

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-22**

13 JANUARY 2016

The Requester, The Centre for Internet & Society, seeks reconsideration of ICANN staff's response to two requests submitted by the Requester pursuant to ICANN's Document Information Disclosure Policy (DIDP), which sought documents relating to ICANN's Contractual Compliance Audit Program.¹

I. Brief Summary.

On 1 September 2015, the Requester submitted two DIDP requests seeking information about "ICANN's internal processes, as well as external measures with respect to compliance and audits" (DIDP Requests).² Specifically, the first DIDP request sought information regarding ICANN's registry audits;³ the second DIDP request sought substantially similar information with respect to ICANN's registrar audits.⁴ ICANN responded to both DIDP Requests on 1 October 2015 (DIDP Response).⁵ The Requester now claims that ICANN "has not been able to satisfy [its] actual requests" for information.⁶

The Requester's claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by ICANN staff. Rather, the Requester simply

¹ The Requester's Reconsideration Request addresses two DIDP requests, both filed on 1 September 2015.

² DIDP Request No. 20150901-1, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/didp-request-20150901-1-01sep15-en.pdf> (Registry Audits DIDP Request); DIDP Request No. 20150901-2, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/didp-request-20150901-2-01sep15-en.pdf> (Registrar Audits DIDP Request).

³ Registry Audits DIDP Request, Pgs. 1-2.

⁴ Registrar Audits DIDP Request, Pg. 2.

⁵ See Response to DIDP Requests No. 20150901-1 and 20150901-2, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/didp-response-20150901-1-response-20150901-2-cis-ry-rr-audits-01oct15-en.pdf> (DIDP Response).

⁶ Request, § 8, Pg. 2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-22-cis-request-redacted-02nov15-en.pdf>.

disagrees with the substance of the DIDP Response. Substantive disagreements with a DIDP response, however, are not proper bases for reconsideration. Because the Requester has not shown that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Reconsideration Request 15-22 (Request 15-22) be denied.

II. Facts.

B. Background Facts.

On 1 September 2015, the Requester submitted two DIDP requests seeking information “regarding ICANN’s internal processes, as well as external measures with respect to compliance and audits.”⁷ The first DIDP request sought information regarding ICANN’s registry audits (Registry Audits DIDP Request), including:

1. Copies of the registry contractual compliance audit reports for all the audits carried out as well as external audit reports from the last year (2014-2015).
2. A generic template of the notice served by ICANN before conducting such an audit.
3. A list of the registries to whom such notices were served in the last year.
4. An account of the expenditure incurred by ICANN in carrying out the audit process.
5. A list of the registries that did not respond to the notice within a reasonable period of time.
6. Reports of the site visits conducted by ICANN to ascertain compliance.
7. Documents which identifies [*sic*] the registry operators who had committed material discrepancies in the terms of the contract.
8. Documents pertaining to the actions taken in the event that there was found to be some form of contractual non-compliance.⁸

⁷ See Registry Audits DIDP Request, Pg. 1; see also Registrar Audits DIDP Request, Pg. 1.

⁸ Registry Audits DIDP Request, Pgs. 1-2.

The Requester's second DIDP request sought substantially similar information regarding ICANN's registrar audits (Registrar Audits DIDP Request), including:

1. Copies of the registrar contractual compliance audit reports for all the audits carried out as well as external audit reports from the last year (2014-2015).
2. A generic template of the notice served by ICANN before conducting such an audit.
3. A list of the registrars to whom such notices were served in the last year.
4. An account of the expenditure incurred by ICANN in carrying out the audit process.
5. A list of the registrars that did not respond to the notice within a reasonable period of time.
6. Reports of the site visits conducted by ICANN to ascertain compliance.
7. Documents which identify the registrars who had committed material discrepancies in the terms of the contract.
8. Documents pertaining to the actions taken in the event that there was found to be some form of contractual non-compliance.
9. A copy of the registrar self-assessment form which is to be submitted to ICANN.⁹

On 1 October 2015, ICANN issued a consolidated response to the Registry Audits DIDP Request and the Registrar Audits DIDP Request.¹⁰ At the outset of the DIDP Response, ICANN provided the Requester with an overview of ICANN's Contractual Compliance Audit Program.¹¹ The DIDP Response stated that much of the information responsive to the DIDP Requests had already been published on ICANN's Contractual Compliance page. ICANN then furnished links to all responsive, publicly available documents including, among other things: the 2014

⁹ Registrar Audits DIDP Request, Pg. 2.

¹⁰ DIDP Response, Pg. 2.

¹¹ *Id.*, Pgs. 2-6 (providing links to publicly available materials describing ICANN's Overall Contractual Compliance Approach, as well as the Informal Resolution Process and Formal Resolution Process).

Contractual Compliance Annual Report; the 2014 Contractual Compliance New Registry Agreement Audit Report; the 2014 Contractual Compliance Year Three Audit Program Report; and the ICANN Contractual Compliance Monthly Updates for 2014.¹² These reports contain “detailed information regarding the 2014 audits, including audit scope, key findings, key recommendations, and the entities that were audited.”¹³ ICANN also provided its Contractual Compliance operating budgets for FY15 and FY16, as well as links to many other sources of responsive information.¹⁴

With respect to three items requested, ICANN explained in the DIDP Response that there were “no documents responsive to [these items].”¹⁵ ICANN also explained that certain requested documents, including “[i]ndividual contracted party audit reports,” were not appropriate for disclosure pursuant to the DIDP Defined Conditions of Nondisclosure.¹⁶

On 2 November 2015, the Requester filed Request 15-22 seeking reconsideration of the DIDP Response stating “ICANN staff has not been able to satisfy [the Requester’s] actual requests with respect to gaining an understanding of … the compliance audits.”¹⁷

C. Relief Requested.

The Requester asks “ICANN to make [available] the records in question.”¹⁸ Specifically, the Requester asks ICANN to produce: (a) “audit reports for individual contracted parties that reflect discrepancies in contractual compliance;” and (b) “access to all documents that relate to the expenditure incurred by ICANN in the [audit] process.”¹⁹

¹² *Id.*, Pg. 6.

¹³ *Id.*

¹⁴ *Id.*, Pg. 7.

¹⁵ *Id.*, Pgs. 7, 10.

¹⁶ *Id.*, Pg. 6.

¹⁷ See Request, §§ 3,8, Pgs. 1-2.

¹⁸ Request, § 9, Pg. 2.

¹⁹ *Id.* (emphasis in original).

III. Issue.

In view of the claims set forth in Request 15-22, the issue is whether ICANN staff violated established policy or procedure by determining that certain documents sought in the DIDP Requests were subject to the DIDP Defined Conditions for Nondisclosure.²⁰

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

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.²¹ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

B. Documentary Information Disclosure Policy (DIDP).

ICANN 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's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN's operational activities. In that regard, ICANN has identified many

²⁰ *Id.*, § 8, Pg. 2.

²¹ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states 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:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

categories of documents that are made public as a matter of course.²² In addition to ICANN’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.²³

In responding to a request for documents submitted pursuant to ICANN’s DIDP, ICANN adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).²⁴ 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’s website].”²⁵

Per the DIDP, ICANN reserves the right to withhold documents if they fall within any of the DIDP Nondisclosure Conditions, which include, among others: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...];” (ii) “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...] ;” and (iii) “[c]onfidential business information and/or internal policies and procedures.”²⁶ Notwithstanding the above, information that falls within any of the conditions set forth above may still be made public if ICANN determines,

²² See ICANN Documentary Information Disclosure Policy, available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²³ *Id.*

²⁴ See DIDP Response Process, available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

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

²⁶ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.²⁷

V. Analysis and Rationale.

The only basis advanced by the Requester in support of Request 15-22 is that, in the Requester’s view, “ICANN staff has not been able to satisfy our actual requests with respect to gaining an understanding of how the compliance audits help in regulating actions of the registrars, and how they are effective in preventing breaches and discrepancies.”²⁸ According to the Requester, this is because ICANN has not produced “the audit reports for individual contracted parties that reflect discrepancies in contractual compliance,” and has not provided “access to all documents that relate to the expenditure incurred by ICANN” in carrying out the audit process.²⁹ These documents were requested in Item Numbers 4, 7, and 8, respectively, in the DIDP Requests.

However, the Requester does not identify any misapplication of policy or procedure by ICANN staff, or even claim that any established policy or procedure has been violated. Rather—although the Requester does not explicitly say—it appears that the Requester simply disagrees with ICANN staff’s determination that certain requested documents were subject to the DIDP Defined Conditions of Nondisclosure.³⁰ Substantive disagreements with a DIDP response, however, are not proper bases for reconsideration.

A. ICANN Staff Adhered to Established Policies and Procedures in Responding to the DIDP Requests.

²⁷ *Id.*

²⁸ Request, § 8, Pgs. 2-3.

²⁹ *Id.*, § 9, Pg. 3 (emphasis in original).

³⁰ It does not appear that the Requester is challenging ICANN staff’s determination that certain documents do not exist.

The Requester acknowledges that ICANN “provided … an array of detailed links explaining the compliances audit process,” but nonetheless protests that “ICANN staff has not been able to satisfy our actual requests with respect to gaining an understanding of how the compliance audits help in regulating actions of the registrars, and how they are effective in preventing breaches and discrepancies.”³¹ While this statement reflects the Requester’s dissatisfaction with the information and documents that it received from ICANN, it does not demonstrate that ICANN violated any established policy or procedure.

The DIDP Response Process provides that, “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested.”³² In responding to the Requester’s DIDP Requests, ICANN staff determined that most of the documentary information requested had already been published on ICANN’s Contractual Compliance webpage. In doing so, ICANN gathered and compiled *fifty-three* links to responsive publicly available information. To facilitate the Requester’s understanding of that information, ICANN aligned its responses with the specific items requested.³³ ICANN also informed the Requester that some requested information, such as its request for a list of registries that did not respond to audit notices, did not exist; consequently, no documents were responsive to such requests.³⁴

Request 15-22 challenges the DIDP Response and requests production of the “audit reports for individual contracted parties,” and “all documents that relate to the expenditure

³¹ Request, § 8, Pg. 2.

³² Process for Responding to ICANN’s Documentary Information Disclosure Policy (DIDP) Requests, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³³ For example, in its response to Registrar Audit DIDP Request Item C, ICANN provided: “Item C asks for a list of registrars who received audit notices for the 2014-2015 audit year. This list appears on Appendix A of the 2014 Contractual Compliance Year Three Audit Program Report at <https://www.icann.org/en/system/files/files/contractualcompliance-audit-report-2014-13jul15-en.pdf>.” See DIDP Response, Pg. 9.

³⁴ DIDP Response, Pg. 7.

incurred by ICANN.”³⁵ This information was requested in Item Numbers 4, 7, and 8, respectively, in each of the DIDP Requests. However, no reconsideration is warranted with respect to ICANN’s response to these item numbers.

In response to Item Number 4, which requested “[a]n account of the expenditure incurred by ICANN in carrying out the audit process,” ICANN provided the Requester with links to its Contractual Compliance budget for audits for FY15 and Contractual Compliance Audit Program budget for FY16.³⁶ In response to Item Numbers 7 and 8, which asked for documents identifying registries and registrars “who had committed material discrepancies,” and detailing the “actions taken in the event … [of] non-compliance,”³⁷ ICANN provided links to the 2014 Contractual Compliance New Registry Agreement Audit Report, the 2014 Contractual Compliance Year Three Audit Program Report, and breach notices.³⁸ ICANN further explained in the DIDP Response that the registries that were selected to participate in the 2014 audit were identified in Appendix B of the 2014 Contractual Compliance Year Three Audit Program Report, and that said report contained the following finding:

For the Registries, five were selected in the Year Three Audit. All five participating Registries were issued on Observation Report. An Observation Report is defined as a report of findings based on review, which relies upon the Registry to take appropriate action towards remediation (i.e., not requiring ICANN to confirm the actions have been implemented).³⁹

ICANN did not produce the audit reports for these individual registries because the reports are confidential and subject to certain DIDP Defined Conditions of Nondisclosure.

³⁵ Request, § 9, Pg. 2 (emphasis in original).

³⁶ DIDP Response, Pgs. 7, 9.

³⁷ Registry Audit DIDP Request, Pg. 2; Registrar Audit DIDP Request, Pg. 2.

³⁸ DIDP Response, Pgs. 8, 10.

³⁹ *Id.*, Pg. 8.

While the Requester may find that these documents do not aid it in “gaining an understanding” of the compliance audit process necessary for its research, the Requester fails to identify any policy or procedure ICANN staff violated in identifying these documents, which are responsive to the DIDP Requests. As such, no reconsideration is appropriate.

B. ICANN Staff Adhered to Established Policy and Procedure in Finding Certain Requested Documents Subject to DIDP Nondisclosure Conditions.

The Requester does not expressly challenge ICANN’s application of the DIDP Defined Conditions of Nondisclosure, but appears to take issue with ICANN’s determination to withhold certain documents because the Requester “believe[s] financial transparency is absolutely integral to the values that ICANN stands by.”⁴⁰ Reconsideration is not warranted on this basis.

As detailed above, the DIDP identifies a number of “conditions for the nondisclosure of information,” such as documents containing: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...];” (ii) “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...];” and (iii) “[c]onfidential business information and/or internal policies and procedures.”⁴¹ ICANN must independently undertake the analysis of each DIDP Defined Condition of Nondisclosure as it applies to the documentation at issue, and make the final determination as to whether any DIDP Nondisclosure Conditions apply. In conformance with the publicly posted DIDP Response Process, ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. ICANN also provided links to *all* responsive, publically available information not subject to DIDP Defined Conditions of

⁴⁰ Request, § 9, Pg. 3.

⁴¹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Nondisclosure, including the 2014 Contractual Compliance Annual Report, the 2014 Contractual Compliance New Registry Agreement Audit Report, and the 2014 Contractual Compliance Year Three Audit Program Report.⁴²

Regarding the “audit reports for individual contracted parties” requested by Item Number 4, ICANN staff determined that some documents (such as invoices from ICANN’s Contractual Compliance Audit Partner, KPMG) were not appropriate for disclosure because they comprised “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...].”⁴³ ICANN also determined that some documents responsive to the request for “all documents that relate to...expenditure,”⁴⁴ as sought by Item Numbers 7 and 8, were subject to the following DIDP Defined Conditions of Nondisclosure: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...]”; (ii) “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...];” and (iii) “[c]onfidential business information and/or internal policies and procedures.”⁴⁵ While the Requester may not agree with ICANN’s determination, the Requester identifies no policy or procedure that ICANN staff violated in making its determination, and the Requester’s substantive disagreement with that determination is not a basis for reconsideration. ICANN staff provided the Requester with all responsive, publically available information regarding registry and registrar audits, and as such, properly responded to the DIDP Requests.⁴⁶

⁴² See DIDP Response, Pg. 6.

⁴³ *Id.*, Pgs. 7, 9.

⁴⁴ Request, § 9, Pg. 9.

⁴⁵ DIDP Response, Pgs. 8, 10-11.

⁴⁶ *Id.*, Pgs. 2-11.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 15-22. There is no indication that ICANN staff violated established policy or procedure in responding to the Requester's DIDP Requests. If the Requester believes it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In terms of the timing of the BGC's recommendation, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical.⁴⁷ To satisfy the thirty-day deadline, the BGC would have to have acted by 2 December 2015. However, due to the timing of the BGC's meetings in November and December, the first practical opportunity for the BGC to consider Request 15-22 was 13 January 2016.

⁴⁷ *Id.*, Art. IV, § 2.16.