

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-7
26 JUNE 2016**

The Requesters, dotMusic Limited (DotMusic), the International Federation of Musicians, the International Federation of Arts Councils and Culture Agencies, the Worldwide Independent Network, the Merlin Network, the Independent Music Companies Association, the American Association of Independent Music, the Association of Independent Music, the Content Creators Coalition, the Nashville Songwriters Association International, and ReverbNation, seek reconsideration of ICANN staff's response to a request submitted by the Requesters pursuant to ICANN's Document Information Disclosure Policy (DIDP).

I. Brief Summary.

DotMusic submitted a community application for .MUSIC (Application). One other applicant submitted a community application for .MUSIC, and six other applicants submitted standard (meaning, not community-based) applications. All eight .MUSIC applications were placed into a contention set. As the Application was community-based, it was invited to and did participate in Community Priority Evaluation (CPE). The Application did not prevail in CPE.

On 24 February 2016, the Requesters submitted Reconsideration Request 16-5 (Request 16-5), seeking reconsideration of the CPE panel's report on the Application (CPE Report) and ICANN's acceptance of it. On 1 April 2016, the Requesters submitted a DIDP request seeking documents relating to the CPE Report. On 29 April 2016, the Requesters submitted an amended DIDP request (DIDP Request), which superseded the 1 April 2016 request, seeking information about the CPE Report, and ICANN's acceptance of it, as well as ICANN's change request procedures. On 15 May 2016, ICANN responded to the DIDP Request. The Requesters thereafter filed the instant Reconsideration Request 16-7 (Request 16-7), which challenges

ICANN's response to the DIDP Request (DIDP Response). Request 16-5 has been put on hold at the Requesters' request, pending the determination of Request 16-7.

The Requesters' claims do not support reconsideration. The Requesters do not identify any misapplication of policy or procedure by ICANN staff. Rather, the Requesters simply disagree with the substance of the DIDP Response. Substantive disagreements with a DIDP response, however, are not proper bases for reconsideration. Because the Requesters have not shown that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 16-7 be denied.

II. Facts.

A. Background Facts.

DotMusic submitted a community application for .MUSIC.¹ .Music LLC also submitted a community application for .MUSIC.² Six other applicants submitted standard (meaning not community-based) applications for .MUSIC. All eight applications were placed into a contention set.³

On 29 July 2015, DotMusic's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook (Guidebook). It will occur only if a community application is in contention and if that applicant elects to pursue CPE. DotMusic elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE administrator, for evaluation.⁴

¹ Application Details, Application ID: 1-1115-14110, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>.

² Application Details, Application ID: 1-959-51046, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1659>.

³ *See* Contention Set Status, .MUSIC, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus>.

⁴ *See* Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 10 February 2016, the CPE panel issued the CPE Report.⁵ The CPE Report explained that the Application earned only 10 out of 16 possible points on the CPE criteria.⁶ Because a minimum of 14 points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.⁷

On 24 February 2016, the Requesters submitted Request 16-5, seeking reconsideration of the CPE Report and ICANN's acceptance of it.⁸

On 1 April 2016, the Requesters submitted a DIDP request seeking documents relating to the CPE Report, and asked ICANN to postpone its review of Request 16-5 pending ICANN's response to this DIDP request.⁹ ICANN agreed.

On 29 April 2016, the Requesters submitted an amended DIDP request (the DIDP Request at issue here), which superseded its 1 April 2016 DIDP request.¹⁰ The DIDP Request sought documents relating to the CPE Report and ICANN's change request policies,¹¹ and again asked ICANN to postpone its review of Request 16-5 pending ICANN's response to the DIDP Request.¹² ICANN agreed.

The DIDP Request sought information regarding six items (respectively, Item Nos. 1-6):

1. "All non-public internal documents (including call records and minutes) of the communication between ICANN, the EIU and independent Quality Control service provider relating [to] the EIU's consistent, compelling and defensible decision-making process used in developing the CPE Report determination and showcasing how DotMusic's application and CPE Process was compared to previous prevailing

⁵ *Id.*

⁶ See CPE Report at 1, available at <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁷ See *id.*

⁸ Request 16-5, available at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

⁹ See DIDP Response at 1, available at <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

¹⁰ See DIDP Response at 1.

¹¹ <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

¹² See <https://icann.org/en/system/files/files/reconsideration-requests-status-2016-29apr16-en.pdf>.

- CPE determinations to ensure fairness, non-discrimination, transparency, predictability and consistency.”
2. “All the non-public internal draft CPE Reports and all related internal correspondence between ICANN and the EIU related to (i) DotMusic’s .MUSIC CPE; (ii) the prevailing .RADIO CPE; (iii) the prevailing .HOTEL CPE; (iv) the prevailing .SPA CPE; (v) the prevailing .ECO CPE; (vi) the prevailing .OSAKA CPE; (vii) the .GAY CPE; and (viii) all non-public internal correspondence, reports, documents, emails and any other forms of other communication showcasing how DotMusic’s application and CPE Process was compared to other prevailing CPE determinations to ensure fairness, non-discrimination, transparency, predictability and consistency.”
 3. “All the non-public internal communication documents and non-public internal correspondence between ICANN and the EIU in formulating the CPE Guidelines that were ‘prepared by the Economist Intelligence Unit’ before and after the CPE Guidelines public comment period (nearly 1 ½ years after DotMusic’s 2012 Application filing).”
 4. “All non-public internal documents and internal correspondence between ICANN staff that relate to the altering of the original AGB language pertaining to the Notice of Changes of Information section of the AGB.”
 5. “The names of all the EIU CPE evaluators pertaining to the .MUSIC, .ECO, .RADIO, .SPA, .HOTEL, .OSAKA and .GAY CPE processes and any correspondence between ICANN and Google’s Vice-President (also ex-ICANN chairman and ICANN Strategy Chair) Vinton Cerf to further investigate the appearance of a conflict of interest and ensure that the evaluators were qualified to evaluate a music-related CPE as explicitly required by the AGB and CPE Materials.”
 6. “The name of ‘the appointed independent Quality Control service provider’ per the [statement of work between the EIU and ICANN (SOW)] and all non-public internal documents and non-public internal correspondence between ‘the appointed independent Quality Control service provider for the purposes of helping it to verify that Panel Firm’s evaluation services have been and are performed in accordance with the Quality Control Guidelines’ and ICANN and/or the EIU.”¹³

The DIDP Request also requested that ICANN staff undertake three further steps: “(i) to define ‘public interest’ with respect to the DIDP process and explain in detail how ‘the harm in disclosing the information outweighs the public interest in disclosing the information;’ (ii) to provide DotMusic with privileged [*sic*] logs that clearly describe as to each document withheld:

¹³ DIDP Request at 5-10. The Requesters opted to emphasize portions of the DIDP Request and Request 16-7 with italic, bold and/or underline type. Unless otherwise indicated, such emphasis has been removed.

the type of document, the general subject matter thereof, the date on which it was created, the authors of the document, all parties who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law that recognizes such claim of privilege; and (iii) to follow the ICANN Board Resolution of 10 March 2016 to ‘be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents.’”¹⁴

On 15 May 2016, ICANN issued the DIDP Response.¹⁵ In the DIDP Response, ICANN provided the Requesters with an overview of the CPE and change request processes.¹⁶ The DIDP Response also stated that much of the information responsive to the DIDP Request had already been published on ICANN’s website.¹⁷ ICANN then furnished links to all the responsive, publicly available documents including, among other things: the draft CPE Guidelines; the community feedback received regarding the draft CPE Guidelines; the SOW; and an explanation of the quality control program.¹⁸ ICANN also furnished a document in response to Item No. 1, which was an email wherein ICANN informed the EIU that the CPE process for the Application could commence.¹⁹ With respect to Item Nos. 4-6, ICANN explained in the DIDP Response that there were “no documents responsive to [these Items].”²⁰ Similarly, with respect to the portion of Item No. 1 that sought communications with “an independent Quality service provider” regarding the CPE Report, ICANN noted that “ICANN does not have any responsive

¹⁴ Request 16-7, § 3, Pg. 1; DIDP Request at 10-11; *see also* 10 March 2016 Board Resolution 2016.03.10.11, available at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a..>

¹⁵ DIDP Response, available at <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

¹⁶ *Id.*, Pgs. 2-3, 7-9.

¹⁷ *See generally id.* While the Requesters noted they did not seek any publicly available documents (DIDP Request at 5), ICANN provided them for the sake of completeness.

¹⁸ DIDP Response at 3, 12.

¹⁹ *Id.*, Attachment.

²⁰ *Id.*, Pgs. 11-12.

documentation[.]”²¹ With respect to Item Nos. 1-3, ICANN explained that certain requested documents were not appropriate for disclosure pursuant to the DIDP Defined Conditions of Nondisclosure (Nondisclosure Conditions).²²

The Requesters submitted Request 16-7 on 30 May 2016, seeking reconsideration of the DIDP Response and requesting that Request 16-5 remain on hold pending the determination on Request 16-7.²³

B. Relief Requested.

The Requesters ask ICANN:

1. To review the ICANN Staff decision to withhold all information requested, to ensure that each and every one of the six Items, documents and information requests was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requesters request that the Items and documents requested are granted;
2. To recognize and instruct Staff that ICANN’s default policy is to release all information requested unless there is a compelling reason not to do so and, where such a compelling reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested, including providing the requested privileged [*sic*] logs in the case of nondisclosure; and
3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the public interest does not outweigh the harm. Withholding of information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN’s Bylaws.²⁴

The Requesters also request to attend the BGC meeting at which Request 16-7 will be considered.²⁵

III. The Relevant Standards For Reconsideration Requests and DIDP Requests.

²¹ *Id.*, Pg. 3.

²² *Id.*, Pgs. 1-7.

²³ <https://www.icann.org/resources/pages/reconsideration-16-7-dotmusic-request-2016-06-08-en>.

²⁴ Request 16-7, § 9, Pgs. 22-23.

²⁵ *Id.*, § 9, Pg. 23. Because no policy or procedure permits those who submit reconsideration requests to attend BGC meetings at which their requests are considered, ICANN does not agree to permit the Requesters’ attendance.

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.²⁶ Request 16-7 challenges staff action.²⁷ 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.

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 categories of documents that are made public as a matter of due course.²⁸ 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

²⁶ 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.

²⁷ In Request 16-7, the Requesters checked the box for "Board action/inaction" as well as staff action. However, the issues identified and argued in Request 16-7 implicate only the actions of ICANN staff, as the Board plays no role in responding to DIDP requests.

²⁸ See ICANN Documentary Information Disclosure Policy, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.²⁹

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).³⁰ 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].”³¹

Pursuant to 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.”³² Notwithstanding the above, information that falls within any of the Nondisclosure Conditions may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.³³

IV. Analysis And Rationale.

²⁹ *Id.*

³⁰ See DIDP Response Process, available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

³¹ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³² See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³³ *Id.*

The Requesters have not demonstrated that reconsideration of the DIDP Response is warranted, for three reasons. First, the Requesters fail to identify any misapplication of policy or procedure by ICANN staff in the DIDP Response. Specifically, the Requesters fail to identify any policy or procedure violation with respect to the responsive links and document provided, ICANN's application of the Nondisclosure Conditions, the balancing of the public interest against the harm that would result from disclosure of those documents to which a Nondisclosure Condition applies, the requirements of the Board's Resolution on 10 March 2016 (10 March Resolution), or the determination not to provide a privilege log. Second, Request 16-7 makes various claims with respect to the CPE Report (which is the subject of Request 16-5). To the extent such claims are raised in Request 16-5, they will be addressed in the BGC's determination on Request 16-5. To the extent such claims are *not* raised in Request 16-5, they are time-barred. Third, the Requesters' discussion of ICANN procedures that are wholly irrelevant to the DIDP Response or process does not support reconsideration here.

In addition, Request 16-7 violates section 2.7 of Article IV of the Bylaws, which provides that "Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request."³⁴ Request 16-7 exceeds that page limit, as the majority of the text is in nine-point, single spaced font, including two pages that consist almost entirely of small-type single-spaced footnotes.³⁵ The BGC will consider the arguments the Requesters raise notwithstanding this violation, but cautions the Requesters to adhere to all applicable policies and procedures concerning ICANN's accountability mechanisms in future submissions.

³⁴ Bylaws, Art. IV, § 2.7.

³⁵ DIDP Request at 17-18.

A. ICANN Staff Adhered To Established Policies And Procedures In Responding To The DIDP Request.

1. The DIDP Response Complies With Applicable Policies And Procedures In Providing Responsive Documents And Information.

The Requesters acknowledge that ICANN provided numerous links to publicly available responsive documents, one previously non-public responsive document, and an explanation of why one or more of the Nondisclosure Conditions prohibit the production of any other documents or, where applicable, a statement that no responsive documents exist. Nevertheless, the Requesters protest that ICANN has violated established policies and procedures in the DIDP Response.³⁶ While these assertions reflect the Requesters' dissatisfaction with the information and documents that it received from ICANN, they do 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.”³⁷ In responding to the Requesters' DIDP Request, ICANN staff determined that most of the documentary information requested had already been published on ICANN's website.³⁸ In doing so, ICANN compiled and provided more than 15 links to responsive information that was already publicly available.³⁹ ICANN also informed the Requesters that some requested information, such as information regarding the names of EIU evaluators, did not exist within ICANN; consequently, no documents were responsive to such requests.⁴⁰ To facilitate the Requesters' understanding of that information, ICANN aligned its responses with

³⁶ Request 16-7, § 3, Pg. 4.

³⁷ 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>.

³⁸ *See generally* DIDP Response.

³⁹ *Id.*

⁴⁰ *See, e.g.*, DIDP Response at 11.

the specific items requested. The responses to each Item in the DIDP Response fully complied with, if not exceeded, ICANN’s obligations under the DIDP Response Process.

Item No. 1 requested “communication[s] between ICANN, the EIU and independent Quality Control service provider relating [to] the EIU’s . . . decision-making process used in developing the CPE Report determination and showcasing how DotMusic’s application and CPE Process was compared to previous prevailing CPE determinations.”⁴¹ In response, ICANN first noted that the Quality Control Program did not extend to the CPE process; as such, no responsive documents exist that are responsive to the request for communications with a “Quality service provider” in relation to the CPE Report.⁴² ICANN then provided the Requesters with publicly available information explaining the CPE process.⁴³ ICANN also provided one previously non-public email exchange between ICANN and the EIU, showing that ICANN instructed the EIU to commence CPE for the Application.⁴⁴

Item No. 2 requested “draft CPE Reports and all related internal correspondence between ICANN and the EIU related to (i) DotMusic’s .MUSIC CPE; (ii) the prevailing .RADIO CPE; (iii) the prevailing .HOTEL CPE; (iv) the prevailing .SPA CPE; (v) the prevailing .ECO CPE; (vi) the prevailing .OSAKA CPE; (vii) the .GAY CPE; and (viii) . . . other communication showcasing how DotMusic’s application and CPE Process was compared to other prevailing CPE determinations[.]”⁴⁵ ICANN determined that all documents responsive to the request were subject to one or more DIDP Nondisclosure Conditions, as discussed below.

⁴¹ DIDP Request at 5.

⁴² DIDP Response at 3.

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 4 & Attachment.

⁴⁵ DIDP Request at 6.

Item No. 3 requested “correspondence between ICANN and the EIU in formulating the CPE Guidelines that were ‘prepared by the Economist Intelligence Unit’ before and after the CPE Guidelines public comment period[.]”⁴⁶ In response, ICANN provided the Requesters with links to publicly available documents explaining the genesis of the CPE Guidelines, as well as the public comments received regarding the draft CPE Guidelines.⁴⁷

Item No. 4 requested “correspondence between ICANN staff that relate to the altering of the original AGB language pertaining to the Notice of Changes of Information section[.]”⁴⁸ In response, ICANN provided the Requesters with links to publicly available documents explaining the history and nature of the change request process.⁴⁹ ICANN further explained that contrary to the Requesters’ apparent belief, “the language in the Guidebook regarding change requests have not been altered over time.”⁵⁰ As such, ICANN explained that it “does not have any responsive documentation to this Item.”⁵¹

Item No. 5 requested “[t]he names of all the EIU CPE evaluators pertaining to the .MUSIC, .ECO, .RADIO, .SPA, .HOTEL, .OSAKA and .GAY CPE processes and any correspondence between ICANN and Google’s Vice-President . . . Vinton Cerf to further investigate the appearance of a conflict of interest and ensure that the evaluators were qualified to evaluate a music-related CPE[.]”⁵² In response, ICANN explained that “ICANN does not have any information regarding the names of the CPE panel evaluators for any evaluation. ICANN therefore does not have any documents responsive to this request.”⁵³ Moreover, the

⁴⁶ *Id.* at 8.

⁴⁷ DIDP Response at 3.

⁴⁸ DIDP Request at 9.

⁴⁹ DIDP Response at 8-9.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 11.

⁵² DIDP Request at 9.

⁵³ DIDP Response at 11.

Requesters appear to have drawn incorrect conclusions from the document ICANN produced along with the DIDP Response,⁵⁴ that document includes the names of two EIU administrative employees,⁵⁵ neither of which served as CPE “evaluators” for the Application or any application. Instead, they are both members of the “core team,” which is an administrative function within the EIU.⁵⁶ As such, the Requesters’ arguments in Request 16-7 about the purported lack of expertise with respect to those two people are misplaced factually and not relevant to a reconsideration request regarding the DIDP Response. ICANN further explained that ICANN “does not have any documents” responsive to the other portions of Item No. 5, because “ICANN is not involved in the selection of CPE evaluators” and therefore does not have any documents related to evaluators’ qualifications. Similarly, ICANN explained that it “does not have any documents responsive to the request [in Item No. 5] for ‘correspondence between ICANN and Google’s Vice-President (also ex-ICANN chairman []) Vinton Cerf[.]’” as it relates to investigating the appearance of a conflict of interest as set forth in Item No. 5.⁵⁷

Item No. 6 requested “[t]he name of ‘the appointed independent Quality Control service provider’ per the [SOW] and . . . correspondence between ‘the appointed independent Quality Control service provider for the purposes of helping it to verify that Panel Firm’s evaluation services have been and are performed in accordance with the Quality Control Guidelines’ and ICANN and/or the EIU.”⁵⁸ In response, ICANN explained that it “does not have any documents responsive to this request” because the “Quality Control Program did not extend to CPE.”⁵⁹

⁵⁴ Request 16-7, § 8, Pgs. 15-17.

⁵⁵ DIDP Response at Attachment.

⁵⁶ See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>.

⁵⁷ DIDP Response at 11.

⁵⁸ DIDP Request at 10.

⁵⁹ DIDP Response at 12.

While the Requesters argue that these responses “violate established procedures,”⁶⁰ the Requesters fail to identify any policy or procedure ICANN staff violated in providing the responsive links and document contained in the DIDP Response. Moreover, ICANN’s DIDP Response Process is designed 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.”⁶¹ The DIDP does not impose any duty on ICANN to compile or create documents, or to gather documents from third parties.⁶² For these reasons, ICANN staff acted in accordance with established policy and procedure in responding to the DIDP Request, and in noting that ICANN is not able to make public documents that are not within its possession, custody, or control, including those in the possession of the EIU. As such, no reconsideration of the DIDP Response is appropriate.

2. ICANN Staff Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

As detailed above, the DIDP identifies a number of “conditions for the nondisclosure of information.”⁶³ ICANN must independently undertake the analysis of each DIDP Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.⁶⁴ In conformance with the publicly posted DIDP Response Process, ICANN undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

⁶⁰ Request 16-7, § 3, Pg. 4.

⁶¹ <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

In response to Item No. 1,⁶⁵ ICANN staff determined that some responsive documents were not appropriate for disclosure because they comprised: “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; “[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 [...]”; “[c]onfidential business information and/or internal policies and procedures”; or “[d]rafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.”⁶⁶

In response to Item No. 2,⁶⁷ ICANN staff determined that some documents responsive to the portions of this Item relating to the Application and the CPE Report were not appropriate for disclosure because they comprised: “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; “[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 [...]”; “[c]onfidential business information and/or internal policies and procedures”; or “[d]rafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.”⁶⁸ ICANN also determined that documents responsive to the portions of Item No. 2 “seeking documentary information regarding other applicants’ CPEs” were not appropriate for disclosure because they comprised: “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making

⁶⁵ DIDP Request at 5.

⁶⁶ DIDP Response at 4.

⁶⁷ DIDP Request at 6.

⁶⁸ DIDP Response at 5.

process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...]” “[i]nformation provided to ICANN by a party that... [could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...]”; [c]onfidential business information and/or internal policies and procedures”; or “[d]rafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.”⁶⁹

In response to Item No. 3,⁷⁰ ICANN staff determined that some responsive documents were not appropriate for disclosure because they comprised: “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; “[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 [...]”; “[i]nformation provided to ICANN by a party that... [could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...]”; “[c]onfidential business information and/or internal policies and procedures”; or “[d]rafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.”⁷¹

The Requesters argue that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because “ICANN’s default policy is to release all information requested unless there is a compelling reason not to do so.”⁷² The Requesters are correct that, under the DIDP Response Process, documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, [are] made available to the public

⁶⁹ DIDP Response at 5-6.

⁷⁰ DIDP Request at 8.

⁷¹ DIDP Response at 7.

⁷² Request 16-7, § 3, Pg. 3.

unless there is a compelling reason for confidentiality.”⁷³ Yet the Requesters’ arguments fail because ICANN did identify compelling reasons in each instance of nondisclosure; with respect to each Item, ICANN cited which of the Nondisclosure Conditions comprise the compelling reason for maintaining confidentiality.

While the Requesters may not agree with ICANN’s determinations as to the applicability of the cited Nondisclosure Conditions to Item Nos. 1 through 3, the Requesters identify no policy or procedure that ICANN staff violated in making its determinations, and the Requesters’ substantive disagreement with those determinations is not a basis for reconsideration.

3. ICANN Staff Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To DIDP Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.

The DIDP states that documents subject to the DIDP Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”⁷⁴ In accordance with the DIDP Response Process, ICANN staff conducted a review of the responsive documents that fell within the DIDP Nondisclosure Conditions, and determined that the potential harm outweighed the public interest in the disclosure of those documents.⁷⁵

The Requesters recognize that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.”⁷⁶ Nevertheless, the Requesters claim reconsideration is warranted

⁷³ <https://www.icann.org/resources/pages/didp-2012-02-25-en>

⁷⁴ *See id.*

⁷⁵ DIDP Response at 2, 6-7.

⁷⁶ Request 16-7, § 3, Pg. 4.

because the DIDP Response did not include a definition of “public interest,” as requested in the DIDP Request.⁷⁷ The Requesters, however, identify no policy or procedure that requires ICANN to define “public interest” when responding to a DIDP Request. In short, the Requesters’ claims in this regard are an attempt to impose an obligation upon ICANN that is not found in any established policy or procedure, and therefore do not support reconsideration. To the contrary, the DIDP itself explicitly states that ICANN is not required to create documentation in response to a DIDP request.⁷⁸

4. The DIDP Response Is Consistent With The 10 March Resolution.

The 10 March Resolution, among other things, “encourages ICANN staff to “be as detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents[.]”⁷⁹ The Requesters claim that the DIDP Response fails to comply with the 10 March Resolution. This claim is belied by the level of detail found in the 13-page, single-spaced DIDP Response, which constitutes an exemplar of the detailed analysis the 10 March Resolution envisions. With respect to each Item, ICANN: provided all publicly available responsive information; explained that, in certain circumstances, responsive documents did not exist; identified that, to the extent that there were additional responsive documents, such documents were subject to specific Nondisclosure Conditions; and determined that the harm that may be caused by the requested disclosure outweighs the public interest in such disclosure.⁸⁰ As such, nothing about the DIDP Response violates the 10 March Resolution; in fact, the DIDP Response fully adheres to it in providing the Requesters with a thorough explanation of the available

⁷⁷ *Id.*

⁷⁸ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁷⁹ <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

⁸⁰ See generally DIDP Response.

documents, why certain documents might not be available, and the grounds for withholding any responsive documents from disclosure.

5. No Policy Or Procedure Requires ICANN To Produce A Privilege Log.

Reconsideration also is not warranted based on the Requesters' request for a "privilege log" describing each document withheld.⁸¹ This argument seems to be based on an apparent misreading of the DIDP; the Requesters claim that "the DIDP rules allow ICANN Staff to create or compile summaries of any documented information, including logs of documents withheld under one of the Conditions of Nondisclosure[.]"⁸² In fact, the DIDP states that "ICANN *shall not be required* to create or compile summaries of any documented information," and makes no mention of privilege logs at all.⁸³ Because established policies and procedures make clear that ICANN "shall not be required" to compile "any documented information" (though *may* do so at its discretion), no reconsideration is warranted based on ICANN's determination not to provide a privilege log.

B. The Requesters' Claims Regarding The CPE Report Will Either Be Addressed In The BGC's Determination On Request 16-5 Or Are Time-Barred Insofar As They Were Not Raised Therein.

Request 16-5 challenges the CPE Report and ICANN's acceptance of it.⁸⁴ To the extent Request 16-7 raises arguments that the Requesters also included in Request 16-5, those arguments will be addressed in the BGC's consideration of Request 16-5, which the Requesters have asked to be placed on hold pending the BGC's determination on Request 16-7.⁸⁵ To the extent Request 16-7 raises new arguments regarding the CPE Report that are not included in

⁸¹ Request 16-7, § 3, Pg. 3.

⁸² *Id.*

⁸³ <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).

⁸⁴ <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

⁸⁵ Request 16-7, § 6, Pg. 6.

Request 16-5, they are untimely. Request 16-7 was submitted on 30 May 2016, more than 15 days from the date on which the Requesters became aware of the challenged CPE Report, namely 10 February 2016.⁸⁶ New arguments raised in Request 16-7 concerning the CPE Report are therefore untimely.⁸⁷

C. The Requesters' Discussion Of Matters Irrelevant To The DIDP Response Do Not Support Reconsideration.

The Requesters raise a host of matters that are not relevant to either the DIDP Response or the CPE Report. For instance, the Requesters claim reconsideration is warranted based on ICANN's procedure for handling change requests (even though the Requesters do not challenge the result of any change request it submitted), and the Guidebook's covenant not to sue provision (which is not at issue here at all).⁸⁸ The Requesters also posit their view that ICANN has "wasted significant resources" addressing the concerns raised by claimants in "accountability mechanisms invoked which related to the CPE process."⁸⁹ However, none of these issues bear any relevance to the DIDP Response, and therefore do not support reconsideration, which is the only relief the Requesters seek here. Nor can the Requesters' broadly phrased allusions to the transparency principles found in ICANN's Bylaws, Affirmation of Commitments, and other foundational documents support reconsideration.⁹⁰ For the reasons discussed above, the DIDP Response Process is the policy and procedure applicable to the DIDP Response, and the Requesters have not identified any way in which the DIDP Response is inconsistent with it.

⁸⁶ See Request 16-5, § 4, Pg. 1.

⁸⁷ Bylaws, Art. IV, § 2.5 (setting forth fifteen-day deadline for submitting reconsideration requests); <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

⁸⁸ Request 16-7, § 8, Pg. 20; *id.*, § 9, Pgs. 21-22.

⁸⁹ *Id.*, § 6, Pg. 4; *see also id.* § 6, Pg. 9.

⁹⁰ See Request 16-7, § 3, Pg. 4; *id.*, § 10, Pg. 24.

V. Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 16-7. If the Requesters believe that they have somehow been treated unfairly in the process, they are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all reconsideration requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 16-7 seeks reconsideration of staff action or inaction. As such, after consideration of Request 16-7, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.