

## Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-2

DotMusic<sup>1</sup> submits this Rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Reconsideration Request 17-2 (the “Recommendation”).<sup>2</sup> The Recommendation concerns DotMusic’s request that ICANN reconsider its refusal to disclose the documents requested in DotMusic’s DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation’s claims, are not “unfettered information requests” or requests “to create or compile summaries of any documented information.”<sup>4</sup> Specifically, DotMusic asked ICANN to disclose, *inter alia*, the following documents, which have not been disclosed:

- Request 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- Request 4. The terms of instructions provided to the evaluator;
- Request 5. The materials provided to the evaluator by the EIU;
- Request 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
- Request 7. The materials submitted by affected parties provided to the evaluator;
- Request 8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator; and

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in DotMusic’s Reconsideration Request 17-2. *See* Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *See* Annex C, DotMusic DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>4</sup> *See* Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 11 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

Request 10. All materials provided to ICANN by the evaluator concerning the Review.<sup>5</sup>

As explained in Request 17-2,<sup>6</sup> ICANN refused to disclose these documents to DotMusic. This DIDP Response is clearly improper because (1) ICANN’s assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by any evidence, (2) the public interest outweighs any Nondisclosure Condition, and (3) ICANN’s decision violates its Commitments and Core Values. The BAMC’s Recommendation now attempts to further justify ICANN’s improper decision.

Moreover, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that DotMusic made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.<sup>7</sup> These claims are unfounded. To provide further clarity for both the BAMC and the ICANN Board regarding the significance of both ICANN’s Commitments and Core Values, DotMusic will now further clarify its position in this Rebuttal to the Recommendation.

#### **1. The DIDP Response Must Adhere to ICANN’s Commitments and Core Values**

ICANN must comply with its Commitments and Core Values, even when issuing a DIDP response, or it will violate its own Bylaws. ICANN is required to “act in a manner consistent with [its] Bylaws”<sup>8</sup> and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”<sup>9</sup> in performing its mission “to ensure the stable and secure

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<sup>5</sup> Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), p. 4, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>6</sup> *See generally id.*

<sup>7</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>8</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>9</sup> *Id.* at Art. 1, §1.2.

operation of the Internet’s unique identifier systems.”<sup>10</sup> There is no exception carved out for the DIDP<sup>11</sup> and neither ICANN nor the BAMC has contested that the DIDP process is not governed by these Commitments and Core Values, simply that they do not relate to the DIDP Response for DotMusic’s DIDP Request.<sup>12</sup> In fact, the BAMC even explained in the Recommendation that the DIDP is the direct result of ICANN’s Commitment to transparency:

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring 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 organization’s approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN organization’s operational activities.<sup>13</sup>

ICANN’s refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN’s other Commitments and Core Values.

## **2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness**

ICANN’s DIDP is “[a] principal element of ICANN’s approach to transparency and information disclosure.”<sup>14</sup> This principle of transparency “is one of the essential principles in ICANN’s creation documents, and its name reverberate[s] through its Articles and Bylaws.”<sup>15</sup> ICANN’s Articles of Incorporation commit it to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent

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<sup>10</sup> *Id.* at Art. 1, § 1.1(a).

<sup>11</sup> *See id.*; *see also* ICANN Articles of Incorporation.

<sup>12</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>13</sup> *Id.* at pp. 10-11.

<sup>14</sup> ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>15</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

processes.”<sup>16</sup> ICANN’s Bylaws reaffirm the same Commitment, explicitly stating that “ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>17</sup> And, in addition to dedicating an entire Article on transparency,<sup>18</sup> the Bylaws further reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be “accountable and transparent.”<sup>19</sup>

However, ICANN did not adhere to its Commitment to openness and transparency when it denied DotMusic’s requests for further documents about the ongoing review of the CPE process. The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria,<sup>20</sup> drawing criticism from legal experts<sup>21</sup> and even the Council of Europe.<sup>22</sup> According to the BAMC, “the [ICANN] Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by” DotMusic and identified in the *Dot Registry v. ICANN* proceeding; this discussion resulted in ICANN’s decision to initiate an independent review of the CPE process.<sup>23</sup>

Yet, the actual content and scope of the review has been mired in secrecy, leaving applicants in the dark regarding ICANN’s planned processes for addressing their concerns. This lack of transparency is evident through DotMusic’s community application process for the

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<sup>16</sup> ICANN Articles of Incorporation, § 2.III.

<sup>17</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>18</sup> See *id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>19</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>20</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>21</sup> See Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board (Jan. 30, 2017), p. 2), <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>.

<sup>22</sup> See Council of Europe Report, *Application to ICANN for Community-Based New Generic Top Level Domains (gTLDs), Opportunities and challenges from a human rights perspective*: <https://rm.coe.int/16806b5a14>.

<sup>23</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 4 <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

.MUSIC gTLD. In February 2016, DotMusic discovered that it did not prevail as the community applicant for the .MUSIC gTLD. In response, and with the support of numerous community applications, DotMusic filed Reconsideration Request 16-5.<sup>24</sup> DotMusic subsequently waited for *over a year* for the BGC to respond to the Reconsideration Request with a Recommendation. And, when ICANN did finally provide DotMusic with a response to Reconsideration Request 16-5, it provided no closure; rather, in April 2017, DotMusic learned that its application was “on hold” as the BGC reviewed the CPE process.<sup>25</sup> Despite requests, no other substantive information about the independent review was disclosed to DotMusic for another *two months*, when ICANN released name of the independent evaluator conducting the review.<sup>26</sup>

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information held in documents in its possession about the independent review. For instance, DotMusic and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents in ICANN’s possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI’s work for ICANN; and (3) the documents relied on by the EIU during the CPE that are currently under review by FTI. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

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<sup>24</sup> CPE RR 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>25</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> Annex D, ICANN DIDP Response (June 4, 2017), p. 2, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

The BAMC Recommendation suggests that DotMusic has not sufficiently identified Board conduct implicated in the denial of its DIDP request.<sup>27</sup> In fact, ICANN's Board and the BGC remain in ultimate control of any review process initiated by ICANN staff and make the decisions as to the information and documents that are to be released in response to justified requests for documents from affected applicants such as DotMusic. Accordingly, contrary to the BAMC's understanding, DotMusic does in fact ask for the reconsideration of BGC's actions in denying its requests for information and its inaction in refusing to disclose or direct the disclosure of the requested categories of information.

### **3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure**

The independent review is significant not only to DotMusic but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>28</sup> This evaluation process has clearly disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent

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<sup>27</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 9, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>28</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) (identifying seven other gTLD strings with pending reconsideration requests), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>29</sup>

It further committed itself to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>30</sup>

ICANN’s DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN’s own investigation of the CPE process and by the CPE Provider’s lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.<sup>31</sup> This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from certain community gTLDs, such as .MUSIC.

Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding

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<sup>29</sup> ICANN Bylaws, Art. 3, § 3.1.

<sup>30</sup> *Id.* at Art. 1, § 1.2(a)(v).

<sup>31</sup> *See* Exhibit K, Minutes of BGC Meeting (Aug. 1, 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en>. “This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced.” *Id.*

the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. It implies that details about the independent review and CPE must be kept hidden because of improper behavior by the reviewer or the CPE panel. While trying to allay such concerns and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, while ICANN claims that they analyzed whether "each Item" was covered by a Nondisclosure Condition, neither ICANN nor the BAMC identify or apply the specific Nondisclosure Condition for each category of document included within DotMusic's request, much less to individual documents that have been requested.<sup>32</sup> Instead, both have simply made conclusory statements that the requested categories of documents are covered by certain Nondisclosure Conditions based on this analysis, expecting DotMusic to understand how these conditions apply to unknown documents.<sup>33</sup>

ICANN's actions are therefore in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

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<sup>32</sup> Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 21  
<https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>33</sup> *Id.* at pp. 16-20.

#### **4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness**

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to "[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness."<sup>34</sup> ICANN is also committed to two Core Values: (1) "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;"<sup>35</sup> and (2) "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community."<sup>36</sup>

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In addition to violating its Bylaws, ICANN's attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

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<sup>34</sup> ICANN Bylaws, Art. 1, § 1.2(a)(vi).

<sup>35</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>36</sup> *Id.* at Art. 1, § 1.2(b)(v).

## 5. Conclusion

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 17-2. In addition to the reasons stated in the Request 17-2,<sup>37</sup> then, the Board should grant Request 17-2 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

September 12, 2017

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Date

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<sup>37</sup> Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.