

## Response to Documentary Information Disclosure Policy Request

To: Mr. Flip Petillion, Crowell & Moring LLP

Date: 20 June 2014

Re: Request No. 20140523-1

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Thank you for your Request for Information dated 23 May 2014 (the “Request”), which was submitted through the Internet Corporation for Assigned Names and Numbers’ (ICANN) Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email forwarding this Response.

### Items Requested

In summary, the Request seeks “all documents directly and indirectly relating to (1) the balance of the competing interests of each factor” considered by the New gTLD Program Committee (“NGPC”) in approving Resolution 2014.05.14.NG03, which determined that Amazon EU S.à.r.l.’s (“Amazon”) applications for .AMAZON and the related internationalized domain names in Japanese and Chinese (collectively, the “Amazon Applications”) should not proceed, “and (2) the Governmental Advisory Committee’s (“GAC”) advice in relation to the Amazon Applications.” The Request identifies certain specific categories of documents, including:

1. All communications between individual members of ICANN’s Board and GAC representatives or other government officials acting as GAG representatives directly or indirectly relating to any of the Amazon Applications;
2. All communications between ICANN’s Board and the GAC directly or indirectly relating to any of the Amazon Applications;
3. All communications between individual members of ICANN’s Board and ICANN’s Staff directly or indirectly relating to any of the Amazon Applications;
4. All communications between individual members of ICANN’s Staff directly or indirectly relating to any of the Amazon Applications;
5. All communications between individual members of ICANN’s Board directly or indirectly relating to any of the Amazon Applications;
6. All communications between individual members of ICANN Staff and the Independent Expert M. Jérôme Passa directly or indirectly relating to any of the Amazon Applications;
7. All communications between individual members of ICANN Staff and/or the ICANN Board and the Independent Objector M. Alain Pellet directly or indirectly relating to any of the Amazon Applications;

8. All communications between individual members of ICANN Staff and the Independent Objector M. Alain Pellet directly or indirectly relating to ICANN policies around conflicts of interest and/or M. Pellet's ongoing representation of governments;
9. All GAC deliberations from behind closed doors directly or indirectly relating to any of the Amazon Applications;
10. All GAC communications, including but not limited to a GAC vote on whether or not the GAC could obtain consensus against any of the Amazon Applications during the April 2013 ICANN meeting in Beijing;
11. All GAC communications, including but not limited to the GAC's inability to obtain consensus against any of the Amazon Applications during the April 2013 ICANN Meeting in Beijing;
12. All GAC communications, including but not limited to communications directly or indirectly relating to the decision to hold another vote on the Amazon Applications during the April 2013 ICANN Meeting in Durban;
13. All GAC communications directly or indirectly relating to the decision to make the GAC deliberations during the April 2013 ICANN Meeting in Beijing closed;
14. All GAC communications directly or indirectly relating to the Amazon Applications between the April 2013 ICANN Meeting in Beijing and the July 2013 ICANN Meeting in Durban.

## **Response**

The Request seeks the disclosure of various categories of documents related to NGPC Resolution 2014.05.14.NG03 ("Resolution"), by which the NGPC accepted advice from the GAC and determined that the Amazon Applications should not proceed.

A principal element of ICANN's approach to transparency and information disclosure is the commitment to make publicly available on its website a comprehensive set of materials concerning ICANN's operational activities as a matter of course. As a result, many of the items that are sought from ICANN within the Request are already publicly posted. For transparency and ease of reference, ICANN includes the following relevant links:

On 20 November 2012, the GAC representatives for the governments of Brazil and Peru submitted an Early Warning with respect to the Amazon Applications. (*Available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en>.)

On 12 March 2013, ICANN's Independent Objector ("IO") filed a Community Objection to the Amazon Applications on behalf of the "Amazon Community," i.e., the community of "South-American region with the same English name around the Amazon River." The 27 January 2014 Expert Determination overruling that objection is posted at <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.

On 11 April 2013, in its Beijing Communiqué, the GAC identified the Amazon Applications as warranting further GAC consideration and advised the Board not to proceed beyond Initial Evaluation on the applications. (*Available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.) Amazon's response to that GAC advice is posted at <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on the Amazon Applications. (*Available at* <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.) Amazon's response to that GAC advice is posted at <http://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf>.

On 7 April 2014, the NGPC provided Amazon and the GAC with an independent, third-party report it had commissioned from French Law Professor Jérôme Passa regarding specific issues of law raised by the Amazon Applications. That report is posted at <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>. Amazon's response to the report is posted at <https://www.icann.org/en/system/files/correspondence/hayden-to-crocker-et-al-14apr14-en.pdf>.

The Resolution and accompanying rationale, are posted at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en-/2.b>. The Preliminary Report of the NGPC's 14 May 2014 meeting is available at <https://www.icann.org/resources/board-material/prelim-report-new-gtld-2014-05-14-en>. The minutes of the 14 May 2013 NGPC meeting were approved on 21 June 2013, and will be posted, together with accompanying Briefing Materials, at <https://www.icann.org/resources/pages/meetings-2014-01-06-en>.

On 20 May 2014, Amazon filed a Reconsideration Request, seeking reconsideration of the Resolution. That request, as well accompanying exhibits, are posted online at <https://www.icann.org/resources/pages/14-27-2014-06-03-en>.

Finally, correspondence sent and received by ICANN's Board with respect to the Amazon Applications has been posted as follows:

- 5 March 2013 letter from Stacey King, Sr. Corporate Counsel, Amazon.com to ICANN's Board, President and CEO, and General Counsel, *available at* <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-05mar13-en.pdf>
- 4 July 2013 letter from Stacey King, Sr. Corporate Counsel, Amazon.com to ICANN's Board and President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-04jul13-en.pdf>

- 13 September 2013 letter from Stefanos Tsimikalis to ICANN's Board and President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/tsimikalis-to-crocker-chalaby-13sep13-en.pdf>
- 4 October 2013 letter from Ernesto H. F. Araújo, Chargé d'Affairs for Brazil, to ICANN's President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/araujo-to-chehade-04oct13-en.pdf>
- 3 December 2013 letter from Stacey King, Sr. Corporate Counsel, Amazon.com to ICANN's Board and President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/king-to-chehade-et-al-03dec13-en.pdf>
- 24 December 2013 letter from Fernando Rojas Samané, Vice Minister of Foreign Affairs of Peru, to ICANN's Board *available at* <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-24dec13-en.pdf>
- 10 January 2014 letter from Stacey King, Sr. Corporate Counsel, Amazon.com to ICANN's Board and President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-10jan14-en.pdf>
- 3 March 2014 letter from Fernando Rojas Samané, Vice Minister of Foreign Affairs of Peru, to ICANN's Board and President and CEO, *available at* <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-et-al-03mar14-en.pdf>
- 25 March 2014 letter from Robby Ramlakhan, Secretary General of the Amazon Cooperation Treaty Organization to ICANN's Board, *available at* <https://www.icann.org/en/system/files/correspondence/ramlakhan-to-crocker-25mar14-en.pdf>
- 7 April 2014 letter from Cherine Chalaby, Chair of the NGPC, to Amazon EU S.à.r.l., *available at* <https://www.icann.org/en/system/files/correspondence/chalaby-to-gradden-07apr14-en.pdf>
- 7 April 2014 from ICANN's Board to the GAC, *available at* <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>
- 10 April 2014 letter from Cherine Chalaby, Chair of the NGPC, to Robby Ramlakhan, Secretary General of the Amazon Cooperation Treaty Organization, *available at* <https://www.icann.org/en/system/files/correspondence/chalaby-to-ramlakhan-10apr14-en.pdf>
- 11 April 2014 letter Fernando Rojas Samané, Vice Minister of Foreign Affairs of Peru, to ICANN's Board, *available at* <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-11apr14-en.pdf>
- 14 April 2014 letter from Cherine Chalaby, Chair of the NGPC, to Fernando Rojas Samané, Vice Minister of Foreign Affairs of Peru, *available at* <https://www.icann.org/en/system/files/correspondence/chalaby-to-samanez-14apr14-en.pdf>
- 14 April 2014 letter from the Ministries of External Relations and Science, Technology, and Innovation of Brazil to ICANN's Board, *available at*

<https://www.icann.org/en/system/files/correspondence/filho-almeida-to-crocker-14apr14-en.pdf>

- 14 April 2014 letter from Scott Hayden, Vice President, Intellectual Property, Amazon, to ICANN’s Board, *available at* <https://www.icann.org/en/system/files/correspondence/hayden-to-crocker-et-al-14apr14-en.pdf>

ICANN further responds to your individual requests as follows:

Requests regarding ICANN’s Communications Concerning the Amazon Applications – Items 1, 2, 3, 4, 5

Amazon applied for the Amazon Applications. On 20 November 2012, the GAC representatives for the governments of Brazil and Peru submitted an Early Warning with respect to the Amazon Applications. On 11 April 2013, in its Beijing Communiqué, the GAC identified the Amazon Applications as warranting further GAC consideration and advised the Board not to proceed beyond Initial Evaluation on the applications. On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on the Amazon Applications. On 14 May 2014, the NGPC passed the Resolution, accepting the advice in the GAC’s Durban Communiqué and determining that the Amazon Applications should not proceed.

Items 1, 2, 3, 4, and 5 seek communications between ICANN and the GAC concerning the Amazon Applications, as well as internal ICANN communications concerning the Amazon Applications. These Items do not identify the time period for which responsive documents are sought and are therefore overbroad. Because Amazon submitted its applications on 23 March 2012, ICANN understands the relevant time period as including documents created from 23 March 2012 to the present. These Items are also overbroad and vague insofar as they seek all documents “directly and indirectly” relating to any of the Amazon Applications. So construed, the Items would require ICANN to produce thousands of documents, and would be “excessive or overly burdensome.” (DIDP Policy, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) As is discussed above, the focus of Amazon’s Request as noted in the “Relevant Background” section of the Request is obtaining information relating to the GAC’s Advice on the Amazon Applications and to the Resolution. ICANN therefore interprets Items 1, 2, 3, 4, and 5 as seeking communications concerning the GAC’s Advice in relation to the Amazon Applications. If Amazon chooses to revise its request to more specifically and narrowly describe the documents it seeks, ICANN will consider any such narrowed request.

Subject to the above, ICANN responds that many of the items that are sought from ICANN within the Request are already publicly posted on ICANN’s website. ICANN further responds that given the scope and timing of the Request, ICANN has not completed its review of documents that may be responsive to the Items. Thus far, ICANN’s review of documents that may be responsive to the Items 1, 2, 3, 4, and 5 show that any responsive document that has not already been publicly disclosed on ICANN’s website is not appropriate for disclosure pursuant to the following DIDP Defined Conditions of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; or (iii) complying with which is not feasible.

ICANN continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to any of the DIDP's Defined Conditions for Nondisclosure as soon as practicable.

Requests regarding ICANN's Communications with the Independent Expert M. Jérôme Passa Concerning the Amazon Applications – Item 6

On 5 February 2014, in response to the consensus GAC Advice on the Amazon Applications, the NGPC announced that it was commissioning an “independent, third-party expert to provide additional analysis on the specific issues of application of law at issue, which may focus on legal norms or treaty conventions relied on by Amazon or governments.” (See Annex 1 to NGPC Resolution 2014.02.05.NG01, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-05feb14-en.pdf>.)

ICANN, however, did not directly retain Professor Passa. Professor Passa was retained by ICANN's outside counsel, and ICANN did not have any communications with him regarding the scope of his work or the substance of his conclusions. As a result, ICANN's search for documentary information in response to this Request revealed that no responsive documents exist within ICANN.

Requests regarding ICANN's Communications with the Independent Objector M. Alain Pellet Concerning the Amazon Applications – Items 7 and 8

Under the New gTLD Program, formal objections were permitted to be filed against applications. Specifically, an objection could have been based on four enumerated grounds: string confusion,

legal rights, limited public interest, and community. Module 3 of the New gTLD Applicant Guidebook (“Guidebook”) and the New gTLD Dispute Resolution Procedure (“Procedure”) set forth the procedures and process for filing objections. (See Guidebook, § 3, <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>.) Objections were, and continued to be, administered by independent Dispute Resolution Service Providers (“DRSPs”) in accordance with the Procedure and the applicable DRSP’s Rules. (See Procedure, Art. 1, <http://newgtlds.icann.org/en/applicants/agb>.) Community objections are administered by the International Center of Expertise of the International Chamber of Commerce (“ICC”). (See Guidebook, § 3.2.3.)

The IO was authorized to act in the best interest of global Internet users and to lodge limited public interest and community objections in cases where no other objection has been filed. The IO lodged a community objection against the Amazon Applications on 12 March 2013. An Expert Determination on that objection, finding against the IO, was issued on 27 January 2014.

Item 7 asks for documents constituting communications between ICANN and the IO relating to the Amazon Applications. This item overlaps with Item 8, which seeks documents in ICANN’s possession or control concerning communications between ICANN and the IO concerning ICANN policies around conflicts of interest and/or the IO’s “ongoing representation of governments.”

These Requests do not identify the time period for which responsive documents are sought and are therefore overbroad. Because Amazon submitted its applications on 23 March 2012, ICANN understands the relevant time period as including documents created from 23 March 2012 to present. Item 7 is also overbroad and vague insofar as it seeks all documents “directly and indirectly” relating to any of the Amazon Applications. Because the focus of Amazon’s Request is the IO objection to the Amazon Applications, ICANN interprets Item 7 as seeking communications between the IO and ICANN regarding the Amazon Applications. Item 8 is overbroad and vague insofar as it seeks all documents “indirectly” relating to ICANN policies around conflicts of interest and/or M. Pellet’s ongoing representation of governments. ICANN interprets Item 8 as seeking communications between the IO and ICANN directly relating to those issues. If Amazon chooses to revise its request to more specifically and narrowly describe the documents it seeks, ICANN will consider any such narrowed request.

Further, all communications during an objection proceeding regarding the objection must comply with Article 6 of the Procedure, which provides that the DRSP, Panel, Applicant, and Objector shall provide copies to one another of all correspondence (apart from confidential correspondence between the Panel and the DRSP and among the Panel) regarding the proceedings. (See Procedure, Art. 6(b).) ICANN has the authority, pursuant to Article 10(b) of the Procedure, to monitor the progress of all proceedings and to take steps, where appropriate, to coordinate with DRSPs regarding individual applications for which objections are pending before more than one DRSP. (See *id.* at Art. 10(b).) However, ICANN is not otherwise involved

in the objection proceedings and ICANN generally does not communicate directly with the parties regarding the objection during the course of the proceedings.<sup>1</sup>

As such, unless the parties to the proceedings and/or the DRSP provide ICANN with copies of documents or correspondence submitted during the objection proceedings, ICANN would not be generally be in possession of such documents. In those circumstances where ICANN is copied on documents submitted during the objection proceedings, such documents would also equally be available to the parties to the objection proceedings.

Subject to the above, ICANN responds that given the scope and timing of the Request, ICANN has not completed its review of documents that may be responsive to these Items. Thus far, ICANN's review of documents that may be responsive to the Items 7 and 8 show that any responsive document that has not already been publicly disclosed on ICANN's website is not appropriate for disclosure pursuant to the following DIDP Defined Conditions of Nondisclosure.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; or (iii) complying with which is not feasible.

ICANN continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to any of the DIDP's Defined Conditions for Nondisclosure as soon as practicable.

#### Requests regarding Internal Communications of the GAC Concerning the Amazon Applications - Items 9, 10, 11, 12, 13, and 14

ICANN's 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. A threshold consideration in responding to a DIDP request, then, is whether the documents requested are in ICANN's possession, custody, or control.

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<sup>1</sup> In some circumstances, applicants communicate with ICANN and seek ICANN's involvement in the proceedings. In those circumstances, ICANN informs the applicants that ICANN does not become involved in objection proceedings and directs the applicants to contact the DRSP directly.

Items 9, 10, 11, 12, 13, and 14 all seek the disclosure of “GAC communications” concerning the Amazon Applications. ICANN’s GAC is an advisory committee established pursuant to Article XI, Section 2.1 of ICANN’s Bylaws “to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” Membership in the GAC is open to all national governments and distinct economies recognized in international fora. ICANN does not hold membership in the GAC and does not participate or otherwise get involved in the GAC’s operations or decision-making processes. As such, unless the GAC provided ICANN with copies of documents or correspondence concerning its communications relating to the Amazon Applications, ICANN would not be in possession of such documents. The GAC advice regarding the Amazon Applications, as well as the Early Warning regarding those applications that was submitted by the governments of Brazil and Peru, are both published. All of the materials are already publicly posted and are therefore equally available to Amazon. The links to those materials are included above, in the list of publicly available documents responsive to the Requests.

Furthermore, as noted, the DIDP is intended to ensure that information contained in documents concerning ICANN’s operational activities is made public absent a compelling reason for confidentiality. The internal GAC documents requested in these Items do not constitute “documents concerning ICANN’s operational activities” and are therefore not appropriately subject to the DIDP. (See DIDP Policy, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.)

Subject to the above, ICANN responds that given the scope and timing of the Request, ICANN has not completed its search for documents that may be responsive to these Items. Thus far, ICANN’s search for responsive documents shows that there are no responsive documents in ICANN’s possession, custody, or control. ICANN continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to any of the DIDP’s Defined Conditions for Nondisclosure as soon as practicable.

### **About DIDP**

ICANN’s DIDP is limited to requests for information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, which is contained within the ICANN Accountability & Transparency: Framework and Principles please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request.

We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).