

## **RECONSIDERATION REVIEW REQUEST: APPEAL OF DENIAL OF INFORMATION**

The GNSO Noncommercial Users Stakeholder Group (NCSG) respectfully submits to the Board Governance Committee (BGC), per Article IV, section 2.3 of the Bylaws of the Internet Corporation of Assigned Names and Numbers (ICANN), this Request for Reconsideration of the staff denial, dated 24 August 2013, of our 24 July 2013 Request for information per ICANN's Documentary Information Disclosure Policy (DIDP).

This Request is made further to ICANN's DIDP guidelines (posted at <http://www.icann.org/en/about/transparency/didp>) which states:

To the extent a requestor chooses to appeal a denial of information from ICANN, the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN Bylaws, which can be found at <http://www.icann.org/en/about/governance/bylaws>.

This Request consists of the following elements, as specified on the website of the Board Governance Committee (BGC) (<http://www.icann.org/en/groups/board/governance/reconsideration>), in effect on the date of staff action.

### **I. Requester Information:**

Noncommercial Users Stakeholder Group (NCSG)  
Ms. Robin Gross, Chair  
IP Justice  
Contact Information  
Redacted

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

Staff action of 24 August 2013 titled 'Response to Documentary Information Disclosure Policy Request'

### **III. Description of specific action we are seeking to have reconsidered:**

Staff decision to release virtually **NO** information in response to the NCSG DIDP request of 24 July 2013.

### **IV. Date of action:**

24 August 2013

**V. Date we became of staff action:**

26 August 2013

**VI. Manner by which we will be affected by the action / Standing:**

The Noncommercial Users Stakeholder Group (NCSG) is the home of civil society and individual noncommercial users within ICANN. Consisting of over three hundred members, both individuals and noncommercial institutions, from over seventy countries, the NCSG is the most international and diverse component of the ICANN governance structure.

Transparency and openness are key components of ICANN's self-identity. These twin virtues are often cited by ICANN, staff and Board, in justifying its continued stewardship of the Internet's domain name system. The NCSG applauds ICANN's public pronouncements in this regard and seeks, through this Request, to help ICANN realize its goals in these areas. A truly open and transparent ICANN is one to which it will be far easier for us to expand our membership base in and will allow us to better serve in our supporting role within ICANN. A closed and opaque ICANN seriously damages our attempt to fulfill our function.

The NCSG is currently engaged in a Cooperative Engagement Process (CEP) with ICANN, as a precursor to filing for an Independent Review, as a continuation of our action resulting in Reconsideration Request 13-3 (<http://www.icann.org/en/groups/board/governance/reconsideration/request-ncsg-19apr13-en.pdf>). The materials requested in our DIDP directly pertain to our CEP effort.

By denying us access to the requested information, ICANN staff is impeding our efforts to truly understand the process by which ICANN reversed its position on the 'exact match' versus 'Trademark + 50 (TM+50)' issue. In restricting our efforts in this regard, the staff action at issue severely decreases the possibility of a successful conclusion of the CEP (proceedings of which have been stayed pending our receipt of the information requested) and increases the likelihood we will have to resort to the expensive and time consuming Independent Review procedure to safeguard the interests of those we represent at ICANN.

**VII. Extent to which others will be adversely affected by the staff action.**

Each and every member of the ICANN community will be adversely affected should the staff predilection for secrecy and nondisclosure be maintained. We note that twelve DIDP requests have been filed since ICANN's new management team was installed on 14 September 2012. These dozen requests did not result in the disclosure of any information that was not either publicly available or already scheduled to be made so. Absent an effective policy of transparency and accountability, the very legitimacy and existence of ICANN itself is at stake.

## VIII. Details of Staff Action

On 24 July 2013 the Noncommercial Users Stakeholder Group filed a DIDP Request seeking a number of documents and information resources pertaining to issues expected to be examined and discussed in its forthcoming CEP with ICANN staff. Documentation was requested relating to fifteen specific items. The request was made under ICANN's Documentary Information Disclosure Policy, which requires staff to "ensure that information contained in ICANN's operational activities is made available to the public unless there is a **compelling** reason for confidentiality."

Staff issued an eleven-page response to our DIDP Request, dated 24 August 2013. Despite the length of the response **there was absolutely no new information released by ICANN as a result of our Request**. We still have absolutely no idea as to why the policy of 'exact match' in the Trademark Clearinghouse was changed, the rationale for the 50 in Trademark +50, knowledge of any correspondence and / or contacts that may have led to the change in question. We are still waiting for answers concerning staff and Board consideration of our Reconsideration Request 13-3, including information concerning the unprecedented action of the BGC in issuing a revised recommendation on the matter. As a result of staff's nondisclosure we still are no closer to answering the questions that prompted the DIDP Request.

We note that we filed a request for documents and other information types not already made public involving fifteen specific items. We were not asking for staff justification of their position, a new study, or help in locating documents already made public on ICANN's website. In fact, in our DIDP Request we specifically stated:

'We would respectfully point out that the information requested, per the DIDP, is that which is not currently 'publicly available'. We are aware of the contents of the ICANN website and do not need any guidance in locating materials on it.'

Instead of the documents we requested, staff proceeded to respond to our DIDP Request by providing us with eleven pages of information we did not ask for. For example:

1. Four pages were included repeating our own DIDP Request and then structuring our Request in a way that allowed staff to not have to respond to each item individually. As a result, we have no way of knowing which clauses of the DIDP Defined Conditions of Nondisclosure apply to each of our fifteen items requested. That makes it very difficult to specifically challenge each denial of information in this Reconsideration Request;
2. Three pages were included consisting of a self-justifying narrative through the TMCH/Strawman situation. Rather than provide us with the documents requested, staff provided us with a chronological journey through publicly available documents along with a narrative that created a false / disputed policymaking reality we already have challenged in

other forums. We were seeking documentation not already made public – the stated purpose for DIDP requests -, not justification for policy made, and was denied the information we requested.

3. Despite specifically stating in our DIDP Request that we neither needed nor wanted guidance in finding information already posted on ICANN's website, staff 'included the relevant links for transparency and ease of location'. In fact, despite our request, staff included thirty-one links to information we were already aware of and that by themselves did not answer our questions. This is not transparency; it is camouflage for a nonresponse.
4. Twenty-three recitations of ICANN's DIDP Defined Conditions of Nondisclosure were included in the response, in which staff refused to provide our members with the information requested. Most of these recitations were made in response to multiple documentation requests thus making it impossible for us to determine which particular clause of the Defined Conditions of Nondisclosure applied to each question.

Staff's refusal to release information seemed almost reflexively defensive. For example, in responding to our request for information concerning interaction between Yahoo and ICANN's staff and board, it was asserted that: 1) the request was too broad for any meaningful response and 2) that responding to the request would not be feasible and would be overly burdensome. Then, despite asserting the request was too broad and that a response was not feasible, staff did respond by stating that six clauses of ICANN's Defined Conditions for Nondisclosure pertained to the request. If a response was actually non-feasible, how could staff respond, an action indicating feasibility, by stating documents would be denied to us under the Defined Conditions for Nondisclosure? The response seems a bit contradictory.

Unless, of course, it can safely be assumed that virtually all DIDP requests result in staff denial under the Defined Conditions of Nondisclosure. That was our experience for all fifteen of our queries and has been ICANN's response, in full or in part, to eighty three per cent of those who have filed a DIDP Request since 14 September 2012.

## **IX. What we are asking the Board to do**

Transparency, openness and accountability are not just philosophies to be adhered to by ICANN when convenient. They are mandatory precepts that the Board and this organization are required to apply wherever and whenever possible. The Bylaws of the Internet Corporation of Assigned Names and Numbers are very clear on this matter:

- Article 1 Section 2 of ICANN's Bylaws require it to 'employ open and transparent policy development mechanisms' (subpart 7), to make 'decisions by applying documented policies neutrally and objectively,

with integrity and fairness' (subpart 8) and to 'remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness'.

- Article 3 Section 1 of ICANN's Bylaws state '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'.

Section 7 of the Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers requires ICANN

- to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

We ask the Board to apply the Documentary Information Disclosure Policy to our DIDP Request of 24 July 2013 in the manner it was intended to operate, that is 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'.

The presumption of ICANN's DIDP policy is and should be that information in ICANN's possession should be made available to the public unless there is a **compelling** reason not to do so. The staff's default response to our requests, and all DIDP requests of current vintage, appear to be to deny the request unless the information has already been, or soon will be, made public on ICANN's website. That is not the stated intention of ICANN policy, is not compliant with ICANN's Bylaws and is not in keeping with ICANN's pledges under the Affirmation of Commitments. The latter is of particular concern.

In asking for the materials requested we are as a group particularly interested in obtaining materials that will provide us with a thorough explanation of ICANN's decision, and change of position, in the 'exact match'/TM+50 matter, including the complete rationale of all components of the decision. We are attempting to discover both the sources of data ICANN relied upon in making its decision and, in fact, the data itself that was relied upon. Our request is, in effect, asking ICANN to honour the commitments it has made to the United States Department of Commerce under the Affirmation of Commitments to make such information public.

There is much in the staff response that is worrisome and that frustrates us in filing this Appeal. The staff decision to not respond to each of our requests individually does not give us much confidence that each request was actually considered. DIDP policy, for example, allows for the release of information eligible for nondisclosure under the Defined Conditions of Nondisclosure if the 'public interest in disclosing the information outweighs the harm that may be caused by such disclosure'. This public interest test needs to be applied to each item requested, not to staff's improper sorting of our individual requests nor, as here, to be addressed simply in a single line at the end of the Response that is seemingly applicable to all fifteen documentary items requested. Public interest deserves a more concerted and transparent application.

THEREFORE, we ask the Board:

1. To review the staff decision to withhold all information requested, to ensure that each and every one of our information requests was considered and evaluated individually, and that the public interest test was applied, as well, to each individual item properly. In doing so it is hoped that the Board will cause to be released the information asked for in our DIDP request of 24 July 2013;
2. In doing so, we ask the Board to recognize and instruct staff that ICANN's default policy is to release all information requested unless there is a **compelling** reason not to do so and, where such a compelling reason for nondisclosure exists, to inform us, as the Requester, of the reason for nondisclosure as it pertains to each individual item requested; and,
3. Insofar as information remains withheld, to inform us, as Requestor as to the specific formula used to justify the position that the public interest does not outweigh the harm disclosure is perceived to cause for said item. Arbitrary withholding of information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3 section 1 of ICANN's Bylaws.

Thank you for your consideration of this request. NCSG stands ready to discuss this matter further at the Board's earliest opportunity.

Respectfully Submitted this 8<sup>th</sup> day of September 2013,

Ms. Robin D. Gross  
Chair, Noncommercial Stakeholders Group