

ICANN
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USA

22 October 2015

By email: didp@icann.org

Dear Madam,
Dear Sir,

**.GAY Community Priority Re-Evaluation for Application ID 1-1713-23699
Request under ICANN's Documentary Information Disclosure Policy**

This request is submitted under ICANN's Documentary Information Disclosure Policy on behalf of dotgay LLC, one of the applicants for the .GAY gTLD (hereinafter referred to as "Requester") in relation to ICANN's Community Priority Re-Evaluation panel's ("CPE Panel") determination that Requester's application for the .GAY gTLD (Application ID: 1-1713-23699; hereinafter referred to as the "Application") did not prevail in Community Priority Evaluation according to the Community Priority Evaluation report available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf> (hereinafter: the "Determination").

Context

Reference is made to the second Community Evaluation Report that has been released by ICANN relating to the Requester's Application and published on the ICANN website as referred to above, and ICANN's decision to change the Contention Resolution Status of the Application to "Active" and the Contention Resolution Result to "In Contention".

According to the Determination: *"[t]he Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook",* hereby confirming that the application for the .GAY gTLD that has been submitted by Requester *"did not prevail in Community Priority Evaluation"*.

Considering the fact that, according to the processes and procedures set out in ICANN's Applicant Guidebook, this Determination would result in ICANN (i) not recognizing for the second time the community status of the Applicant and its Application, and (ii) putting the Application again into a contention set with multiple other applicants for the .GAY gTLD, which impacts the Application and the justified claims made by the Applicant in relation to the .GAY gTLD.

According to ICANN, *"ICANN's Documentary Information Disclosure Policy (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.”¹

Requester therefore invokes ICANN's accountability mechanisms in order to understand on which information the CPE Panel and ICANN have relied in developing this Determination and deciding that Requester's Application did not meet the criteria for being awarded community status.

Request

In view of transparency of ICANN's decision-making process, the Requester would like to obtain the following information from ICANN under the Documentary Information Disclosure Policy:

- 1) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered “policy” under ICANN by-laws;
- 2) internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application;
- 3) detailed information on the evaluation panels that have reviewed Requester's Application during the first CPE that was conducted in 2014, as well as the evaluation panels that have conducted the second CPE in 2015, including the names and respective positions of the members of the evaluation panels;
- 4) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by each individual Community Priority Evaluation panel member in view of each of the criteria set out in the Applicant Guidebook, and more in particular:

I. In relation to the criterion “Nexus”

- 5) which information, apart from the information contained in the Application, has been used by the CPE Panel in order to determine that the word “gay” “does not identify or match the name of the community as defined in the Application, nor is it a well-known short-form or abbreviation of the community”, notwithstanding the fact that public references to this “catch-all” or “umbrella” term made by reputable organizations prove otherwise;²
- 6) whether, in considering that individuals who qualify as transgenders, intersex or “allies” are not deemed to be members of the community as defined by the

¹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

² <http://en.wikipedia.org/wiki/Gay>;
<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;
<http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&module=Search&mabReward=relbias%3Aw%2C%7B%22%22%3A%22RI%3A18%22%7D&r=0>;

Application, whereas various national, international and supranational organizations such as Parents, Families, and Friends of Lesbians and Gays (PFLAG) and Children of Lesbians and Gays Everywhere (COLAGE), both of which are also endorsing the Requester's Application for the .GAY gTLD,³ are clearly being recognized as supporting the same causes and endorsing the same values as expressed by the "inner circle" of members of this community, especially since they are closely linked to the thematic remit the community has;

- 7) based on the CPE Report, it seems that the EIU assumed that an "ally" necessarily would be an individual, notwithstanding various statements Requester has made to the contrary, for instance in the context of its initial Reconsideration Request. Therefore, Requester would like to obtain insights into the definition or concept used by the EIU in order to determine what an "ally" is;⁴
- 8) in relation to the above: which information, statistics, etc. and criteria to evaluate and weigh the importance of such information have been used in determining that transgenders, intersex, or "allies" would be "substantially" overreaching the term "gay";
- 9) why, considering the fact that the CPE Panel did not provide passing scores in relation to Requester's answers in relation to the "Nexus between Proposed String and Community" and "Community Endorsement" aspects of the Application, the CPE Panel or ICANN has not reached out to the Requester in the form of Clarifying Questions.

Although Requester did receive Clarifying Questions in relation to the Community Establishment criterion, no such Clarifying Questions have been received, notwithstanding the fact that the EIU already struggled with Requester's answers during the first CPE.

Therefore, Requester would like to know, although the CPE Panel and ICANN had the possibility to submit Clarifying Questions to the Applicant according to the process published at <http://newgtlds.icann.org/en/applicants/clarification-questions>, which have been the reasons, arguments, standards and criteria used by ICANN and the CPE Panel for not doing so, especially in relation to those aspects of its Application that were unclear for the EIU during the first *and* the second CPE.

Indeed, during the Initial Evaluation process, ICANN has reached out to most, if not all applicants in order to provide additional or more detailed information. Given the fact that Requester has paid a sum exceeding USD 210.000 for submitting the Application and participating to the Community Priority Evaluation, one would expect that as a minimum some outreach would have been performed by ICANN or the CPE Panel, rather than outright dismissing or unilaterally interpreting information provided in the Application *now more than three years after such Application has been submitted to ICANN* and notwithstanding the fact that the EIU already had issues with Requester's answers during the first CPE.

³ See for instance <http://en.wikipedia.org/wiki/Gay>.

⁴ CPE Guidelines, Page 7.

II. In relation to the criterion “Community Endorsement”:

- 10) which letters of endorsement and/or support have been considered and verified by the CPE Panel in making its Determination, bearing in mind the fact that the BGC has determined that the EIU has made a process error in the context of the first CPE that was performed in 2014. The information provided in the second CPE Report does not allow Requester to distinguish the letters that have been provided by Requester in the context of the Application from the letters that have been published on ICANN’s correspondence page or through other means since the publication of the first CPE Report;
- 11) which criteria and/or standards have been used by the CPE Panel in order to determine which group is “of relevance” in relation to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application;
- 12) why, although the CPE Panel has recognized that Requester “possesses documented support from many groups with relevance”, only the support of “one group of relevance” has been taken into consideration by the CPE Panel;
- 13) what were the criteria and standards that have been used by the Panel in making such distinction and coming to such determination;
- 14) bearing in mind the previous question, why the CPE Panel has come to a different assessment in relation to the standing of ILGA expressed by the Expert Determination provided by the ICDR, which has been acknowledged and endorsed by ICANN in dismissing an official complaint lodged before the ICDR by Metroplex Republicans of Dallas, in which the Requester prevailed;⁵
- 15) which scores or evaluations have been given to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application against such criteria and/or standards for each of the organizations, companies and groups referred to in the Application and the CPE Report;
- 16) if no particular additional criteria and/or standards have been utilized by the CPE Panel, apart from the ones published in the Applicant Guidebook and the Guidelines published by the CPE Panel, a detailed overview of the arguments that have been brought forward and have been adopted or acknowledged by the CPE Panel for not considering the letters of support and/or endorsement from other groups, organizations, companies and individuals;
- 17) which independent research has been performed by the CPE Panel and how the results of such research have been taken into account by the CPE Panel in the scoring they have applied. Considering the wide endorsement obtained from various umbrella organizations, national and supranational groups, the Determination makes it clear that only one letter of endorsement from one group considered “relevant” by the CPE Panel has been taken into account.

⁵ See ICDR Case No. EXP/390/ICANN/7, §13.

III. In relation to the criterion “Opposition”:

- 18) the name, address, and standing of the anonymous organization considered by the CPE Panel;
- 19) an overview of the staff members, including their names, roles and responsibilities of such organization;
- 20) the events and activities organized by such organization;
- 21) which standards and criteria have been used by the CPE Panel in order to determine that such activities had a “substantial” following;
- 22) the metrics used by ICANN and the Community Priority Evaluation Panels in performing the evaluation; and
- 23) whether any of the information provided by the Requester to ICANN in relation to potential spurious or unsubstantiated claims made by certain organizations have been taken into account, and – in such event – the reasons for not taking into account such information;
- 24) in particular, Requester would like to know whether the Community Priority Panel has considered the letter of the Q Center of April 1^s, 2015 in which the latter requested the opposition letter of the Q Center to be voided.⁶

Requester appreciates that some of the questions referred to above have been asked before in connection with Requester’s initial Request for Information that was submitted in the fall of 2014. Indeed, ICANN did not provide any answer to such questions raised in Requester’s initial Request for Information, but anyway decided to publish some of the information requested therein later on. Therefore, Requester respectfully raises these questions again, since ICANN’s approach and context have changed since responding to Requester’s initial Request for Information.

Standards for Disclosure

Requester is of the opinion that none of the information requested by them meet any of the defined conditions for non-disclosure as set out in ICANN’s Documentary Information Disclosure Policy:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN’s relationship with that party.

Considering the nature and contents of Requester’s requests, this standard is not met.

- 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

⁶ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Considering the nature and contents of Requester's requests, this standard is not met. Since these requests are made in view of assessing Requester's position and (legal) actions in relation to ICANN potentially awarding the .GAY gTLD to the Requester, and considering the impact such award may have upon Requester, we believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evaluation.

- 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.

Considering the nature and contents of Requester's requests, this standard is not met. Since these requests are made in view of assessing Requester's position and possible future (legal) actions in relation to ICANN potentially awarding the .GAY gTLD to Requester, and considering the impact such award may have upon Requester, we believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evaluation.

- 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.

Requester believes that this condition does not apply in relation to this request.

- 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.

Requester believes that this condition does not apply in relation to this request.

- Confidential business information and/or internal policies and procedures.

Requester believes that this condition does not apply in relation to this request.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.

Requester believes that this condition does not apply in relation to this request.

- 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.

Requester believes that this condition does not apply in relation to this request.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Requester believes that this condition does not apply in relation to this request. The Requester's requests relate to the information, final criteria, standards, arguments and considerations used in view of drafting a determination without taking into account the instructions of the BGC, that lacks clarity and is insufficiently motivated.

- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.

Requester believes that this condition does not apply in relation to this request.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

Requester believes that this condition does not apply in relation to this request.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

As stated above, considering the impact of ICANN awarding the .GAY gTLD may have upon Requester, we believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evaluation.

ICANN's transparency obligations, created by ICANN's Bylaws and Articles of Incorporation require the publication of information related to the process, facts and analysis used by individual members of the Community Priority Evaluation panel in preparation of the Determination.

Bylaw Article III, Section 1 provides as follows:

"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to use fairness."

Furthermore, Requester refers to ICANN's core mission and values, set out in their by-laws, and in particular, Requester's intention to review the information provided and to be provided by ICANN following this request on the basis of the following values of ICANN:

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

And

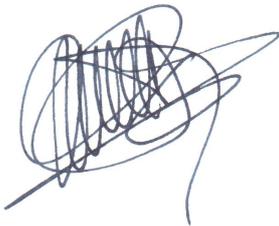
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

Furthermore, Article 4 of ICANN's Articles of Incorporation provides:

"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

Considering the potentially irreparable harm that will be done if ICANN would not take into account the position taken by the Requester as a legitimate competitor for the .GAY gTLD, we respectfully request ICANN to disclose the additional information, criteria, and standards set out above, which have formed the basis of the Determination.

Respectfully submitted,



Bart Lieben
Attorney-at-Law