

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-3**

dotgay<sup>1</sup> submits this rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Request 17-3 (the “Recommendation”),<sup>2</sup> which concerns the reconsideration of ICANN’s refusal to disclose documents requested in dotgay’s DIDP Request.<sup>3</sup> The denied document requests all involve the disclosure of pre-existing documents and are not “unfettered information requests” or requests “to create or compile summaries of any documented information.”<sup>4</sup> Specifically, dotgay asked ICANN to disclose the following documents:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports.”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (1) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,” and (b) all communications between the EIU and ICANN regarding the request.

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation to any comments on the research or evaluation

Request No. 8: The materials provided to the evaluator by the EIU.

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board.

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in dotgay’s Reconsideration Request 17-3. *See* Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

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

<sup>3</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>. As explained in the Request, ICANN refused to disclose documents related to Request Nos. 1-3, 8-9, and 13. *See* Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>4</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 13, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>5</sup>

As explained in Request 17-3,<sup>6</sup> ICANN improperly refused to disclose these documents because (1) its assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by ICANN, (2) the public interest outweighs any reason for nondisclosure, and (3) the decision violates ICANN’s Commitments and Core Values.

Significantly, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that dotgay 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.<sup>8</sup> To provide further clarity for both the BAMC and the ICANN Board, dotgay 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**

In issuing the DIDP Response, ICANN must comply with its Commitments and Core Values or violate its own Bylaws. ICANN, in performing its mission “to ensure the stable and secure operation of the Internet’s unique identifier systems,”<sup>9</sup> must “act in a manner consistent with [its] Bylaws”<sup>10</sup> and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”<sup>11</sup> There is no exception carved out for the DIDIP<sup>12</sup> and ICANN

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<sup>5</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-6, <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>.

<sup>6</sup> Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

<sup>7</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>8</sup> See Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-8, <https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en>.

<sup>9</sup> ICANN Bylaws, Art. 1, § 1.1(a).

<sup>10</sup> *Id.* at Art. 1, § 1.2(a).

<sup>11</sup> *Id.* at Art. 1, § 1.2.

<sup>12</sup> See *id.*; see also ICANN Articles of Incorporation.

has not contested that its actions here are governed by these Commitments and Core Values.<sup>13</sup> In fact, the BAMC explained in the Recommendation that the DIDIP 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>14</sup>

ICANN's refusal to disclose several documents in response to the DIDP Request is thus in direct contravention of its Commitment to transparency, as well as other Commitments and Core Values.

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

The DIDP is clearly “[a] principal element of ICANN's approach to transparency and information disclosure.”<sup>15</sup> The principle of transparency “is one of the essential principles in ICANN's creation documents, and its name reverberated through its Articles and Bylaws.”<sup>16</sup> ICANN's Articles of Incorporation (the “Articles”) 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 processes.”<sup>17</sup> ICANN's Bylaws only reaffirm the same Commitment. The Bylaws explicitly state that “ICANN must operate in a manner consistent with [its] Bylaws for the

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<sup>13</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21-2, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>14</sup> *Id.* at p. 12.

<sup>15</sup> Exhibit 21, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>16</sup> Exhibit 6, *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>.

<sup>17</sup> ICANN Articles of Incorporation, § 2.III.

benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>18</sup> And, in addition to dedicating an entire Article on transparency,<sup>19</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>20</sup>

However, ICANN did not adhere to its Commitment to openness and transparency when it denied dotgay’s requests for further information about the ongoing review of the CPE process. The CPE has affected several gTLD applicants,<sup>21</sup> and drawn criticism from legal experts<sup>22</sup> and venerable institutions, such as the Council of Europe.<sup>23</sup> And, even though concerns by both applicants and third parties led to ICANN’s initiation of an independent review of the CPE process, the review itself has been mired in secrecy since its inception.

This lack of transparency is evident upon a review of dotgay’s attempts to have the CPE for .GAY reevaluated by the BGC. On June 26, 2016, the BGC issued a recommendation regarding Request 16-3, which concerns dotgay’s community application for .GAY.<sup>24</sup> ICANN was subsequently silent regarding the status of Request 16-3 for nearly *nine months*, and even then

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<sup>18</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>19</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>20</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>21</sup> *See* Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> *See* Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>23</sup> *See* Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>.

<sup>24</sup> *See* Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

dotgay only learned that its application was “on hold” as the BGC reviewed the CPE process.<sup>25</sup> No other substantive information about the review was disclosed to dotgay for another *two months*, when dotgay and other community applicants finally learned the name of the independent evaluator that was conducting the review.<sup>26</sup>

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information about the independent review. For instance, dotgay and the other applicants do not know (1) the documents being reviewed by FTI as part of its independent review, (2) the terms and scope of FTI’s work for ICANN, and (3) the documents relied on by the EIU during the CPE. 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.

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

This secretive review of the CPE process is clearly significant not only to dotgay, but also to other gTLD applicants. The results of the independent review 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>27</sup> This evaluation process, which is currently mired with complaints, has clearly disproportionately treated community gTLD

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<sup>25</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>26</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>27</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 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>.

applicants by inconsistently and unfairly applying criteria between applicants.<sup>28</sup> And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process.

ICANN's refusal to disclose relevant documents through its DIDP not only fails to uphold its openness and transparency obligations but also fails to uphold the principle of fairness. ICANN has specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent 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 made the Commitment 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 refusal to disclose the requested documents is in clear violation of this Commitment. There is a clear problem with the CPE process, evident by the EIU's determinations and ICANN's own investigation of the process. Furthermore, the Minutes from ICANN's Board Governance Meeting of August 1, 2017 clearly show that the CPE Provider itself has been

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<sup>28</sup> See Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>.

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

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

uncooperative with ICANN, thus indicating that 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 be indisputably affected by whether ICANN approves certain community gTLDs, such as .GAY. Despite the clear public interest in maintaining a fair CPE process, however, 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 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 a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding 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 to the community applicants and the general public that there is something to hide regarding the independent review and CPE. In an attempt to defend its reluctance to disclose documents, ICANN has argued that these documents are covered by its Nondisclosure Policy. However, in both the DIDP Response and the Recommendation, neither ICANN nor the BAMC offer any explanation for this singular defense. Instead, both have simply made conclusory statements that the requested documents are covered by the nondisclosure policy

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<sup>31</sup> See Exhibit 22, 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.*

without any explanation other than simply listing several conditions for nondisclosure, expecting dotgay to understand how these conditions apply to unknown documents.<sup>32</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.

#### **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. Through its Bylaws, ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness.”<sup>33</sup> It has also adopted two significant 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>34</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>35</sup>

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<sup>32</sup> Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), pp. 16-9, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>; Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), pp. 3-4, 6, <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.

<sup>33</sup> ICANN Bylaws, Art. 1, § 1.2(a)(vi).

<sup>34</sup> *Id.* at Art. 1, § 1.2(b)(ii).

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

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. As explained prior, ICANN has kept hidden details regarding the review process, prohibiting informed participation in the review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions 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.

## **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 17-3. In addition to the reasons stated in the Request 17-3,<sup>36</sup> then, the Board should grant Request 17-3 and produce the requested documents regarding the CPE independent review.



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Arif Hyder Ali

September 8, 2017

Date

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<sup>36</sup> Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), <https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en>.