

## **DotMusic Limited Reconsideration Request (“RR”)**

March 10, 2018

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited

Contact Information Redacted

**Address:**

**Email:** Constantinos Roussos Contact Information Redacted

Requestor is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

Contact Information Redacted

**Email:**

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180110-1, dated February 10, 2018 (the “DIDP Response”), which denied the disclosure of certain documents requested pursuant to ICANN’s DIDP.

On January 10, 2018, Requestor sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).<sup>1</sup> Specifically, the Requestor submitted nineteen (19) requests:

1. All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
2. All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;
3. The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”
4. All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;
5. All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”
6. All draft CPE Reports concerning .MUSIC, both with and without comments;
7. All draft CPE Reports concerning .MUSIC in redline form, and/or feedback or suggestions given by ICANN to the CPE Provider;
8. All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”

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<sup>1</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

9. All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff;
10. The 13 January 2017 engagement letter between FTI and ICANN;
11. All of the “CPE Provider’s working papers associated with” DotMusic’s CPE;
12. “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”
13. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”
14. All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”
15. FTI’s investigative plan used during its independent review;
16. FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”
17. All communications between ICANN and FTI regarding FTI’s independent review;
18. All communications between ICANN and the CPE Provider regarding FTI’s independent review; and
19. All communications between FTI and the CPE Provider regarding FTI’s independent review.<sup>2</sup>

In its Response, ICANN refused to disclose any of the requested documents.<sup>3</sup>

ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document

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<sup>2</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), pp. 3-6, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>3</sup> See Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

request “without contravening its commitment to transparency.”<sup>4</sup> According to ICANN, a significant number of Nondisclosure Conditions apply to the DIDP Request. For instance, ICANN claimed that, because its outside counsel retained FTI, “FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>5</sup> ICANN further argued that the requests include confidential information from the CPE Provider that cannot be disclosed because “the CPE Provider has not agreed to ICANN organization’s request, and has threatened litigation should ICANN organization breach its contractual confidentiality obligations.”<sup>6</sup> Under its Nondisclosure Conditions, then, ICANN determined that it was not obligated to disclose documents requested in the DIDP Request.

Under the DIDP, however, ICANN can disclose documents covered by the Nondisclosure Conditions under certain circumstances. If ICANN determines that “the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure,”<sup>7</sup> then it can publish the documents. ICANN did not make such a determination, instead finding that:

ICANN organization’s internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>8</sup>

ICANN organization’s communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>9</sup>

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<sup>4</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>5</sup> *Id.*, p. 11. ICANN also argued that, “even if the attorney-client privilege did not apply to documents shared with FTI (which it does), disclosing the content and choice of documents that ICANN organization and the CPE Provider provided to FTI pursuant to ICANN organization’s outside counsel’s direction, and FTI’s draft and working materials, ‘might prejudice an[] internal . . . investigation’—that is, the CPE Process Review.” *Id.*

<sup>6</sup> *Id.*, p. 9.

<sup>7</sup> *Id.*, p. 7.

<sup>8</sup> *Id.*, p. 10.

<sup>9</sup> *Id.*, p. 11.

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>10</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>11</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>12</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>13</sup>

ICANN thus refused to disclose most of the requested documents to the Requestor.

In addition, ICANN asserted that it could not disclose Requests No. 10 and 16, FTI's engagement letter with ICANN and FTI's follow-up communications with the CPE Provider, respectively, because they do "not exist."<sup>14</sup>

**4. Date of action/inaction:**

ICANN acted on February 9, 2018 by issuing its Response to the DIDP Request.<sup>15</sup>

**5. On what date did you become aware of action or that action would not be taken?**

The Requestor became aware of the action on February 9, 2018, when the DIDP Response was received.

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<sup>10</sup> *Id.*, p. 13.

<sup>11</sup> *Id.*, p. 15.

<sup>12</sup> *Id.*, p. 18.

<sup>13</sup> *Id.*, p. 19.

<sup>14</sup> *Id.*, p. 16, 19. ICANN explained that "FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist." *Id.*, p. 16.

<sup>15</sup> Requestor received the DIDP Response on February 9, 2018, even though the DIDP Response is dated February 10, 2018. *See* Exhibit 3, Email to A. Ali from ICANN (Feb. 9, 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>

**6. Describe how you believe you are materially affected by the action or inaction:**

Requestor is materially affected by ICANN's refusal to disclose certain information concerning FTI's review of the CPE process because ICANN intends to rely on the FTI's three reports (the "FTI Reports") to make a decision on Requestor's Reconsideration Request 16-5 ("Request 16-5"). ICANN's reliance on the procedurally and substantively deficient reports will directly affect Requestor's rights regarding its community application for the .MUSIC gTLD, which is the focus of Request 16-5. However, Requestor cannot fully analyze the FTI Reports because ICANN refuses to disclose their underlying documents. ICANN's decision therefore both prevents Requestor from properly and fairly contesting the results and implications of a facially deficient "independent" review and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

ICANN is required to "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets."<sup>16</sup> It has failed to do so.

ICANN has not complied within international law and conventions in violation of its Bylaws. There is an "an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems."<sup>17</sup> This principle is violated "when a decision is based

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<sup>16</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>17</sup> Exhibit 5, Charles T. Kotuby Jr., "General Principles of Law, International Due Process, and the Modern Role of Private International Law" 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

upon evidence and argumentation that a party has been unable to address.”<sup>18</sup> The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.<sup>19</sup> While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”<sup>20</sup> it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-5—the FTI Reports.

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>21</sup> These standards require that ICANN “employ[ ] open and transparent policy development mechanisms;”<sup>22</sup> “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>23</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>24</sup> ICANN’s DIDP is especially important to ICANN’s commitment to transparency. As a “principle element of ICANN’s

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<sup>18</sup> Exhibit 6, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

<sup>19</sup> Exhibit 7, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

<sup>20</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>21</sup> *See* Exhibit 4, ICANN Bylaws (July 22, 2017), Arts. 1, 3-4, <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>22</sup> *Id.*, Art. 3, § 3.1.

<sup>23</sup> *Id.*, Art. 1, § 1.2(v).

<sup>24</sup> *Id.*, Art. 1, § 1.2(vi).

approach to transparency and information disclosure,”<sup>25</sup> the DIDP “is intended 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.”<sup>26</sup>

ICANN has violated these Bylaws, and the commitments contained therein, by refusing to disclose the requested documents. ICANN’s decision raises questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Reconsideration Request 16-5.<sup>27</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising how ICANN maintains that it can instruct FTI to undertake such a review, and accept the conclusions of that review, without disclosing the materials that informed FTI’s findings. If ICANN fails to disclose the requested documents, it will underscore the serious questions that have been raised about the impartiality, independent legitimacy, and credibility of FTI’s investigation, which already have been raised by Requestor.<sup>28</sup> Such an action would harm the global public interest, Requestor, and the global music community that has supported Requestor’s Application.

ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents given FTI’s conclusions, which are contrary to the findings of other panels and experts.

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<sup>25</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>26</sup> *Id.*

<sup>27</sup> See Exhibit 10, Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>28</sup> Exhibit 8, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

This is clearly shown through FTI’s conclusion that it found no evidence that ICANN influenced the CPE Provider.<sup>29</sup> In clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.<sup>30</sup> Without the underlying documents, there is no tenable way to analyze whether ICANN unduly influenced the CPE Provider. The documents are given even greater import because ICANN argued that it did not disclose certain documents because “the CPE Provider has not agreed . . . and has threatened litigation.”<sup>31</sup> In light of the Dot Registry IRP Declaration, a reasonable person would conclude that the CPE Provider’s litigation threats suggests that there were serious and improper conduct during the CPE. Without the requested documents, however, there is no means to determine whether such conduct occurred.

To make matters worse, ICANN admits that “ICANN organization’s outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI’s draft and working materials are protected by the attorney-client privilege under California law.”<sup>32</sup> Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.

Given the above considerations, this is clearly a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested

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<sup>29</sup> Exhibit 11, FTI, Scope 1 Report (Dec. 13, 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

<sup>30</sup> See Exhibit 12, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>31</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 9 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>32</sup> *Id.*, p. 11.

disclosure.”<sup>33</sup> ICANN has not disclosed any “compelling” reason that outweighs the public interest in disclosure. In fact, rejecting full disclosure of the requested items undermines both the integrity and the scope of the FTI investigation that the ICANN Board and the BAMC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s actions materially affects the global music community that has supported the Requestor’s application. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN’s identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

An opaque ICANN materially damages its credibility, accountability, and trustworthiness. Moreover, an ICANN that lacks transparency undermines its due diligence and decision-making process in matters that relate to the global public interest and determinations that could materially

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<sup>33</sup> Exhibit 9, ICANN Documentary Information Disclosure Policy (Feb. 25, 2012), <https://www.icann.org/resources/pages/didp-2012-02-25-en> (“Information that falls within any of the conditions set forth above 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.”).

harm affected parties. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that FTI used to review the CPE process, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>34</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

#### **8. Detail of Staff/Board Action/Inaction – Required Information**

The Requestor filed a community-based Top-Level Domain ("gTLD") application for the ".MUSIC" string. However, the CPE Provider recommended that ICANN reject the Requestor's community application.<sup>35</sup> Requestor subsequently made various submissions, including independent expert reports supporting their community application, showing that the CPE Provider's decision is fundamentally erroneous.<sup>36</sup> These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

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<sup>34</sup> Exhibit 13, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>35</sup> Exhibit 14, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>36</sup> Exhibit 15, "Request 16-5: DotMusic Limited" ICANN (last visited Mar. 8, 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

ICANN began its own review of the CPE process in late 2016, assigning the task to the BGC.<sup>37</sup> It did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to the Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on May 5, 2017, the Requestor filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.<sup>38</sup> In submitting this request, the Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes”<sup>39</sup> and disclose the requested documents. ICANN failed to do so when it denied certain requests made in the First DIDP Request on June 4, 2017.<sup>40</sup>

After Requestor submitted its First DIDP Request, ICANN finally disclosed some additional information regarding the CPE review. It announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the EIU regarding the process.<sup>41</sup> In response to the information disclosed about FTI, on July 25, 2017, the Requestor jointly filed another DIDP Request on 10 June 2017 (the “Second DIDP Request”) to learn about

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<sup>37</sup> Exhibit 16, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>38</sup> Exhibit 17, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>39</sup> Exhibit 4, ICANN Bylaws (July 22, 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>40</sup> Exhibit 18, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>41</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

FTI and the purview of its review.<sup>42</sup> This request was also denied in violation of ICANN's commitment to transparency.<sup>43</sup>

Requestor finally learned substantive information about FTI's review on December 13, 2017, when ICANN decided to publish the results of FTI's work: the FTI Reports.<sup>44</sup> Upon review of the FTI Reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.<sup>45</sup> For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI's review is intended to "assist in the CPE review,"<sup>46</sup> Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.<sup>47</sup> Therefore, Requestor submitted to ICANN the DIDP Request.

ICANN first responded to the DIDP Request on February 9, 2018.<sup>48</sup> In its Response, ICANN determined that the Nondisclosure Conditions applied to most of the requests and that the public interest did not warrant disclosing the following documents:

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<sup>42</sup> Exhibit 20, DotMusic Limited's Second DIDP Request (Jun. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>43</sup> Exhibit 21, ICANN's Response to DotMusic Limited's DIDP Request (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process with ICANN.

<sup>44</sup> Exhibit 22, "ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process" ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>45</sup> See Exhibit 8, Email from DotMusic to ICANN attaching the "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

<sup>46</sup> Exhibit 19, Community Priority Evaluation Process Review Update (Jun. 2, 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>47</sup> Exhibit 1, Request No. 20180110-1, DotMusic Limited DIDP Request (Jan. 10, 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>48</sup> Exhibit 2, ICANN Response to DIDP Request No. 20180110-1 (Feb. 10, 2018), p. 8 <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

ICANN organization's internal communications relating to the CPE process and evaluations (Items 1, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>49</sup>

ICANN organization's communications with the CPE Provider relating to the CPE process and evaluations (Items 2, 4, 5 and 9) are subject to ... Nondisclosure Conditions[.]<sup>50</sup>

With respect to documents responsive to Items 3, 13, 14, and 15, these documents are subject to ... Nondisclosure Conditions[.]<sup>51</sup>

With respect to documents responsive to Items 6, 7, and 8, these documents are subject to ... Nondisclosure Conditions[.]<sup>52</sup>

With respect to documents responsive to Items 11 and 12, these documents are subject to ... Nondisclosure Conditions[.]<sup>53</sup>

With respect to documents responsive to Items 17, 18, and 19, these documents are subject to ... Nondisclosure Conditions[.]<sup>54</sup>

In relation to Item 10, ICANN stated that it cannot share the engagement letter between FTI and ICANN because:

Item 10 seeks the 13 January 2017 engagement letter between FTI and ICANN. FTI signed an engagement letter with Jones Day, not ICANN organization. ICANN organization was not a party to the engagement. As such, the requested documentary information does not exist.<sup>55</sup>

In relation to Item 16, ICANN states that there is no written follow-up communication from the FTI to the CPE Provider and as such, "no such documents exist:"

Item 16 seeks FTI's follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided. There is no written follow up communications from FTI to the CPE Provider. As such, ICANN organization is not in possession, custody, or control of any documents responsive to Item 16 because no such documents exist.<sup>56</sup>

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<sup>49</sup> *Id.*, p. 10.

<sup>50</sup> *Id.*, p. 11.

<sup>51</sup> *Id.*, p. 13.

<sup>52</sup> *Id.*, p. 15.

<sup>53</sup> *Id.*, p. 18.

<sup>54</sup> *Id.*, p. 19.

<sup>55</sup> *Id.*, p. 16.

<sup>56</sup> *Id.*, p. 19.

ICANN, in providing such responses to the DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. Requestor thus submits this Reconsideration Request in response. Disclosure of such information to the gTLD applicant is necessary to ensure that FTI's "independent" review remains a fair, transparent, and independent process.

**9. What are you asking ICANN to do now?**

Requestor asks ICANN to disclose all items and documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestor is a community applicant for the .MUSIC string and the organization that submitted the DIDP Request to ICANN. Requestor is thus materially affected by ICANN's decision to deny the DIDP Request. Further, the global music community that is supporting the .MUSIC community application is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No. The Reconsideration Request is filed on behalf of DotMusic Limited.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



Arif Hyder Ali

March 10, 2018

Date