

## Response to Documentary Information Disclosure Policy Request

To: fTLD Registry Services, LLC

Date: 16 October 2014

Re: Request No. 20140917-1

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Thank you for your Request for Information dated 17 September 2014 (the “Request”), which was submitted through the Internet Corporation for Assigned Names and Numbers’ (“ICANN’s”) Documentary Information Disclosure Policy (“DIDP”). For reference, a copy of your Request is attached to the email forwarding this Response.

### **Items Requested:**

Your Request seeks the following:

fTLD requests that ICANN produce a copy of any communications or written agreement between ICANN and Donuts relating to extending the period for Donuts to engage in the CEP or to file an IRP, including the terms of any such extension.

### **Response**

The Cooperative Engagement Process (“CEP”) was incorporated into ICANN’s Independent Review Process (IRP) in April 2013, after public comments on both the work of the Accountability Structures Expert Panel, which recommended the inclusion of the CEP into the IRP, as well as the Bylaws anticipated to give effect to their work. Part of that work identified that a CEP would be a valuable tool to encourage ICANN and the parties challenging a Board action to come together and try to clarify, limit, and potentially remove issues that might be initiated as part of an IRP. Allowing for clarification, limitation and/or potential removal of issues is anticipated to result in narrower IRPs<sup>1</sup>, which in turn is anticipated to require fewer resources for all involved in the proceedings.

Article IV, Section 3 of ICANN’s Bylaws require that “[a]ll matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.” (<https://www.icann.org/resources/pages/bylaws-2012-02-25-en-IV>). The items requested through this DIDP fall squarely within this Bylaws limitation. In line with the Bylaws, communications between ICANN and a party engaging in CEP are not appropriate for public disclosure through the DIDP.

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<sup>1</sup> The status of current CEP and IRP matters is available at <https://www.icann.org/resources/pages/irp-2012-02-25-en>.

In addition to the Bylaws limitation, the following Defined Conditions of Nondisclosure (“Nondisclosure Conditions”) set forth in the DIDP apply:

- 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.
- Confidential business information and/or internal policies and procedures.

Although your analysis in the Request concluded that no Nondisclosure Conditions should apply, ICANN must independently undertake the analysis of each Condition (and here, other external obligations including the Bylaws) as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply. Here, the requirements set forth in ICANN’s Bylaws clearly place the requested communications as items that are not appropriate for public disclosure, and the Nondisclosure Conditions are in line with this requirement. Since both a Bylaws provision and Nondisclosure Conditions apply, ICANN also must evaluate whether the public’s interest in disclosure of the requested communications outweighs the harm that may be caused to ICANN through its release. Here, the release of these communications would violate ICANN’s Bylaws, which is detrimental to the public interest. Furthermore, a release of information where the parties were participating under an Bylaws-granted expectation of confidentiality, would jeopardize the confidentiality promised to and expected by participants in the CEP process, and have a significant operational impact, which is not outweighed by the public’s interest in disclosure.

ICANN notes that the Enhancing ICANN Accountability and Governance review that is starting may be a place for the Requesters to identify concerns relating to the design of accountability processes, such as the IRP and the confidentiality requirements surrounding the CEP process.

### **About DIDP**

ICANN’s DIDP is limited to requests for information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <https://www.icann.org/resources/pages/didp-2012-02-25-en>. ICANN makes every effort to be as responsive as possible to the entirety of your Request.

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