DETERMINATION

OF THE BOARD OF GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-11

29 OCTOBER 2013

On 8 September 2013, the Noncommercial Users Stakeholders Group ("NCSG") submitted a reconsideration request ("Request"). The Request asks the Board to reconsider the ICANN staff's "Response to Documentary Information Disclosure Policy Request" ("DIDP Response") provided in response to a request from the NCSG under ICANN's Documentary Information Disclosure Policy ("DIDP") ("DIDP Request"). The NCSG's DIDP Request sought the disclosure of documents regarding the "Strawman Solution" for the Trademark Clearinghouse, as well documents relating to the NCSG's Reconsideration Request 13-3[1]. The NCSG seeks reconsideration of the scope of information provided with the DIDP Response. The BGC considered Request 13-11 at its 29 October 2013 meeting and concluded that the NCSG has not stated proper grounds for reconsideration and that the Request shall be denied.

I. Relevant Bylaws

Article IV, Section 2.2 of ICANN's Bylaws states 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:

> (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

[1] For documents relating to Reconsideration Request 13-3, *see* http://www.icann.org/en/groups/board/governance/reconsideration.

> (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
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> (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Dismissal of a reconsideration request concerning a staff action or inaction is appropriate if the Board Governance Committee ("BGC") concludes, and the Board or the New gTLD Program Committee ("NGPC") agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. Instead, the reconsideration process is for situations where the staff acted, or failed to act, in contravention of established ICANN policies, or where the Board acted, or failed to act, without considering available, material information.

The Request was received on 8 September 2013, which makes it timely. (Bylaws, Art. IV, § 2.5.)

II. Background

A. ICANN's Documentary Information Disclosure Policy

The DIDP was developed as a part of the Accountability and Transparency Frameworks and Principles ("AT Frameworks") to help enhance ICANN's accountability and transparency. The development of the AT Frameworks, including the DIDP, was the

result of extensive consultation with the ICANN community and multiple public comment periods spanning from late 2006 to February 2008. The ICANN Board approved the AT Frameworks on 15 February 2008.

The DIDP provides that "information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control" at the time the DIDP request is made, will be made available to the public unless there is a compelling reason for confidentiality. (*See* http://www.icann.org/en/about/transparency/didp.) The DIDP already identifies in the "Defined Conditions of Nondisclosure" certain categories of information for which there are compelling reasons for confidentiality. Some of those Defined Conditions of Nondisclosure are:

- Information exchanged with a government or international organization with expectation that the information will be kept confidential and/or likely would materially prejudice ICANN's relationship with that party.
- Information that, if disclosed, would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications.
- Information provided to ICANN by a party that, if disclosed, would be likely to materially prejudice the commercial or financial interests, or competitive position of such party.
- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege.
- Drafts of all documents or any other forms of communication.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN.
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv)

> are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

(*Id.*)[2]

The DIDP is an accountability and transparency mechanism established for the benefit of the community, and not as a discovery mechanism for the benefit of any single person or entity. As noted on the DIDP website, "[a] principal element of ICANN's approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN makes available on its website as a matter of course." (*Id.*) After ICANN issues a DIDP response, both the request and response are publicly posted at http://www.icann.org/en/about/transparency/didp.

B. The NCSG's DIDP Request

The NCSG's DIDP Request seeks the disclosure of documents relating to: (i) the development of the Trademark Clearinghouse Strawman Solution; (ii) Reconsideration Request 13-3; and (iii) ICANN's communications with the United States Congress, as well as Yahoo! Representatives between May 2012 to the present. The DIDP Request contains fifteen subparts. The breadth and wording of the DIDP Request appears to be written in the style often used by U.S. litigators seeking requests for documents in pending court cases. In nearly all subparts, the NCSG seeks all "documents, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in its possession, in any

[2] As provided in the DIDP, "[i]nformation that falls within any of the [Defined Conditions for Nondisclosure] may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information." (See http://www.icann.org/en/about/transparency/didp.)

and all formats, form and media" for each identified topic area. (*See* DIDP Request.)

Many of the subparts are overlapping in subject matter, interrelated, and expressly call for information subject to Defined Conditions for Nondisclosure. For example, Item No. 1 seeks "**[a]ll** documentation . . . **concerning and/or leading to** the staff action . . . announced in the 20 March 2013 staff memo titled *Trademark Claims Protection for Previously Abused Names*" (bold emphasis added), while Item No. 2 ("[a]ll documentation…leading to adoption of staff recommendation of the so-called 'Trademark +50' . . .") and No. 6 ("[a]ll documentation...concerning staff memo of 29 November 2012, and the 3 December 2013 update, titled 'Trademark Clearinghouse: Strawman Solution'" . . .) are just more specific requests for information already encompassed in Item No. 1.

As discussed in more detail below, ICANN staff conducted a full and thorough review of each item requested by the NCSG. On 24 August 2013, ICANN issued the DIDP Response.

III. Analysis of the NCSG's Request for Reconsideration

In Reconsideration Request 13-11, the NCSG requests that the Board take the following action: (1) review the staff decision to withhold the information requested "to ensure that each…request was considered and evaluated individually, and that the public test was applied, as to each individual item properly"; (2) "recognize and instruct staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so", and to inform the NCSG of the reason for nondisclosure as it pertains to each item request where a compelling reason exists; and (3) to inform the NCSG of "the specific formula used to justify" nondisclosure. (Request, Page 6.)

A. Grouping Responses To The NCSG's DIDP Request Does Not Demonstrate A Policy Or Process Violation

The Reconsideration Request at issue is based primarily on a claim that staff did not apply the proper standard of review in considering the NCSG's DIDP Request. Specifically, the NCSG suggests that staff failed to: (i) apply the presumption that documents should be made available to the public absent a compelling reason for confidentiality; and (ii) comply with the core values under the Bylaws, Article I, Section 2, Subsections 7 and 8 and Section 7 of the Affirmation of Commitments. (Request, Pgs. 3-5.) To support this notion, the NCSG cites to the fact that ICANN responded to the fifteen requested items by subject matter groups, instead of addressing each item separately. The NCSG does not, however, identify any policy or procedure that obligates ICANN to address each request on piecemeal basis or that prohibits ICANN from responding to a DIDP request by aggregating similar items.

As discussed above, the DIDP was created for the benefit of the community by allowing members of the public to request the disclosure of information regarding ICANN's operational activities that are not already publicly available, absent a compelling reason for confidentiality. Neither the DIDP, nor any other policy or procedure within ICANN, dictates the structure of a DIDP response.

The NCSG's DIDP Request is comprised of fifteen often overlapping subparts. In preparing the DIDP Response, ICANN considered each subpart individually, performed a three week long search across the company for responsive documentary information, and conducted over thirty hours of review of hundreds of documents collected. It was only after that exhaustive exercise that the groupings identified in the

DIDP Response were created, as the same documents and the Defined Conditions for Nondisclosure applied across the identified grouping.

The DIDP Response itself included a clear rationale for why each of the groupings was created. (*See* DIDP Response, Pgs. 4-11.) Further, where possible and practical ICANN provided item-by-item responses, such as those on Item Nos. 9, 10, 11, 12, and 15 (regarding Reconsideration Request 13-3), for which ICANN was able to provide specific links for each of the Items as well as identify some Item-specific Defined Conditions for Nondisclosure. (*See, e.g.*, Response to Items 9, 10, 11, 12, and 15, Pgs. 8-9.)

The NCSG alleges that by grouping the items into subject matter categories, ICANN did not consider each request individually. This claim is contradicted by the DIDP Response:

> For all of the Items within the Request, as ICANN reviewed documentary information in accordance with the DIDP, ICANN evaluated whether the public interest in disclosing any information that is not already publicly available would outweigh the harm caused by such disclosure.

(DIDP Response, Pg. 11.) As stated, ICANN identified and addressed each requested item in the DIDP Response.

The NCSG further asserts that it is unable to determine the Defined Conditions for Nondisclosure applicable to each item as a result of the grouping. But the NCSG does not identify any established policy or process that requires ICANN to identify the Defined Conditions for Nondisclosure on a piecemeal basis.[3] Along with the subject

[3] Indeed, the broad scope of the types of documents that the NCSG requested in nearly each item (all "documents, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in its possession, in any and all formats, form and media") could, on their face, render each of those items subject to Defined Conditions for Nondisclosure such as those regarding the release of drafts and internal

matter grouping, the DIDP Response identified each Defined Conditions for Nondisclosure applicable to the corresponding grouping. ICANN did not, as the NCSG suggests, provide a laundry list of Defined Conditions for Nondisclosure without any regard for subject matter or applicability. The DIDP Request shows that ICANN staff tailored the identification of each Defined Conditions for Nondisclosure to only those applicable (and supporting the compelling reason for withholding) to the relevant grouping.

In sum, the NCSG fails to state proper grounds for reconsideration because it has not identified a policy or process that has been violated or contradicted by the methodology that staff utilized in responding to the DIDP Request. Moreover, contrary to the NCSG's suggestion, the practice of grouping requests together by subject matter or some other logical sequence has long been a part of ICANN's practice in responding to other DIDP request DIDP process.[4] While the NCSG may disagree with the practice of grouping responses, Reconsideration is not a mechanism to challenge a methodology simply because the Requester disagrees with it, when such methodology is not in violation or contravention of any established policy or procedure.

B. ICANN Including Links To Publicly Available Information In The DIDP Response Does Not Support Reconsideration

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documents, as well as other types of documents. The NCSG's suggestion that a more meaningful response would have issued if each of the items were handled separately is not supported and does not demonstrate any violation of an ICANN policy or process.

[4] *See, e.g.,* Response to Requests 20130422-1 (combining a response to two items), 20130328-1 (addressing all five subparts to a request in a combined fashion), 20120403-1 (responding in the aggregate to five specific subparts identified in support of a general request), 20110916-1 (responding to six inquiries regarding the IDN Fast Track in a combined fashion), and 20110820-1 (addressing four requested items in a unified manner), available at http://www.icann.org/en/about/transparency. No other party has challenged the form of ICANN's DIDP response.

In its Reconsideration Request, the NCSG contends that the DIDP Response "included thirty-one links to information [the NCSG was] already aware of and that by themselves did not answer [the NCSG's] questions." (Request, Pg. 4.) The NCSG claims that ICANN's use of links in the DIDP Response to information publicly available on ICANN's website is "camouflage for a nonresponse" and is therefore, an abuse of process. (*Id.*) The NCSG's conclusions in these respects are not accurate and do not support Reconsideration.

ICANN's use of links to publicly available information is not unique to this DIDP Response. ICANN routinely includes links to publicly available information within its responses to DIDP requests. The DIDP is intended to be a tool for the community as a whole. Aside from the utility of the links for the requestor, those who may not be as familiar with the subject matter of the request may also benefit from the information referenced in DIDP responses (posted at http://www.icann.org/en/about/transparency).

Because the links included in the DIDP Response are relevant and responsive to the information requested by the NCSG, ICANN's use of links to publicly available information does not constitute a policy or process violation that supports Reconsideration.

C. Withholding Information Subject To Defined Conditions For Nondisclosure Does Not Demonstrate A Process Or Policy Violation

The NCSG contends that ICANN's decision to withhold information subject to the Defined Conditions for Nondisclosure violates the mandate of the DIDP to make information publicly available absent a compelling reason for confidentiality, and violates Article 1, Section 2, Subsections 7 and 8 of the Bylaws and Section 7 of the

Affirmation of Commitments ("AoC").[5] (Request, Pgs. 3-5.) The NCSG claims that "staff's default response to our request, and all DIDP requests of current vintage, appear to be to deny the request unless the information has already been, or soon will be, made public on ICANN's website." (*Id.* at Pg. 5.)

In developing the DIDP, ICANN already identified in the Defined Conditions of Nondisclosure certain categories of information for which there are compelling reasons for confidentiality. Information requested by the NCSG – such as internal drafts, discussion documents and attorney-client privileged documents – are clearly among the types of documentation that carries a presumption of confidentiality under the DIDP. The fact that the DIDP Request seeks such information does not make the justifications supporting the Defined Conditions for Nondisclosure any less compelling.

Moreover, ICANN's decision not to draft the DIDP Response in a manner that applied the public interest balancing on an item-by-item basis – particularly where the DIDP Response indicates that established Defined Conditions for Nondisclosure were identified to support the nondisclosure – does not demonstrate a policy or process violation. The DIDP Response indicates that the balancing test was applied.

We agree with the NCSG that, for information that falls outside the Defined Conditions for Nondisclosure, the default position is, and should remain, that all documents are made public unless there is a compelling reason to withhold. We also agree with the NCSG that ICANN is required to apply a balancing test to weigh the

[5] The NCSG's reference to the Affirmation of Commitments is used to support their request for policy documentation, as it is their position that the inclusion of the Trademark + 50 into the Strawman Solution was a policy action. There is no indication, however, that the AoC has been violated through the DIDP Response. Moreover, the BGC already recommended, and the NGPC accepted the recommendation, that the inclusion of the Trademark + 50 was ***not*** a policy decision undertaken by ICANN staff.

public's interest in the information requested against the potential harm resulting from the release of the information. Upon review of the DIDP Response, there is no indication that ICANN violated any obligations to be open and transparent.[6]

IV. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that the NCSG has not stated proper grounds for reconsideration and is, therefore, denied without further consideration. As there is no indication that ICANN violated any policy or process in issuing its DIDP Response, this Request should not proceed.

The BGC does recognize that the DIDP is an important aspect of ICANN's accountability and transparency, including the fact that ICANN's default position should be to release all information requested unless there is a compelling reason not to do so. The BGC notes that as a follow up to the NCSG's Request, staff has prepared and posted a process document on the DIDP website, at http://www.icann.org/en/about/transparency, explaining the steps that are undertaken in evaluating and responding to all DIDP requests.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-11 shall be final and does not require Board consideration. Article IV, Section 2, Paragraph 15 of the Bylaws provides that the BGC is delegated

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[6] The NCSG also suggests that ICANN's response to Item 14 (all ICANN staff or Board correspondence with Yahoo! Representatives from 1 May 2012 to present) somehow demonstrates that ICANN failed to follow the DIDP process. The NCSG states that it is "a bit contradictory" that ICANN could identify that the Item requested was too broad for meaningful response while still being able to identify applicable Defined Conditions for Nondisclosure. We think this demonstrates compliance with the DIDP in that: (1) ICANN endeavored to identify information responsive to this request; (2) the results of such a review proved to be far too broad; and (3) there were documents identified in the search that were subject to the identified Defined Conditions for Nondisclosure. The NCSG's claims of "contradictory" responses are not supported and do not support Reconsideration here.

with authority by the Board to make a final determination and recommendation for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final and establishes precedential value. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-11 seeks reconsideration of action or inaction taken by staff on the DIDP Response. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.