

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

VIA E-MAIL DIDP@ICANN.ORG

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

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

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report¹ found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.²

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.³ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

¹ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

² See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

³ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*⁴ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.⁵ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the “BGC”).⁶ Dotgay has sent several letters to ICANN noting that ICANN’s protracted delays in reaching a decision and ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of dotgay’s request represent a violation of ICANN’s commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting “an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider”⁷ and that the BGC may have requested from the CPE provider “the materials and research

⁴ Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁵ *Id.*

⁶ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay’s* powerpoint presentation:

⁷ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”⁸

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹ Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.¹⁰

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:¹¹

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

⁸ Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

⁹ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

¹⁰ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

¹¹ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." ¹² According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."¹³ Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

¹² Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

¹³ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁴
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

¹⁴ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

¹⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)