate through open and transparent processes and to the maximum extent feasible in an open and transparent manner.”⁷⁴ The Requestor believes that, by not disclosing the requested materials, ICANN org “has failed to operate in a manner consistent with its Bylaws, which require that it operate with transparency and openness.”⁷⁵ The Requestor’s claims do not support reconsideration.

The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN org, which included extensive public comment and community input.⁷⁶ Following completion of this review, ICANN org sought public comment on the resulting recommendations, and summarized and posted the community feedback.⁷⁷ Based on the community’s feedback, ICANN org proposed changes to its frameworks and principles to “outline, define and expand upon the organisation’s accountability and transparency”⁷⁸ and sought additional community input on the proposed changes before implementing them.⁷⁹

Neither the DIDP nor ICANN’s commitments and Core Values supporting transparency and accountability obligates ICANN org to make public every document in its possession. As noted above, the DIDP sets forth Nondisclosure Conditions for which other commitments or Core Values may compete or conflict with the transparency commitment. These Nondisclosure

⁷⁴ Reconsideration Request 18-8, § 6, Pg. 7 (internal citations to ICANN’s Bylaws omitted).

⁷⁵ *Id.*

⁷⁶ See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁷⁷ See <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁷⁸ <https://www.icann.org/en/system/files/files/accttrans-frameworks-principles-17oct07-en.pdf>.

⁷⁹ <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

Conditions represent areas, vetted through public comment, that the community has agreed are presumed not to be appropriate for public disclosure. The public interest balancing test in turn allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and Core Values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.⁸⁰

As noted above, ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”⁸¹

Here, ICANN org set forth the basis for its determination in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.⁸² It is entirely within ICANN org’s discretion to make this finding, and ICANN org may conclude as

⁸⁰ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

⁸¹ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(c).

⁸² See DIDP Response to Request No. 20180423-1, at Pgs. 9-21, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

much without contravening its commitment to transparency. Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency and openness do not support reconsideration here.

VI. Recommendation.

The BAMC has considered the merits of Reconsideration Request 18-8, and, based on the foregoing, concludes that ICANN org did not violate ICANN's commitments, Core Values or established ICANN policy(ies) in the Second DIDP Response. Accordingly, the BAMC recommends that the Board deny Reconsideration Request 18-8.