

PAUL D. McGRADY
Partner
Contact Information Redacted

July 7, 2014

VIA EMAIL

ICANN Board Governance Committee
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
reconsideration@icann.org

Re: Reconsideration Request for Failure to Disclose Documents to Amazon EU S.à.r.l.

Dear Board Governance Committee,

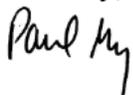
Please find attached a Reconsideration Request submitted on behalf of Amazon EU S.à.r.l. (“Applicant”) and its applications (ID Nos. 1-1315-58086, 1-1318-83995, and 1-1318-5591) (the “Applications”).

This Reconsideration Request is submitted to the ICANN Board Governance Committee (“BGC”), within the 15-day deadline allowed to submit such a request.

As a preliminary remark, Applicant seeks review of a denial to provide documents pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”). ICANN Staff’s response to Applicant’s DIDP request purports to state that all relevant documents are either already publicly available or nonexistent, while simultaneously denying access to an unknown number of documents based on broad and non-descript assertions of privilege. ICANN Staff’s decision to produce **zero** documents in response to Applicant’s request – in spite of ICANN’s public commitment to transparency of process – creates questions as to the reasons behind ICANN’s decision to prevent release of information relating to ICANN’s rejection of Applicant’s meritorious applications for .AMAZON and other related gTLDs.

Applicant therefore makes this Reconsideration Request in compliance with the requirements defined by ICANN and under the DIDP appeal procedures. Should the BGC determine that this Reconsideration Request is not the appropriate procedure, we ask the BGC to specify the appropriate jurisdiction for this appeal.

Sincerely,



Paul D. McGrady
Winston & Strawn LLP

Enclosures

RECONSIDERATION REQUEST

1. Requester Information

Name: Amazon EU S.à.r.l.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

C/o:

Name: Paul D. McGrady, Winston & Strawn LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

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

Amazon EU S.à.r.l. ("Applicant") seeks reconsideration of the actions and inactions of ICANN Staff in responding to Applicant's request for documents made under the Documentary Information Disclosure Policy (the "DIDP Request") relating to the New gTLD Program Committee's ("NGPC") decision not to approve the Applications for .AMAZON and related gTLDs, Resolution 2014.05.14.NG03 ("Applications"). See DIDP Request attached at Appendix 1. ICANN Staff summarily and without adequate justification denied Applicant's DIDP Request relating to the NGPC decision (the "DIDP Response"). See DIDP Response attached at Appendix 2. ICANN Staff's refusal to

properly consider Applicant's reasonable request for information contradicts ICANN's stated commitment to transparency and accountability. See, e.g., Affirmation of Commitments, Articles 3 and 7; ICANN Bylaws, Articles 1 and 3. The specific actions or inactions of ICANN Staff are set forth below in response to Item 8, but in sum, ICANN Staff issued a facially inadequate response to Applicant's DIDP Request by refusing to provide **any documents** regarding the Applications. In doing so, ICANN Staff asserted contradictory justifications and abused the DIDP Defined Conditions Non-Disclosure Policy. ICANN Staff's actions are inconsistent with DIDP Procedures, ICANN Articles of Incorporation, Bylaws, and Affirmation of Commitments. As a result, Applicant has suffered a tangible and serious harm.

4. Date of action/inaction:

On June 22, 2014, ICANN published its Response to Applicant's DIDP Request 20140523-1.

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

Applicant learned of ICANN Staff's Response to its DIDP Request on June 22, 2014.

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

ICANN Staff's refusal to provide non-public documentation despite limited and reasonable requests for information is in violation of its own stated commitment to transparency. This demonstrable disregard for an open decision-making process materially affects Applicant's ability to understand the reason for the denial of its new gTLD applications and to take full advantage of specific accountability mechanisms set

forth by ICANN under its governing documents. As demonstrated in Applicant's Request for Reconsideration of the gTLD decision (attached as Appendix 3 (without exhibits)), Applicant believes the GAC did not follow the appropriate procedure for objecting to the Applications and the NGPC may have relied on false and inaccurate information in reaching its conclusions about the Applications. Without additional documentation from ICANN, however, Applicant has no way of determining how the NGPC balanced competing interests or how GAC advice factored into the NGPC's decision. For Applicant, a company with globally well-known non-geographic trade names and trademarks, similar to a number of other successful gTLD applicants, it is imperative to understand ICANN's justifications for denying the Applications to operate gTLDs in connection with those names and trademarks. Applicant's concerns are amplified by the fact that the individuals reviewing its Applications are some of the same individuals refusing to provide documents related to that review and decision. On its face, the DIDP Response appears so disingenuous and defective that it undermines the spirit and purpose of the DIDP Procedures.

Applicant is entitled to a fair and transparent response regarding the Applications. Applicant should be allowed to evaluate the fairness of the NGPC decision and determine if the decision-making process complied with all ICANN policies and procedures. ICANN Staff's failure to disclose documentation relating to the Applications prevents Applicant from reviewing the actions of ICANN, an organization that states its commitment to openness and transparency.

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

ICANN's failure to respond to the DIDP Requests without adequate justification

calls into question ICANN's objectivity and violates the commitment to openness and transparency articulated in ICANN's Bylaws and Affirmation of Commitments. If ICANN may summarily refuse to provide additional information about its decisions to parties questioning its rationale while simultaneously providing contradictory justifications for the refusal, what is to stop it from keeping all major decisions and considerations behind closed doors? ICANN's refusal to provide information in response to a reasonable and tailored DIDP Request creates dangerous precedent whereby ICANN Staff may use the DIDP Procedures as a shield to keep communications from the applicants and the general public. This causes significant material harm to both current and future applicants, who will be unsure of ICANN's objectivity or commitment to abide by its own rules and regulations.

8. Detail of Staff Action

I. ICANN Staff's DIDP Response is facially inadequate.

a. ICANN Staff's objections based on scope and timeframe are unfounded.

Applicant submitted reasonably narrow and tailored requests and explicitly sought information not already publicly available. DIDP Request at 2. Applicant is not privy to the precise nature of the documents generated in conjunction with the NGPC's decision to deny the Applications for .AMAZON and related gTLDs. Nor is Applicant privy to the precise timeframes during which such communications occurred. Without the benefit of such information, Applicant crafted its DIDP Request in as narrow a fashion as possible.

ICANN Staff's repeated objection that Applicant did not assign a precise timeframe to certain requests is particularly nonsensical given that the *substance* of

each of Applicant's requests was self-limiting with respect to timeframe. As acknowledged in the DIDP Response, all of Applicant's requests related to the Applications submitted on March 23, 2012. DIDP Response at 5. Accordingly, each of these requests clearly sought information from that date forward. Given the very narrow and precise nature of the information sought, a timeframe post-dating March 23, 2012, is neither excessive nor overly burdensome.

b. ICANN Staff's DIDP Response is contradictory and grossly inadequate.

The DIDP Procedures require a response to a DIDP request within 30 days unless more time is needed, in which case, the procedures contemplate an extension period. Accordingly, if ICANN Staff required more time to submit a complete response, the DIDP Procedures explicitly allow for an extension. Instead, the ICANN Staff repeatedly admits that its review of potentially responsive documents is incomplete. See DIDP Response at 5 ("ICANN has not completed its review of documents that may be responsive [to Items 1-5]."); see *also* DIDP Response at 8 (same regarding Items 7-8); DIDP Response at 9 (same regarding Items 9-14). At the same time, however, ICANN Staff claims that no responsive documents exist or would be disclosed at any rate. See, *e.g.*, DIDP Response at 7 ("ICANN has not completed its review of documents that may be responsive to [Items 7-8]" but "any responsive document . . . is not appropriate for disclosure."). Similarly, regarding Items 1-5, ICANN Staff states that such items would require "ICANN to produce thousands of documents," yet simultaneously maintains that "any responsive document . . . is not appropriate for disclosure." DIDP Response at 5. It is not clear why, if thousands of documents are responsive to these items, none are appropriate for disclosure, particularly where

ICANN Staff admits it has not reviewed all of the potentially responsive documents. ICANN Staff's contradictory and incomplete response leaves Applicant in a state of uncertainty whereby it is unclear if ICANN Staff, indeed, intends to produce additional documents at some undisclosed later date or will claim indefinitely that there are no documents to produce.

c. ICANN Staff's DIDP Response abuses the DIDP Defined Conditions of Nondisclosure Policy.

In addition to defects outlined above, ICANN Staff's DIDP Response makes sweeping conclusions as to the content of any responsive documents. To cover all of its bases for withholding all documents under the DIDP, ICANN Staff has broadly asserted privilege over any potentially responsive documents. Despite Applicant's explanation in its initial request that the information sought did not meet any of the defined conditions for nondisclosure (DIDP Request at 2-3), ICANN Staff withheld documents on such grounds. Rather than addressing Applicant's statement to explain why it was inaccurate or articulating why nondisclosure is warranted, ICANN Staff's DIDP Response merely recites the conditions for nondisclosure from the DIDP Procedures verbatim. See, e.g., DIDP Response at 6 (stating that "any responsive document [to Items 1-5] . . . is not appropriate for disclosure pursuant to the . . . DIDP Defined Conditions of Nondisclosure"); DIDP Response at 8 (same statement regarding Items 7-8). Given the fact that ICANN Staff refused to turn over a single document based on 14 different categories of requests, a mere regurgitation of the DIDP Procedures is hardly a sufficient response to the DIDP Request.

Just one of several examples of ICANN Staff's misuse of the Nondisclosure Policy is its response to Item 13, which sought "All GAC communications directly or

indirectly relating to the decision to make the GAC deliberations during the April 2013 ICANN Meeting in Beijing closed.” See DIDP Request at 2. This Item narrowly sought information over a very discrete timeframe that was well within the scope of ICANN’s DIDP policy. ICANN Staff failed to respond to this Item individually, choosing instead to lump it in with broad objections to five other Items that sought information about GAC communications. ICANN Staff’s justification for its refusal to produce any documents responsive to these Items was its assertion that such requests did “not constitute ‘documents concerning ICANN’s operational activities.’” DIDP Response at 9. For support, ICANN Staff simply referred to the DIDP Policy as a whole, without any specific reference to any individual basis for non-disclosure. Such a response from ICANN Staff with respect to a well-defined and discrete request for information is facially inadequate and underscores the perfunctory and superficial nature of ICANN’s responses to Applicant’s DIDP Request.

II. ICANN Staff’s DIDP Response is inconsistent with the DIDP Procedures, ICANN Articles of Incorporation, Bylaws and Affirmation of Commitments.

The DIDP “is intended to ensure that information contained in documents concerning ICANN’s operation activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.” See DIDP Procedures. However, ICANN Staff’s DIDP Response restrains Applicant’s access to such documents without a compelling reason for confidentiality.

a. ICANN Staff refused to produce documents responsive to the DIDP Request within its *custody and/or control*.

ICANN Staff’s response to Item 6 implies that documents in possession of

ICANN's legal representative are outside of ICANN's custody and/or control. See DIDP Response at 6. Applicant objects to this response to the extent that ICANN Staff failed to communicate with its outside counsel to obtain all documents responsive to Item 6. As an initial matter, ICANN Staff's position that documents sent to its outside counsel are not within ICANN's possession, custody, or control is dubious at best. Additionally, such a posture sets a dangerous precedent whereby ICANN Staff could shield documents and information from disclosure simply by shipping such materials to its outside counsel. Such a precedent would inherently degrade ICANN's stated policy in favor of transparency of process.

Similarly, regarding Items 7 and 8, which seek non-public communications between ICANN and the Independent Objector, ICANN Staff provides myriad excuses attempting to explain why ICANN may or may not be in possession of such documents. ICANN Staff does not, however, deny the existence of responsive documents. As such, Applicant requests that ICANN Staff produce documents responsive to such requests. Moreover, to the extent ICANN Staff attempts to dodge production responsibilities based on an argument that parties to the objection proceedings may have received certain documents, Applicant requests production of any such documents.

b. If there are no additional documents responsive to any or all of Applicant's DIDP Requests, ICANN Staff should explicitly indicate as such in writing.

It is unclear from ICANN Staff's response to Items 9-14 whether or not it is ICANN Staff's position that it is not in possession of any relevant documents responsive to such requests. ICANN Staff's DIDP Response explains why responsive documents may not be in ICANN's custody or control; however, ICANN Staff does not specify whether that is the case. To the extent ICANN is in possession of documents

responsive to Items 9-14, Applicant requests disclosure of such documents or a statement of nonexistence to sufficiently respond to the DIDP Request.

ICANN Staff's objections stating that documents relating to the GAC proceedings are not within ICANN's possession, custody or control or are not relating to ICANN proceedings (see, e.g. DIDP Response at 8-9) are without merit. Without addressing whether or not the GAC is an independent entity, its structure is created directly from the ICANN Bylaws and ICANN employees facilitate and work with the GAC on a regular basis. Indeed, at least the following employees seem primarily or substantially focused on work with the GAC:

- Olof Nordling, Sr. Director, GAC Relations
- Julia Charvolen, GAC Services Coordinator
- Jeannie Ellers, GSE Support Manager

Clearly, documents relating to GAC actions and deliberations in the possession of ICANN Staff are within the possession, custody and control of ICANN and are properly sought under Applicant's DIDP Requests.

Additionally, with respect to all of Applicant's DIDP Requests, ICANN Staff should not be permitted to rely vaguely on public documents and on an allegedly ongoing investigation to sidestep its obligations to alert Applicant to the universe of documents that exist. If ICANN Staff contends that the universe of documents responsive to an individual DIDP Request consists of documents that are entirely public, ICANN Staff should identify each of those public documents and then indicate explicitly in writing that there are no additional documents responsive to that Request.

c. ICANN Staff presented no compelling reason for confidentiality.

Under the DIDP, information that falls within the nondisclosure exemptions “*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.*” This policy is of great significance here, given the reality that the same ICANN Staff which advise the ICANN Board are also responsible for fielding and responding to DIDP requests.

ICANN Staff’s generic and contradictory responses to the DIDP Request raise serious concerns over ICANN’s commitment to transparency. In its DIDP Request, Applicant articulated its need for publication of documents and communications in light of the fact that there is a “compelling reason for confidentiality” (DIDP Request at 4); however, ICANN failed to address this point. In its DIDP Request, Applicant articulated a need for disclosure as outweighing any harm because, “unless the requested information is published, the ICANN community will have no way to evaluate whether ICANN has met its obligations to act fairly, for the benefit of the community, and in accord with its own policies.” DIDP Request at 3. ICANN ignored this concern wholeheartedly. As a result, the precise harm articulated in Applicant’s DIDP Request has come to fruition.

As stated previously, the concern at issue is broader than the abuse of the DIDP Procedures. Applicant finds itself in the unfortunate position of ensuring that its Applications have been considered in accordance with ICANN policies. Article 7 of the Affirmation of Commitments embodies ICANN’s commitment “*to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.*” Applicant’s DIDP Request seeks to uncover

the documents and communications that formed the basis on which ICANN relied in making its determination on the Applications. Further, ICANN's Articles and Bylaws repeatedly purport aspirations for transparency, accountability, fairness, and consistency in ICANN operations. ICANN Staff's failure to disclose information pursuant to the DIDP Request is in direct contravention of these policies.

As explained above, ICANN Staff's DIDP Response indicates either an attempt to quell transparent information sharing, as required under ICANN's Bylaws and Articles of Incorporation, or reflects a cavalier attitude towards the DIDP. Either scenario is directly adverse to ICANN's commitment to transparency and exhibits serious disregard to the rights of parties attempting to participate in good faith.

9. What are you asking ICANN to do now?

Applicant requests reconsideration of ICANN Staff's refusal to produce documents responsive to its requests for information concerning the Applications and NGPC decision to deny such Applications. Specifically, Applicant requests that ICANN Staff finish its review of the potentially responsive documents. Where documents are indirectly under ICANN's custody and control, Applicant requests that ICANN Staff endeavor to collect such documents.

Further, where ICANN Staff purports to claim privilege over any responsive document, Applicant requests the production of a privilege log, identifying the documents responsive to the DIDP Request and stating the specific grounds for the privilege asserted (i.e. attorney-client privilege, deliberative process privilege, etc.). To clarify, Applicant is not requesting a summary of such documents; Applicant merely seeks a list of documents that would otherwise be produced pursuant to the DIDP Request and the basis for which such documents are being withheld. Also, where the

privileged information can be redacted, Applicant requests production of responsive documents (as specified under the DIDP). The production of a privilege log would ensure that ICANN Staff has completed a thorough review of its documents, as it is required to do under the DIDP, and is sincerely withholding documents based on actual privilege rather than making blanket assertions to avoid producing any responsive documents. Applicant believes this request is reasonable in light of ICANN's obligation to promote transparency, particularly here, where the same group of individuals who advise the ICANN board – including on issues relating to the gTLD application process – have been tasked with the review of the documents which formed the basis of ICANN's decision with respect to the Applications.

Along the same lines, where ICANN Staff seeks refuge under the DIDP Defined Conditions for Nondisclosure policy, Applicant requests that ICANN Staff provide an explanation identifying specific reasons why withholding documents outweighs the public interest in disclosure. ICANN Staff should keep in mind that there is no public interest in attempting to hide documents which reveal the factors that played a part in ICANN's actual decision-making process – including the participation of government representatives in their roles as members of the ICANN community – and its relative transparency or opacity.

In the event that – after genuine consideration of the DIDP Request – ICANN Staff continues to refuse production of any documents, Applicant requests that ICANN Staff be required to follow the DIDP Procedures and provide a compelling reason for nondisclosure beyond citing to the language of the DIDP. This issue cannot be viewed in a vacuum; the broader perspective reveals a serious threat to the integrity of ICANN

procedures should ICANN Staff be permitted to abuse the system and deny access to documents.

Finally, under Article IV, Section 2 of the Bylaws, the Board possesses the ability to review documents and statements from third parties while considering a reconsideration request. Accordingly, Applicant requests that ICANN reach out to any necessary parties, even if ICANN considers them to be a third party, including but not limited to the GAC and the Independent Objector (to the extent ICANN deems the GAC and the Independent Objector to be independent of the ICANN structure), to determine whether any documents responsive to the DIDP Request exist. This would provide a safeguard to ensure the accuracy of ICANN Staff's DIDP Response.

10. Please state specifically the 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.

I. ICANN Staff's Failure to Properly Consider and Respond to Applicant's DIDP Request Harmed Applicant.

As detailed above, ICANN Staff failed to properly consider Applicant's reasonably limited and tailored request for documents relating to the Applications. In doing so, ICANN Staff violated its own Bylaws and Affirmation of Commitments, which emphasize a commitment to open and transparent decision-making. It is clear from the DIDP Response that ICANN Staff has made, at best, a disingenuous effort to discover documentation relating to Applicant's DIDP Request. Even if responsive documents are present, ICANN Staff refuses to provide them. ICANN Staff's refusal to provide Applicant with even a single page of documentation relating to the Applications is without justification or cause. Applicant is unable to evaluate the fairness of ICANN's

decision-making process and is unable to ensure that ICANN complied with its own policies and procedures.

II. The Requested Relief Reverses Most of the Harm.

The requested relief will reverse the harm caused by ICANN Staff's blanket refusal to provide documents in response to Applicant's DIDP Request. If ICANN Staff finishes its review of documents, including documents under ICANN's indirect control, Applicant and the public can be assured ICANN adheres to the DIDP Procedures instead of issuing premature and summary denials. A privilege log and staff explanations for withholding specific documents will allow Applicant and the public to be confident ICANN Staff is not exercising a broad assertion of privilege in order to avoid thorough review. Additionally, these detailed responses will ensure ICANN Staff is not using its DIDP Procedures as a way of obscuring its decision-making process. In the event ICANN Staff determines after thorough review, that no documents should be produced, a detailed and compelling reason for each non-disclosure will be necessary to allow Applicant to evaluate ICANN's commitment to fair, open, and transparent decision-making. Lastly, employing the Board's power to review documents and statements from third parties will alleviate the harm caused by nondisclosure of responsive documents omitted from ICANN's files.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

Do you have any documents you want to provide to ICANN?

1. Applicant DIDP Request 20140523-1
2. ICANN DIDP Response to Request 20140523-1
3. Applicant Request for Reconsideration of NGPC Resolution 2014.05.14.NG03 (without 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.



Signature

July 7, 2014

Date