

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-2  
5 JUNE 2018**

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The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (2018 DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

**I. Brief Summary.**

The Requestor submitted a community-based application for .GAY (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail. The Requestor has challenged the CPE Provider's evaluation of its Application in Reconsideration Request 15-21 (Request 15-21), which the Board Governance Committee (BGC) denied,<sup>4</sup> and in Request 16-3, which is pending.<sup>5</sup>

While Request 16-3 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>6</sup> The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each

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<sup>1</sup> Request 18-2, § 3, at Pg. 1-4.

<sup>2</sup> Request 18-2, § 6, at Pg. 6-10.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>4</sup> BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>5</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>7</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>8</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>9</sup>

On 15 January 2018, the Requestor submitted the 2018 DIDP Request. The Requestor sought 21 categories of documents and information relating to the CPE Process Review.<sup>10</sup> On 14 February 2018, ICANN org responded to the 2018 DIDP Request (2018 DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the 2018 DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>11</sup> Additionally, in response to three of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>12</sup>

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<sup>7</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>8</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>9</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>10</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>11</sup> Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>12</sup> *Id.*

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

On 15 March 2018, the Requestor filed the instant Reconsideration Request 18-2 (Request 18-2), which challenges certain portions of the 2018 DIDP Response. The Requestor claims that, in declining to produce certain requested documents responsive to Items No. 1-9, 12-16, and 18-21, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>14</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-2 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>15</sup>

The BAMC has considered Request 18-2 and all relevant materials and recommends that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

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<sup>13</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>14</sup> Request 18-2, § 6, at Pg. 6-10.

<sup>15</sup> ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

## II. Facts.

### A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.<sup>16</sup>

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.<sup>17</sup> The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.<sup>18</sup> The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.<sup>19</sup> At the BGC's direction, the CPE Provider conducted a "Second CPE" of the Application. The Application did not prevail in the Second CPE.<sup>20</sup>

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),<sup>21</sup> and filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).<sup>22</sup> Following ICANN org's response to the 2015 DIDP Request,<sup>23</sup> the Requestor revised Request 15-21 to include a challenge the response to the 2015 DIDP Request in addition to the Second CPE

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<sup>16</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

<sup>17</sup> *See* CPE Report at 1.

<sup>18</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>19</sup> *Id.* at Pg. 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>23</sup> Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

report.<sup>24</sup>

On 1 February 2016, the BGC denied Request 15-21.<sup>25</sup> On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.<sup>26</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>27</sup>

### **B. The CPE Process Review.**

While Request 16-3 was still pending, ICANN's Board directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).<sup>28</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>29</sup> The BGC determined that, in addition to reviewing the process by which ICANN org interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>30</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI

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<sup>24</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>25</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>26</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>27</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>28</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>29</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>30</sup> *Id.*

Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.<sup>31</sup>

On 13 December 2017, ICANN org published the three reports issued in connection with the CPE Process Review.<sup>32</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).<sup>33</sup>

**C. Relevant Prior DIDP Requests from the Requestor Seeking Documents Regarding the CPE Process Review.**

While the CPE Process Review was pending, the Requestor submitted two DIDP Requests seeking documents and information relating to the CPE Process Review.<sup>34</sup> The Requestor subsequently filed two Reconsideration Requests, Requests 17-3 and 17-4, which

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<sup>31</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>32</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>33</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>34</sup> See DIDP Request No. 20170518-1, available at <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

challenged certain portions of ICANN org’s Responses to those two DIDP Requests.<sup>35</sup> The Board denied both Requests 17-3 and 17-4.<sup>36</sup>

**D. The 2018 DIDP Request.**

On 15 January 2018, the Requestor submitted the 2018 DIDP Request, seeking 21 categories of documents.<sup>37</sup> On 14 February 2018, ICANN org responded to the 2018 DIDP Request. ICANN org provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org’s possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions. Notwithstanding the Nondisclosure Conditions, ICANN org “also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”<sup>38</sup> Additionally, ICANN org explained that the documentary information requested in three of the requested categories did not exist.<sup>39</sup>

On 15 March 2018, the Requestor filed Request 18-2, seeking reconsideration of ICANN org’s determination not to produce Items No. 1-9, 12-16, and 18-21, which are discussed in detail below.

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<sup>35</sup> Request 17-3, available at <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>. See also Request 17-4, available at <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>. Request 17-4 was filed in conjunction with DotMusic Limited.

<sup>36</sup> Board Action Regarding Request 17-3, available at <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>; Board Action Regarding Request 17-4, available at <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en#1.a>.

<sup>37</sup> See DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>38</sup> Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>39</sup> Response to DIDP Request No. 20180115-1 at Items 10, 11, and 17.

On 23 March 2018, the Requestor submitted a letter to the BAMC concerning the CPE Process Review.<sup>40</sup> Among other things, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN org should disclose all of the documents requested in the 2018 DIDP Request.<sup>41</sup> The Requestor asserted that if ICANN org did not agree to all of its conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”<sup>42</sup>

On 5 April 2018, the Requestor reiterated that, “[i]n order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” the items it sought in its 23 March 2018 letter, including the documents requested in the 2018 DIDP.<sup>43</sup>

#### **E. Relief Requested.**

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.”<sup>44</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN org complied with established ICANN policies in responding to the DIDP Request, and particularly with respect to Item Nos. 1-9, 12-16, and 18-21; and
2. Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>45</sup>

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<sup>40</sup> 23 March 2018 letter from A. Ali to ICANN Board at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

<sup>41</sup> *Id.* at Pg. 4-5.

<sup>42</sup> *Id.* at Pg. 5.

<sup>43</sup> Attachment 1, 5 April 2018 email from R. Wong to ICANN org.

<sup>44</sup> Request 18-2, § 9, at Pg. 18.

<sup>45</sup> Request 18-2.

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>46</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>47</sup> Where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>48</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>49</sup>

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<sup>46</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

<sup>47</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>48</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>49</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

On 16 April 2018, the BGC determined that Request 18-2 is sufficiently stated and sent Request 18-2 to the Ombudsman for review and consideration.<sup>50</sup> The Ombudsman thereafter recused himself from this matter.<sup>51</sup> Accordingly, the BAMC has reviewed Request 18-2 and all relevant materials, and issues this Recommendation.

## **B. The DIDP.**

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.<sup>52</sup> In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available, is made available to the public unless there is a compelling reason for confidentiality.<sup>53</sup>

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and

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<sup>50</sup> Ombudsman Action Regarding Request 18-2, Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

<sup>51</sup> *Id.*, Pg. 1.

<sup>52</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>53</sup> *Id.*

transparency within ICANN org, which included extensive public comment and community input.<sup>54</sup>

Neither the DIDP nor ICANN org’s Commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org’s possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>55</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>56</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org’s website].”<sup>57</sup>

The Nondisclosure Conditions identify circumstances for which ICANN org’s other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review

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<sup>54</sup> See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; and <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

<sup>55</sup> *Id.*

<sup>56</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>57</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws).

They include, among others:

- i. 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 (Internal Deliberative Process);
- ii. 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 (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and
- vii. 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 (Privilege/Investigation).<sup>58</sup>

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN organization determines, under the

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<sup>58</sup> DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>59</sup>

**V. Analysis and Rationale.**

**A. ICANN org Adhered to Established Policies and Procedures in Responding to the DIDP Request.**

**1. The 2018 DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor asserts that ICANN org should have disclosed the documentary information requested in Items No. 1-9, 12-16, and 18-21 because the Requestor believes that the public interest in disclosing these materials outweighs the potential harm of disclosure.<sup>60</sup> As a preliminary matter, the BAMC notes that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the 2018 DIDP Response. Instead, the Requestor claims that ICANN org is “hiding behind” those Nondisclosure Conditions and, in the Requestor’s view, ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.<sup>61</sup> This represents a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the 2018 DIDP Response and, for the reasons discussed below, concludes that the 2018 DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

In the course of evaluating Request 18-2, ICANN org conducted a review of the documents identified by FTI as part of its review and determined that those documents

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<sup>59</sup> *Id.*

<sup>60</sup> *See* Request 18-2.

<sup>61</sup> *Id.* § 6, at Pg. 10.

responsive to Items No. 1-9, 12-16, and 18-21 that were not already publicly available are subject to Nondisclosure Conditions and that the public interest in disclosure does not outweigh the harm that may be caused by disclosing the information, for the reasons discussed below. In the course of that review, ICANN org also confirmed that most of the documents do not relate to ICANN org's operational activities, and are therefore not appropriate subjects of DIDP requests.<sup>62</sup>

a. The Response to Items No. 1, 2, 4, 5, and 9 Complies with Applicable Policies and Procedures.

Items No. 1, 2, 4, 5, and 9 sought the disclosure of emails relating to the CPE process:

- All “[i]nternal e-mails among relevant ICANN [org] 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 (Item No. 1);
- All “[e]xternal e-mails between relevant ICANN [org] 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 (Item No. 2);
- All “100,701 emails, including attachments, in native format” provided to FTI by ICANN [org] in response to FTI’s request (Item No. 4);
- 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” (Item No. 5); and
- All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff (Item No. 9).<sup>63</sup>

Consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had

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<sup>62</sup> See DIDP.

<sup>63</sup> DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

already been published, and provided hyperlinks to the publicly available documents.<sup>64</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information;
- Drafts; and
- Privilege/Investigation.<sup>65</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>66</sup>

The Requestor does not challenge the applicability of these Nondisclosure Conditions. Indeed, as ICANN org noted in the 2018 DIDP Response, the Requestor *conceded* that the materials FTI relied on in the CPE Process Review reflect “ICANN’s deliberative and decision-making process concerning the CPE process,”<sup>67</sup> and are therefore subject to the first Nondisclosure Condition identified above.

According to the Requestor, because “ICANN [org] has already disclosed [the requested] documents to FTI as part of its review rather than keep them confidential,” ICANN org cannot

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<sup>64</sup> See 2018 DIDP Response, at Pg. 2-11.

<sup>65</sup> 2018 DIDP Response, at Pg. 9-13.

<sup>66</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 9-13.

<sup>67</sup> DIDP Request No. 20180115-1, at Pg. 3.

now justify withholding them from the public.<sup>68</sup> As discussed further in Section V.B.1. below, ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>69</sup> ICANN org explained in the DIDP Response that it sought consent from the CPE Provider to release the information, but as the Requestor recognized in Request 18-2, the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. Nevertheless, the Requestor claims that ICANN org should still be required to produce these documents.<sup>70</sup> But, the Requestor points to no policy, procedure, or other commitment undertaken by ICANN that would require it to breach its contractual obligations to accommodate the Requestor.

The Requestor claims that the “DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential.”<sup>71</sup> This argument completely ignores the fact that the CPE Provider consented to the disclosure of certain materials to FTI—and itself produced the CPE working papers to FTI. By contrast, the CPE Provider has *not* consented to disclosure of – and indeed has threatened litigation if ICANN org were to disclose – the same materials to the public. Accordingly, ICANN org remains bound by its contractual commitment to maintain confidentiality of the materials unless and until the CPE Provider agrees to the release of the

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<sup>68</sup> Request 18-2, § 6, at Pg. 10-11.

<sup>69</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>70</sup> Request 18-2, § 6, at Pg. 10-11.

<sup>71</sup> *Id.* § 6, at Pg. 10.

information. For the reasons discussed in Section V.B.1 below, ICANN org’s policies and procedures do not require ICANN org to breach its contract with the CPE Provider to accommodate the Requestor’s request.

Additionally, because outside counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org, all of the disclosures were privileged (as discussed below) unlike the public disclosure that the Requestor seeks. The Requestor indirectly concedes the applicability of the Attorney-Client Privilege Nondisclosure Condition to ICANN org’s internal emails (Item No. 1) when it argues that “ICANN [org] deliberately chooses to hide behind waivable privileges,” and “ensured that critical items . . . be withheld based on the attorney-client privilege.”<sup>72</sup> Regardless of this concession, the BAMC concludes that ICANN org applied the Nondisclosure Condition consistent with the DIDP when it determined that the attorney-client privilege applied here. As ICANN org explained in the 2018 DIDP Response, ICANN org’s outside counsel—not ICANN org—retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org.<sup>73</sup> Accordingly, FTI’s working materials, including ICANN’s internal emails, are protected by the attorney-client privilege.

b. The Response to Items No. 6-8 and 12-13 Complies with Applicable Policies and Procedures.

Items No. 6-8, 12, and 13 sought the disclosure of the CPE Provider’s work product:

- All draft CPE Reports concerning .GAY, both with and without comments (Item No. 6);

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<sup>72</sup> Request 18-2, § 6, at Pg. 11.

<sup>73</sup> 2018 DIDP Response, at PG. 11, citing FTI’s CPE Process Review Reports, each indicating that they were “Prepared for Jones Day,” ICANN org’s outside counsel; and citing *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013).

- All draft CPE Reports concerning .GAY in redline form, and/or feedback or suggestions given by ICANN [org] to the CPE Provider (Item No. 7);
- All draft CPE Reports reflecting an exchange between ICANN org and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey” (Item No. 8);
- All of the “CPE Provider’s working papers associated with” dotgay’s CPE (Item No. 12); and
- “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets” (Item No. 13).<sup>74</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.<sup>75</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy (Items No. 12 and 13 only);
- Nondisclosure Agreements;
- Drafts; and
- Privilege/Investigation.<sup>76</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>77</sup>

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<sup>74</sup> DIDP Request No. 20180115-1.

<sup>75</sup> See 2018 DIDP Response, at Pg. 16-20.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 13.

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, it is clear that ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

c. The Response to Items No. 3 and 14-16 Complies with Applicable Policies and Procedures.

Items No. 3 and 14-16 sought the disclosure of FTI’s work product in the course of the CPE Process Review:

- The “list of search terms” provided to ICANN org by FTI “to ensure the comprehensive collection of relevant materials” (Item No. 3);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN [org] personnel” (Item No. 14);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel” (Item No. 15); and
- FTI’s investigative plan used during its independent review (Item No. 16).<sup>78</sup>

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.<sup>79</sup> ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Drafts; and

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<sup>78</sup> DIDP Request No. 20180115-1.

<sup>79</sup> See 2018 DIDP Response, at Pg. 14-15.

- Privilege/Investigation.<sup>80</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>81</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

d. The Response to Items No. 18-21 Complies with Applicable Policies and Procedures.

Items No. 18-21 sought the disclosure of correspondence and documents relating to the CPE Process Review and its scope:

- All communications between ICANN org and FTI regarding FTI’s independent review (Item No. 18);
- All communications between ICANN org and the CPE Provider regarding FTI’s independent review (Item No. 19);
- All communications between FTI and the CPE Provider regarding FTI’s independent review (Item No. 20); and
- All documents and communications regarding the scope of FTI’s independent review (Item No. 21).<sup>82</sup>

Consistent with the DIDP Response Process, ICANN org identified documents responsive to Items No. 18-21, determined that certain of the documents responsive to the Items

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.* at Pg. 9-21.

<sup>82</sup> DIDP Request No. 20180115-1.

had already been published, and provided hyperlinks to the publicly available documents.<sup>83</sup>

ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information; and
- Privilege/Investigation (Items No. 18 and 21 only).<sup>84</sup>

Notwithstanding those Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm, as discussed further below.<sup>85</sup>

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

**2. ICANN Org Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**<sup>86</sup>

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>86</sup> Information subject to these Nondisclosure Conditions are not appropriate for

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<sup>83</sup> See 2018 DIDP Response, at Pg. 21-22.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 21.

<sup>86</sup> DIDP.

disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>87</sup> In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in the 2018 DIDP Response.

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in Items No. 1-9, 12-16, and 18-21. Instead, the Requestor asserts that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.<sup>88</sup> According to the Requestor, the public interest in disclosing the requested documents stems from the fact that ICANN is “ask[ing] everyone affected by the [CPE Process Review] Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports.”<sup>89</sup> The Requestor claims that the “clear problem[.]” is that the Dot Registry IRP Panel concluded that there was “a close nexus between ICANN staff and the CPE Provider,” “in clear contrast to FTI.”<sup>90</sup> The Requestor claims that it cannot “analyze whether ICANN unduly influenced the [CPE Provider] without the underlying documents.”<sup>91</sup> The Requestor’s claims do not support reconsideration.

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<sup>87</sup> *Id.*

<sup>88</sup> Request 18-2, § 6, at Pg. 10-11, § 8, at Pg. 17.

<sup>89</sup> *Id.*, § 6, at Pg. 10.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The Board’s decision to initiate the CPE Process Review was in part in response to issues raised in the Dot Registry IRP Panel Declaration.<sup>92</sup> The Dot Registry IRP Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be “intimately involved in the [CPE] process.”<sup>93</sup> At the same time, the Panel emphasized that the Panel was “not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].”<sup>94</sup> In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN org may have interacted with the CPE provider and the CPE reports, and directed ICANN org to undertake the CPE Process Review.<sup>95</sup>

To be sure, the Board did *not* direct that the CPE Process Review come to one conclusion over another and the Requestor has provided no evidence to the contrary. Instead, FTI was retained to assess—and reach its own conclusions concerning—three issues: (1) ICANN org’s interactions with the CPE Provider; (2) the way the CPE Provider applied the CPE criteria; and (3) the research referenced in the CPE Reports placed on hold. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. Accordingly, the Requestor’s belief that the conclusions in the CPE Process Review Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is no more than that—a belief—and it is immaterial. The Requestor provides no evidence to support this claim, because there is none. This baseless belief does not justify requiring ICANN org to permit the Requestor to

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<sup>92</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>93</sup> Dot Registry IRP Panel Declaration, ¶ 93, at Pg. 35, *available at* <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>94</sup> *Id.* ¶ 152, at Pg. 60.

<sup>95</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

conduct its own re-evaluation of the CPE process or of the CPE Process Review Reports, and does not demonstrate that the public interest in disclosing the documents FTI reviewed in the course of the CPE Process Review outweighs the harm that may come from disclosing those documents. This argument does not support reconsideration.

The Requestor next argues that the documents at issue in Request 18-2 “are given even greater import because . . . the CPE Provider has not agreed to disclose the documents and has threatened litigation.”<sup>96</sup> The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure.

The Requestor also argues that ICANN org “failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”<sup>97</sup> This argument fails because ICANN org *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>98</sup> There is no policy or procedure requiring that ICANN org to provide *additional* justification for nondisclosure.<sup>99</sup> Further, ICANN org explained why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. For example, ICANN org explained that the draft CPE reports and FTI’s notes of interviews of CPE Provider personnel reflected the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports and the Personal Information of CPE Provider personnel, two categories

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<sup>96</sup> Request 18-2, § 6, at Pg. 10 (internal quotation marks and citations omitted).

<sup>97</sup> *Id.*, § 6 at Pg. 10-11.

<sup>98</sup> 2018 DIDP Response at Pg. 9-22.

<sup>99</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

of information for which ICANN org is contractually obligated to maintain confidentiality.<sup>100</sup> Accordingly, reconsideration on this basis is not warranted.

Relatedly, the Requestor asserts that rather than state compelling reasons for nondisclosure, ICANN org “deliberately cho[o]ses to hide behind waivable privileges as an excuse to not disclose the documents.”<sup>101</sup> The Requestor claims that because ICANN org’s outside counsel retained FTI, “ICANN [org] 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.”<sup>102</sup>

As an initial matter, the Requestor provides no basis—because there is none—for its unfounded assertions that: (1) ICANN org relied on outside counsel to “ensure[.]” that documents would not be subject to public disclosure “based on the attorney-client privilege loophole,” or (2) the documents in question “could expose both ICANN and the CPE Provider” of some unidentified wrong.

Second, the Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the 2018 DIDP Request.<sup>103</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason not to disclose certain documents.<sup>104</sup>

Third, the Requestor’s desire that ICANN org waive that privilege does not demonstrate that the public interest in disclosure outweighs the harm that may occur if privileged materials

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<sup>100</sup> See 2018 DIDP Response at Pg. 12-17, 20-22. ICANN org also explained why the attorney-client privilege and the Nondisclosure Condition protecting documents whose disclosure might prejudice an internal investigation applied to certain of the items requested. *Id.* at Pg. 11-12.

<sup>101</sup> Request 18-2, § 6, at Pg. 11.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> DIDP Nondisclosure Conditions.

are disclosed. Weakening the attorney-client privilege by forcing a client—here, ICANN org—to waive that privilege at the request of a third party like the Requestor poses a significant threat to ICANN org’s ability to trust that its future communications with counsel will be protected, and therefore undermines ICANN org’s ability to communicate candidly with counsel.<sup>105</sup> This potential harm outweighs the public interest in disclosing privileged materials. The BAMC notes that it is a fundamental principle of law that the invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. The BAMC therefore rejects the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide. Accordingly, reconsideration is not warranted on these grounds.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>106</sup> Initially, the Requestor is incorrect in its assertion that ICANN org determined that applicants would not be interviewed or submit materials in the course of the CPE Process Review. FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports.<sup>107</sup> FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the

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<sup>105</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

<sup>106</sup> Request 18-2, § 6, at Pg. 11.

<sup>107</sup> See, e.g. Scope 2 Report, at Pg. 3-9, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

investigation because neither the Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants.<sup>108</sup> Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.<sup>109</sup> Despite that conclusion, FTI ensured that it understood the concerns applicants raised in reconsideration requests and IRP proceedings concerning the CPE process.<sup>110</sup> The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, the Requestor has not demonstrated that FTI’s decision not to interview or accept materials submitted by CPE applicants supports the public interest in disclosing the documents that FTI did consider in the course of the CPE Process Review. Reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to its Commitments and Core Values in Responding to the 2018 DIDP Request.**

**1. ICANN Org Adhered to its Commitments to Accountability, Openness, and Transparency in Responding to the 2018 DIDP Request.**

The Requestor asserts that ICANN org’s determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to “operate to the maximum extent feasible in an open and transparent manner,”<sup>111</sup> “apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for

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<sup>108</sup> *Id.* at Pg. 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at Pg. 8.

<sup>111</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

discriminatory treatment,”<sup>112</sup> and “[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>113</sup>

As a preliminary matter, the BAMC notes that the DIDP was developed as the result of an independent review of standards of accountability and transparency, which included extensive public comment and community input. The DIDP—and particularly the Nondisclosure Conditions—balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.<sup>114</sup> This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.<sup>115</sup>

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy

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<sup>112</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(v).

<sup>113</sup> *Id.*, Art. 1, § 1.2(a)(vi); Request 18-2, § 6, at Pg. 9-10. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-2. See Request 18-2, § 6, at Pg. 9. The BAMC considers Request 18-2 under the Bylaws in effect when the Requestors submitted the reconsideration request which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>114</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>115</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.”<sup>116</sup>

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence<sup>117</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”<sup>118</sup> Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.”<sup>119</sup> The materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (i.e., its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees’ personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>120</sup>

Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain

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<sup>116</sup> ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c).

<sup>117</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>118</sup> New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>119</sup> <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>120</sup> See, e.g., Response to Request 20150312-1 at Pg. 2, available at <https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN org's contract with the CPE Provider.<sup>121</sup> Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency, openness, and accountability do not support reconsideration here.

Additionally, the Requestor asserts that part of ICANN org's response to Item No. 3, in which ICANN org noted that the Scope 1 Report "includes the information responsive to" Item No. 3.<sup>122</sup> The 2018 DIDP Response explained that

the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN org with a list of search terms and requested that ICANN org deliver to FTI all email (including attachments) from relevant ICANN org personnel that 'hit' on a search term. The search terms were [designed] to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN org and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website."<sup>123</sup>

The Requestor claims that this is "the exact same language" that the Requestor used in Item No. 3, which sought "[t]he 'list of search terms' provided to ICANN by FTI 'to ensure the

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<sup>121</sup> See DIDP (Nondisclosure Condition for "[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement").

<sup>122</sup> 2018 DIDP Response, at Pg. 13.

<sup>123</sup> *Id.* at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

comprehensive collection of relevant materials,”<sup>124</sup> and “an obvious attempt to side-step the disclosure of any responsive documents.”<sup>125</sup>

ICANN org’s response did more than repeat the language in Item No. 3. First, as quoted above, ICANN org noted that the Scope 1 Report had explained that the search terms “included the names of ICANN org and CPE Provider personnel who were involved in the CPE process,” along with “words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website.”<sup>126</sup> Additionally, ICANN org explained that “documents responsive to Item [No.] 3” were not appropriate for disclosure because they were subject to certain Nondisclosure Conditions, and ICANN org determined that the public interest in disclosing documents reflecting the search terms did not outweigh the harm that may be caused by such disclosure.<sup>127</sup> For the reasons explained above, ICANN org’s determination concerning the disclosure of such documents was consistent with established policy and ICANN org’s commitments and core values. Accordingly, this argument does not support reconsideration.

## **2. ICANN Org Adhered to its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the 2018 DIDP Request.**

The Requestor asserts that “[p]ursuant to [international] laws and conventions, there is an ‘international minimum standard of due process as fairness-based on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”<sup>128</sup> The Requestor argues that the CPE Process Review did

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<sup>124</sup> 2018 DIDP Request.

<sup>125</sup> Request 18-2, § 6, at Pg. 9.

<sup>126</sup> 2018 DIDP Response at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

<sup>127</sup> *Id.* at Pg. 14, 22.

<sup>128</sup> Request 18-2, § 6, at Pg. 8 (quoting 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))

not provide due process to the Requestor because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available.”<sup>129</sup>

The BAMC recognizes ICANN org’s commitment to conform with relevant principles of international law and conventions.<sup>130</sup> Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>131</sup> ICANN org established the DIDP in support of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org’s general commitment to conform with relevant principles of international law. ICANN org was not required to establish a DIDP, but instead did so voluntarily. Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.<sup>132</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the

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and 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>129</sup> *Id.*

<sup>130</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>131</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

<sup>132</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor.<sup>133</sup>

The Requestor’s conclusory statement that because it did not have access to every document underlying the CPE Process Review Reports, the Requestor has been deprived of due process, does not support reconsideration. The Requestor asserts—based entirely on speculation—that the CPE Process Review Reports are “the one piece of significant evidence relevant to its Request 16-3.”<sup>134</sup> The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-3.

Further, when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>135</sup> The Board noted that the Requestor’s arguments and challenges to the merits of the report issued by the CPE Provider in connection with its community application for the .GAY gTLD will be addressed in connection with Request 16-3,<sup>136</sup> and, additionally the BAMC is required to act “on the basis of the public written record, including information submitted by the Requestor.”<sup>137</sup> Accordingly, there is no basis for the Requestor’s assumption that the CPE Process Review Reports are “the one piece of significant evidence relevant to . . . Request 16-3,” particularly in light of the volume of materials

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<sup>133</sup> For the same reasons, the Board was not required to “seek . . . input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation,” or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. See 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>134</sup> Request 18-2, § 6, at Pg. 8.

<sup>135</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>136</sup> See *id.*

<sup>137</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(p).

submitted by the Requestor in support of Request 16-3.<sup>138</sup> This argument does not support reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

## **VI. Recommendation.**

The BAMC has considered the merits of Request 18-2, and, based on the foregoing, concludes that ICANN org did not violate ICANN’s Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the 2018 DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 18-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical, in which case, the BAMC “shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request.”<sup>139</sup> Request 18-2 was submitted on 15 March 2018. To satisfy the thirty-day target deadline, the BAMC would have to have acted by 14 April 2018. Due to scheduling, the first opportunity that the BAMC has to consider Request 18-2 is 5 June 2018, which is within 90 days of receiving Request 18-2.<sup>140</sup>

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<sup>138</sup> Request 18-2, § 6, at Pg. 8.

<sup>139</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

<sup>140</sup> *Id.*