

To: Arif Ali on behalf of Afilias Domains No. 3 Limited

Date: 20 January 2019

Re: Request No. 20181221-1

This is in response to your request for documentary information (Request), which was submitted on 21 December 2018 through the Internet Corporation for Assigned Names and Numbers' (ICANN org) Documentary Information Disclosure Policy (DIDP) on behalf of Afilias Domains No. 3 Limited (Afilias). For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks disclosure of the following information related to the .WEB contention set and Interim Supplementary Procedures (Interim Supplementary Procedures) for ICANN's Independent Review Process (IRP):

1. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference Afilias' complaints about the .WEB contention set;
2. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the Cooperative Engagement Process ("CEP") between ICANN and Afilias regarding the .WEB generic top-level domain ("gTLD");
3. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process ("IRP");
4. All communications between ICANN representatives on the Independent Review Process-Implementation Oversight Team ("IRP-IOT"), including Samantha Eisner, and any other employee of ICANN regarding any [of] the drafting, text, effect, or interpretation of the final or any prior draft of what is now Section 7 of the Interim Procedures;
5. All communications between Samantha Eisner and David McAuley concerning the development, drafting, text, effect, or interpretation of the Interim Procedures, and/or, the mandate and/or work of the IRP-IOT, including all communications concerning or that reference the modifications to Section 7 that were circulated to the IRP-IOT on 19 October 2018;
6. All communications circulated among members of the IRP-IOT between 19 October 2018 and 21 October 2018 on any subject related to or that references the Interim Procedures;

7. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the drafting of the Interim Procedures and, in particular, the development of the text of Section 7;
8. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the changes made to Section 7 of the Interim Procedures as compared with the version of Section 7 that had been posted for public comment on 28 November 2016; and
9. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the need to seek a further public consultation regarding Section 7 of the Interim Procedures.

Response

I. Background Information

A. The .WEB/.WEBS Contention Set

In 2012, ICANN opened the application window for the New Generic Top-Level Domain (gTLD) Program (Program) and created the new gTLD microsite (<https://newgtlds.icann.org/en/>), which provides detailed information about the Program. From the Program Status webpage of the new gTLD microsite (<https://newgtlds.icann.org/en/program-status>), people can access the public portions of each new gTLD application, including all of the .WEB applications, by clicking on “Current Application Status” and accessing the New gTLD Current Application Status webpage at <https://gtldresult.icann.org/applicationresult/applicationstatus/viewstatus>.

ICANN received seven applications for .WEB, which were placed into a contention set (see [Applicant Guidebook](#) (Guidebook), §1.1.2.10 (String Contention)). Module 4 of the Guidebook (String Contention Procedures) describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving contention absent private resolution: “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.” (Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).)

Should private resolution not occur, the contention set will proceed to an ICANN auction of last resort governed by the Auction Rules that all applicants agreed to by applying. (Guidebook, § 1.1.2.10 (String Contention)). In furtherance of ICANN’s commitment to transparency, ICANN org established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process. (See <https://newgtlds.icann.org/en/applicants/auctions>.)

Following the procedures set forth in the Guidebook, ICANN org scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction). (See <https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf>.)

On or about 22 June 2016, Ruby Glen LLC (Ruby Glen) asserted that changes had occurred in Nu Dot Co LLC's (NDC's) application for .WEB, in particular to NDC's management and ownership, and asserted that the Auction should be postponed pending further investigation. (See <https://www.icann.org/en/system/files/files/litigationruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amendedcomplaint-26oct16-en.pdf>.)

ICANN org investigated Ruby Glen's¹ assertions regarding NDC's application. After completing its investigation, ICANN org sent a letter to the members of the contention set stating, among other things, that "in regards to inquiries we have received concerning 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 auction." (See <https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members13jul16-en.pdf>.)

On 18 June 2018, Afilias initiated a Cooperative Engagement Process (CEP) regarding .WEB. (See <https://www.icann.org/en/system/files/files/irp-cep-status-11jan19-en.pdf>.) CEP is a process that is part of the IRP that allows parties to participate in non-binding cooperative engagement for the purpose of attempting to resolve and/or narrow the issues in dispute prior to filing an IRP. (See Bylaws, Art. 4, § 4.3(e), <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.) CEP is a confidential process between ICANN and the requesting party. (See <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.) Following the closure of the CEP, Afilias initiated an IRP against ICANN regarding .WEB (the Afilias IRP). (See <https://www.icann.org/resources/pages/irp-afili-as-v-icann-2018-11-30-en>.)

B. IRP Interim Supplementary Procedures

The IRP is an accountability mechanism set out in the ICANN Bylaws that allows for independent third-party review of actions (or inactions) of the ICANN Board or staff that a party or entity claims are in violation of the Bylaws or Articles of Incorporation and that materially and adversely affected them. (See [ICANN Bylaws, Art. 4, Section 4.3](#).) The International Centre for Dispute Resolution (ICDR) currently administers

¹ Ruby Glen also invoked ICANN's accountability mechanisms by submitting a reconsideration request. (See <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-requestredacted-17jul16-en.pdf>.) When the request was denied, Ruby Glen sued ICANN org. (See <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf> and <https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf>.) When the Court dismissed Ruby Glen's complaint, Ruby Glen appealed. On 15 October 2018, the Ninth Circuit affirmed the dismissal. (See <https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf> and <https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regardingdismissal-20dec16-en.pdf>.)

the ICANN IRPs. ICANN IRPs are governed by the [ICDR's International Arbitration Rules](#) as modified by the IRP Supplementary Procedures. (*Id.*) The IRP was significantly modified through the [Enhancing ICANN Accountability Process](#), and the Bylaws reflecting the new IRP process were updated on 1 October 2016. (See <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>.) The IRP Supplementary Procedures in place before the October 2016 revisions to the Bylaws did not meet all the requirements of the updated Bylaws. (*Id.*) Accordingly, an IRP Implementation Oversight Team (IRP-IOT) was formed to, among other tasks, prepare updates to the Supplementary Procedures (Updated Supplementary Procedures) for Board approval. (*Id.*)

In November 2016, a draft of the Updated Supplementary Procedures was published for public comment. (<https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.) Following the close of the public comment period on 1 February 2017, the IRP-IOT considered amending the draft Updated Supplementary Procedures in light of the comments received.²

In February 2018, because of the time it was taking the IRP-IOT to finalize a full set of recommended Updated Supplementary Procedures, and recognizing that the IRP had been in place for over a year with Supplementary Procedures that did not align with the updated Bylaws, the IRP-IOT started work towards an interim set of updated Supplementary Procedures (Interim Supplementary Procedures).³ This would allow for the adoption of a set of Supplementary Procedures that aligns with the current Bylaws while the IRP-IOT completed its work on a final version of Updated Supplementary Procedures. The IRP-IOT could then take the time that it needed to produce the final version of Updated Supplementary Procedures while still providing ICANN org and IRP claimants with a set of interim procedures that align with the new Bylaws if any IRP was initiated before the final version was completed.

The IRP-IOT began consideration of a set of Interim Supplementary Procedures in May 2018. That version included changes that were anticipated as a result of the IRP-IOT's consideration of public comments. The IRP-IOT gave additional direction to ICANN's attorneys and Sidley Austin, the law firm engaged to assist the IRP-IOT, and additional drafting and refinement took place. Ultimately, the version of the Interim Supplementary Procedures that was sent to the Board for consideration had been the subject of intensive focus by the IRP-IOT in two meetings on 9 and 11 October 2018, convened with the intention of delivering a set to the Board for consideration at ICANN63. There were modifications to four sections of the Interim Supplementary Procedures identified through those meetings, and a set reflecting those changes was proposed to the IRP-IOT on 19 October 2018. With no objection raised in the IRP-IOT, on 22 October 2018

² The IRP-IOT sought a second public consultation on the proposed revisions to Rule 4 from 22 June 2018 to 10 August 2018. Additional details about the second public consultation are available at <https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en>.

³ The principles followed in drafting the Interim Supplementary Procedures are available at [Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers \(ICANN\) Independent Review Process \(IRP\)](#), adopted 25 October 2018, at pg. 3.

the IRP-IOT sent the proposed set of Interim Supplementary Procedures to the Board for consideration. On 25 October 2018, the ICANN Board adopted the IRP Interim Supplementary Procedures. (See <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>.) The IRP-IOT's work towards a final set of Updated Supplementary Procedures is still underway.

II. Your Request

The DIDP is a mechanism, developed through community consultation, to ensure that information contained in documents concerning ICANN organization'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. (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.)

Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN org has published process guidelines for responding to requests for documents submitted pursuant to the DIDP (DIDP Response Process). (See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.) In responding to this DIDP, ICANN org followed the DIDP Response Process. ICANN org has identified the relevant custodians who may have responsive documentary information and has begun to conduct in-depth searches and reviews for all documents that may be responsive to the items requested. Given that the Request seeks the disclosure of documents on nine subject matters and covers a broad time period of more than two years, ICANN org wanted to ensure that all relevant custodians are included in this search. However, due to the timing of when this Request was received, which was the last business day before the ICANN 2018 holiday shutdown, ICANN org was not in a position to begin processing this Request until 11 days later. In an effort to meet its obligations to respond to the DIDP Request within 30 calendar days of receipt of the Request, ICANN org devoted all reasonably available resources to search and review available documents to determine their responsiveness, which included consideration of "whether any of the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified [on ICANN org's website]" and whether the public interest outweighs the potential harm in disclosure for those documents that are subject to applicable DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions). Due to number of custodians identified, combined with the number of subject matters and the time span the Request covers, along with the loss of processing time, ICANN org is still searching and reviewing relevant documentary information that may be responsive to this request. ICANN org will supplement this Response once it is done with its document review if it identifies additional responsive documents.

Items 1 through 3

Items 1 through 3 seek, in part, the disclosure of communications "between and amongst legal counsels to ICANN and VeriSign." To the extent that this is intended to include communications between ICANN org's outside counsel and VeriSign, such communications are outside the scope of ICANN org's operational activities. In

addition, the request itself runs contrary to the intent of the DIDP process. The DIDP is an example of ICANN's commitment to supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN org's operations that are not already publicly available are made available unless there is a compelling reason for confidentiality; it is not a mechanism to make broad information requests or to obtain litigation-style discovery.

It should be noted that 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. Since it is unclear, in the instant case, what operational importance, if any, such communications between outside legal counsels of ICANN and VeriSign provides, such documents are not appropriate for disclosure.

Item 1 seeks, in part, "[a]ll communications between ICANN and VeriSign... regarding or that reference Afilias' complaints about the .WEB contention set."

Based upon ICANN org's extensive review to date, ICANN org has determined there are two letters responsive to this Request. The first is a letter from Christine Willet to Patrick Kane dated 16 September 2016. This letter has already been published on ICANN's website at <https://www.icann.org/resources/pages/correspondence-2016>. The second is VeriSign's response to this letter. A previous DIDP request for this letter was made on 23 February 2018 (See [DIDP Request and Response 20180223-1](#).) ICANN org indicated in its response that the letter was subject to certain DIDP Nondisclosure Conditions. Upon receiving the current request, ICANN org re-evaluated whether this letter is appropriate for disclosure under the current circumstances including reaching out to VeriSign to see if it still wanted to maintain its confidentiality. VeriSign again has indicated that its response to ICANN's 16 September 2016 request for information should remain confidential. ICANN org has determined that this letter remains subject to the following Nondisclosure Conditions:

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

As previously stated, ICANN org is continuing to conduct its due diligence to ensure a comprehensive search across all custodians has been performed. If there are

additional documents identified as appropriate for disclosure pursuant to the DIDP, ICANN org will disclose such documents and will notify you accordingly. If there are additional documents responsive to this request that are not appropriate for disclosure, ICANN org will provide an updated response with the further information about such documents and the applicable Nondisclosure Conditions.

Item 2 seeks, in part, “[a]ll communications between ICANN and VeriSign... regarding or that reference the Cooperative Engagement Process (“CEP”) between ICANN and Afilias regarding the .WEB generic top-level domain (“gTLD”).”

As discussed above, the CEP is a confidential process between ICANN org and the requesting party. (See <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.) While ICANN identifies the CEPs that are filed (<https://www.icann.org/en/system/files/files/irp-cep-status-20jun18-en.pdf>), ICANN org does not share or disclose conversations between ICANN and the claimant engaged in a CEP. Consistent with that approach, and based on our search to date, we have not identified any documents where ICANN and VeriSign discuss or reference this CEP, therefore, there are no documents responsive to this request. If there are documents identified as appropriate for disclosure pursuant to the DIDP, ICANN org will disclose such documents and will notify you accordingly. If there are additional documents responsive to this request that are not appropriate for disclosure, ICANN org will provide an updated response with the further information about such documents and the applicable DIDP Defined Conditions of Nondisclosure.

Item 3 seeks, in part, “[a]ll communications between ICANN and VeriSign... regarding or that reference the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process (“IRP”).”

ICANN org makes available all relevant documents submitted in an IRP on the IRP Documents webpage at <https://www.icann.org/resources/pages/accountability/irp-en>. The relevant documents that have been submitted to date for the Afilias IRP have been published at <https://www.icann.org/resources/pages/irp-afilias-v-icann-2018-11-30-en>. Based on its search and review to date, ICANN org has determined that there are no documents in its possession or control that are responsive to this request that have not already been published. If there are additional documents identified as appropriate for disclosure pursuant to the DIDP, ICANN org will disclose such documents and will notify you accordingly. If there are additional documents responsive to this request that are not appropriate for disclosure, ICANN org will provide an updated response with the further information about such documents and the applicable DIDP Defined Conditions of Nondisclosure.

Item 4

Item 4 seeks “[a]ll communications between ICANN representatives on the Independent Review Process-Implementation Oversight Team (“IRP-IOT”), including Samantha Eisner, and any other employee of ICANN regarding any [of] the drafting, text, effect, or

interpretation of the final or any prior draft of what is now Section 7 of the Interim Procedures.”

In responding to this item, ICANN org has reached out to all ICANN representatives that participated on the IRP-IOT and collected available documentary information, consisting of emails that were exchanged between ICANN representatives. Due to the volume of documents identified, combined with the loss of processing time, ICANN org has conducted an extensive review of a portion of the emails collected and has determined that the emails exchanged between ICANN representatives consisting of internal discussion with ICANN’s legal counsel and internal discussions between ICANN representatives about legal counsel’s advice are subject to the following DIDP Defined Conditions of Nondisclosure, and are therefore not appropriate for disclosure:

- 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.
- 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.

Item 5

Item 5 seeks “[a]ll communications between Samantha Eisner and David McAuley concerning the development, drafting, text, effect, or interpretation of the Interim Procedures, and/or, the mandate and/or work of the IRP-IOT, including all communications concerning or that reference the modifications to Section 7 that were circulated to the IRP-IOT on 19 October 2018.”

The IRP-IOT maintains a page on the ICANN community wiki, at <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home>. ICANN org makes available a comprehensive set of materials pertaining to the IOT’s work on this page as a matter of course. (See [Independent Review Process – Implementation Oversight Team \(IRP-IOT\) Home](#).) Amongst other things, the home page contains information about members of the IRP-IOT, provides links to email archives detailing discussions that took place within the IRP-IOT, provides transcripts of all IRP-IOT meetings, as well as all documents exchanged within the IRP-IOT. To the extent that there are communications on the IRP-IOT mailing list that are responsive to this request, such documents have already been made public at <http://mm.icann.org/pipermail/iot/>. ICANN org has also conducted a search for communications responsive to this request that were exchanged outside of the iot@icann.org listserv. To date, ICANN org has reviewed the majority of the emails collected in response to this request and has begun publishing responsive emails on the IRP-IOT community wiki page under “Off-List Correspondences,” at <https://community.icann.org/x/TpcWBq>. ICANN org will continue

its review of these emails to determine if additional documents should be publicly disclosed and if so, will post these documents on the IRP-IOT community wiki page on a rolling basis.

Item 6

Item 6 seeks “[a]ll communications circulated among members of the IRP-IOT between 19 October 2018 and 21 October 2018 on any subject related to or that references the Interim Procedures.”

As discussed above, any communications amongst IRP-IOT members sent through the iot@icann.org listserv are available on the IRP-IOT community wiki page. (See [https://mm.icann.org/pipermail/iot/.](https://mm.icann.org/pipermail/iot/)) Responsive off-list communications between Samantha Eisner and David McAuley are being made available in response to item 5 of this Request. To the extent there are other communications between IRP-IOT members that do not include ICANN representatives and/or the IRP-IOT listserv, such communications would be outside of ICANN org’s possession and control, and are subject to the following Nondisclosure Conditions, and are therefore not appropriate for disclosure:

- 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.

Items 7 and 8

Item 7 seeks “[d]ocuments sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the drafting of the Interim Procedures and, in particular, the development of the text of Section 7.”

Item 8 seeks “[d]ocuments sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the changes made to Section 7 of the Interim Procedures as compared with the version of Section 7 that had been posted for public comment on 28 November 2016.”

Board Resolutions 2018.10.25.20 – 2018.10.25.21 and the Rationale for Resolutions 2018.10.25.20 – 2018.10.25.21, which set forth the basis for the Board’s adoption of the Interim Supplementary Procedures, have been published at <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>. The corresponding Preliminary Report for this meeting is available at <https://www.icann.org/resources/board-material/prelim-report-2018-10-25-en>. Additionally, the transcript and audio recordings for this meeting have been published at <https://63.schedule.icann.org/meetings/901535>.

The briefing materials that were provided to the ICANN Board for its consideration of the Interim Supplementary Procedures at the 25 October 2018 Board meeting will be published, along with the minutes from the 25 October 2018 meeting, once the minutes are approved by the Board. Once the minutes are approved, the minutes and briefing materials will be published at <https://www.icann.org/resources/pages/2018-board->

[meetings](#) in accordance with the Bylaws and the [Guidelines for the Posting of Board Briefing Materials](#). We encourage you to check back once the minutes are approved.

Item 9

Item 9 seeks “[d]ocuments sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the need to seek a further public consultation regarding Section 7 of the Interim Procedures.”

There are currently no documents responsive to this request.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN org has 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. ICANN org has determined that there are no current circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure. ICANN org will continue to search and review potentially responsive materials to determine if additional documentary information is appropriate for disclosure under this DIDP. If it is determined that certain additional documentary information is appropriate for public disclosure, ICANN org will supplement this DIDP Response and notify you of the supplement.

About DIDP

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.