

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-8
28 AUGUST 2018**

The Requestor, Afilias Domains No. 3 Ltd. (Afilias), seeks reconsideration of ICANN organization's response to the Requestor's request for documents, pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the .WEB contention set.¹ Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Core Values and commitments established in the Bylaws concerning transparency and openness.²

I. Brief Summary.

The Requestor submitted an application for the .WEB generic top-level domain (gTLD), which was placed in a contention set with other .WEB applications. The Requestor was invited to, and did, participate in an auction to secure the right to operate the .WEB gTLD. The Requestor did not prevail at the auction; another applicant, Nu Dot Co, LLC (NDC), placed the prevailing bid.

On 23 February 2018, the Requestor submitted a DIDP Request to ICANN org requesting documents related to the .WEB contention set (First DIDP Request).³ ICANN org responded on 24 March 2018 (First DIDP Response).

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org's responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a Reply to the First DIDP Response, in which

¹ Reconsideration Request 18-8, § 3, at Pgs. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-8-afiliias-request-redacted-22jun18-en.pdf>.

² *Id.*, § 6, at Pgs. 6-11.

³ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

it revised Items 1, 4, 5, 6(a-b), and 9(a). With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP request (Second DIDP Request), with an effective submission date of 23 April 2018. On 23 May 2018, ICANN organization responded to the Second DIDP Request in accordance with the DIDP Process (Second DIDP Response).

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) summarily dismissed Reconsideration Request 18-7.⁴

On 22 June 2018, the Requestor submitted Reconsideration Request 18-8 (Request 18-8). The Requestor claims that ICANN org's application of certain Defined Conditions for Nondisclosure (Nondisclosure Conditions) in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org's commitment under the Bylaws to operate with transparency and openness.⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.⁶

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Request 18-8 because ICANN org adhered to established policies and procedures in its Second DIDP Response; and ICANN org did not violate its commitments established in the Bylaws concerning transparency and openness.

⁴ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afilias-bamc-determination-request-05jun18-en.pdf>.

⁵ Reconsideration Request 18-8, § 6.1, at Pg. 7.

⁶ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afilias-ombudsman-action-20jul18-en.pdf>.

II. Facts.

A. Background Facts.

1. The New gTLD Program and String Contention

In 2012, ICANN org opened the application window for the New gTLD Program and created the new gTLD microsite,⁷ which provides detailed information about the Program. ICANN org received seven applications for the .WEB string, including an application from the Requestor (Application), which were placed into a contention set together with one application for the .WEBS string.⁸ Module 4 of the Guidebook describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving such contention sets, including through community priority evaluation or through voluntary agreement among the involved applicants.⁹

Should resolution not occur through these processes, the contention set will proceed to an ICANN facilitated auction of last resort.¹⁰ The auction procedures are set forth in the Guidebook, and were developed with extensive community consultation.¹¹ Additionally, the auction is governed by the Auction Rules that were developed with community consultation via the public comment processes for both direct and indirect contention set auctions.¹² As part of ICANN's commitment to transparency, ICANN org established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process.¹³

⁷ <https://newgtlds.icann.org/en/>.

⁸ See Applicant Guidebook (Guidebook), §1.1.2.10 (String Contention); see also <https://gtldresult.icann.org/applicationstatus/applicationdetails/292>; <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

⁹ Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).

¹⁰ See *id.*

¹¹ See *id.* at § 4.3.1.

¹² See Auctions webpage, at News Archive section, WEB string, <https://newgtlds.icann.org/en/applicants/auctions>.

¹³ <https://newgtlds.icann.org/en/applicants/auctions>.

2. Resolution of .WEB/.WEBS Contention Set

Following the procedures set forth in the Guidebook, ICANN org first scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction).¹⁴ On or about 22 June 2016, Ruby Glen LLC (Ruby Glen), one of the applicants for the .WEB string, asserted that changes had occurred in NU DOT CO LLC's (NDC's) application for .WEB. In particular, Ruby Glen claimed that changes had occurred to NDC's management and ownership, and that the Auction should be postponed pending further investigation.¹⁵

ICANN org investigated Ruby Glen's allegations. After completing its investigation, ICANN org sent a letter to all of the members of the .WEB/.WEBS contention set stating, among other things, that "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the [A]uction."¹⁶

Ruby Glen then invoked one of ICANN org's accountability mechanisms by submitting a reconsideration request on an urgent basis (Reconsideration Request 16-9), seeking postponement of the Auction and requesting a more detailed investigation.¹⁷ After carefully considering the information related to Reconsideration Request 16-9, ICANN's Board Governance Committee (BGC) denied Reconsideration Request 16-9 on 21 July 2016.¹⁸

The next day Ruby Glen filed a lawsuit against ICANN¹⁹ and, at the same time applied for a temporary restraining order (TRO Application) seeking to stop ICANN org from

¹⁴ See <https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf>.

¹⁵ See <https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amended-complaint-26oct16-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members13jul16-en.pdf>.

¹⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-requestredacted-17jul16-en.pdf>.

¹⁸ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glenradix-bgc-determination-21jul16-en.pdf>.

¹⁹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf>.

conducting the Auction on the scheduled date.²⁰ The Court denied the TRO Application²¹ and the Auction took place on 27 and 28 July 2016. NDC secured the winning bid.²²

On 28 November 2016, the Court dismissed Ruby Glen's complaint and entered judgment in ICANN organization's favor.²³ Ruby Glen appealed that decision, and the appeal is currently pending.²⁴

3. The Requestor's DIDP Requests

On 23 February 2018, the Requestor submitted the First DIDP Request to ICANN organization requesting the following ten categories of documents related to the .WEB contention set.²⁵

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
 - a. The .WEB contention set,
 - b. NDC's application for the .WEB gTLD,
 - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
 - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;

²⁰ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parteapplication-tro-memo-points-authorities-22jul16-en.pdf>.

²¹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-courtorder-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf>.

²² <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults>.

²³ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf>.

²⁴ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regarding-dismissal-20dec16-en.pdf>.

²⁵ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
 - a. Document productions to the DOJ,
 - b. Communications with the DOJ,
 - c. Submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions,
 - d. Communications with Verisign or NDC relating to the investigation, and
 - e. Internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ investigation.²⁶

On 24 March 2018, ICANN org provided the First DIDP Response. ICANN org responded individually to each of the ten items (and their subparts) by providing links to the publicly available documents responsive to the requests; objecting to certain requests as vague, overbroad, or unrelated to ICANN's operational activities; and/or confirming that documents responsive to the items do not exist. With respect to certain 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 set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org considered whether the public interest in disclosure of the information subject to these conditions outweighed the harm that may be caused by such disclosure and determined that there were no current circumstances for which the public interest in disclosing the information outweighed the harm of disclosure.²⁷ With respect to requests that were vague, ICANN org indicated that the Requestor could amend its DIDP Request to clarify, if it so wished.²⁸

²⁶ *Id.*

²⁷ 24 March 2018 Response to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

²⁸ *Id.*

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org’s responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a letter replying to the First DIDP Response.²⁹ In its letter, the Requestor offered to enter into a confidentiality agreement with ICANN org under which the Requestor would limit disclosure of any material produced by ICANN org in response to Requests 1, 4, 6, and 9 and designate such material as “highly confidential” and accessible only to the Requestor’s outside counsel. The Requestor also revised Items 1, 4, 5, 6(a-b), and 9(a) of the First DIDP Request as follows:

Request	First DIDP Request	Second DIDP Request
1	All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information.	Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter.
4	All applications, and all documents submitted with the applications, for the rights to .WEB.	NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.
5	All documents discussing the importance of .WEB to bringing competition to the provision of registry services.	Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs.
6(a-b)	All documents concerning any investigation or discussion related to a. The .WEB contention set,	Documents related to the .WEB Investigation, including: 1. All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012,

²⁹ 23 April 2018 Reply to DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

Request	First DIDP Request	Second DIDP Request
	b. NDC’s application for the .WEB gTLD.	<ol style="list-style-type: none"> 2. All documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 3. Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (<i>sic</i>) auction, and 4. Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.
9(a)	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ.	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias’ possession.

The Requestor acknowledged in Request 18-7 that it had submitted the Second DIDP Request and that Request 18-7 was premature. Specifically, the Requestor stated:

Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the [First] DIDP Response should ICANN and Requestor fail to reach an agreement based on the [Second] DIDP [Request]. Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the [Second] DIDP [Request]. Requestor is prepared to discuss an appropriate “tolling” agreement that would allow Requestor and ICANN to attempt to

reach an agreement concerning the First DIDP Request and the [Second] DIDP [Request].³⁰

On 27 April 2018, ICANN org responded to the Requestor's letter of 23 April 2018.³¹

Regarding the Requestor's offer to enter into a confidentiality agreement, ICANN org stated:

The concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make public documents concerning ICANN organization's operations unless there is a compelling reason for confidentiality. (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) Moreover, your proposal is asking ICANN organization to treat Afilias differently than other requestors, and to act in a manner that is contrary to what is set forth in the DIDP Process, which as you know would be in contravention of ICANN's Bylaws.³²

With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP Request, with an effective submission date of 23 April 2018. ICANN org confirmed that it would respond to the Second DIDP Request in accordance with the DIDP Process.³³

On 23 May 2018, ICANN org provided the Second DIDP Response.³⁴ 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 set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org also "considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure . . . [and] determined that there are no current circumstances for

³⁰ Reconsideration Request 18-7, § 3, at Pg. 5.

³¹ See Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

³² *Id.*

³³ *Id.*

³⁴ See DIDP Response to Request No. 20180423-1, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”³⁵

On 5 June 2018, the BAMC summarily dismissed Request 18-7 because Afilias had not sufficiently stated a Reconsideration Request.³⁶

On 22 June 2018, the Requestor submitted Request 18-8. The Requestor claims that ICANN org’s application of certain Nondisclosure Conditions in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org’s commitment to “‘operate in a manner consistent with [its] Bylaws,’ which require that it operate with transparency and openness.”³⁷

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.³⁸

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Reconsideration Request 18-8 because ICANN org adhered to established policies and procedures in the Second DIDP Response.

B. Relief Requested.

The Requestor asks the BAMC to “disclose the documents requested in the DIDP Request, as amended by the [Second] DIDP [Request].”³⁹

III. Issues Presented.

The issues are as follows:

³⁵ *Id.* at 14.

³⁶ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afili-as-bamc-determination-request-05jun18-en.pdf>.

³⁷ Reconsideration Request 18-8, § 6.1, at Pg. 7.

³⁸ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afili-as-ombudsman-action-20jul18-en.pdf>.

³⁹ Reconsideration Request 18-8, § 9, at Pg. 16.

1. Whether ICANN org complied with established ICANN policies in responding to the Second DIDP Request; and
2. Whether ICANN org complied with its Core Values and commitments established in the Bylaws concerning transparency and openness.⁴⁰

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.”⁴¹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Reconsideration Request is sufficiently stated, the Reconsideration Request is sent to the Ombudsman for review and consideration.⁴² 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.⁴³ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

⁴⁰ Reconsideration Request 18-8.

⁴¹ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(a), (c).

⁴² ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(k), (l).

⁴³ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴⁴

On 13 July 2018, the BAMC determined that Request 18-8 is sufficiently stated and sent Reconsideration Request 18-8 to the Ombudsman for review and consideration.⁴⁵ The Ombudsman thereafter recused himself from this matter.⁴⁶ Accordingly, the BAMC has reviewed Request 18-8 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.⁴⁷ 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.⁴⁸

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

⁴⁴ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e)(vi), (q), (r).

⁴⁵ Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afili-as-ombudsman-action-20jul18-en.pdf>

⁴⁶ *Id.* at Pg. 1.

⁴⁷ See ICANN Documentary Information Disclosure Policy (DIDP), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁴⁸ *Id.*

transparency within ICANN org, which included extensive public comment and community input.⁴⁹

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.⁵⁰

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).⁵¹ 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].”⁵²

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 that the *Amazon EU S.A.R.L.*

⁴⁹ 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>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁵⁰ <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>, at pg. 17.

⁵¹ See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁵² *Id.*; see also “Defined Conditions for Nondisclosure,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Independent Review 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).⁵³

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

⁵³ DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁴

V. Analysis and Rationale.

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Second DIDP Request.

1. The Response to the Second DIDP Request Complies with Applicable Policies and Procedures.

The Requestor's Second DIDP Request sought the disclosure of documents relating to the .WEB/.WEBS contention set. As an initial matter, the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in ICANN org's Second DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁵ 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 Second DIDP Response and, for the reasons discussed below, concludes that the Second DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

Items No. 1, 4, 5, 6(a-b), and 9(a) in the Second DIDP Request sought the disclosure of documents and information relating to the .WEB contention set:

- “Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter” (Item No. 1);

⁵⁴ *Id.*

⁵⁵ Reconsideration Request 18-8, § 6, at Pg. 9-11. While the Requestor summarily concludes that the Nondisclosure Conditions were “unreasonably and illegitimately appl[ied]” (*see* Reconsideration Request 18-8, § 6, Pg. 8), the Requestor does not explain how that is so. Without more, the Requestor’s unsupported assertions do not support reconsideration.

- “NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items” (Item No. 4);
- “Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs” (Item No. 5);
- “Documents related to the .WEB Investigation, including: (1) All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (2) all documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (3) Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (*sic*) auction, and (4) Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party” (Item No. 6(a-b)); and
- “All documents relating to the Department of Justice, Antitrust Division’s (DOJ) investigation into Verisign becoming the registry operator for .WEB (DOJ Investigation), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afiliat’s possession” (Item No. 9(a)).⁵⁶

Consistent with the DIDP Response Process, ICANN org responded individually to each of the five items (and their subparts) by providing links to the publicly available documents responsive to the requests. ICANN org also identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;

⁵⁶ 23 April 2018 Reply to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

- Confidential Business Information;
- Trade secrets;
- Drafts; and
- Privilege/Investigation.⁵⁷

Notwithstanding the applicable 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.⁵⁸ Accordingly, the BAMC finds that ICANN org complied with the DIDP Response Process when it responded to the Second DIDP Request.

The Requestor does not challenge the applicability of the Nondisclosure Conditions identified by ICANN org. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁹ For the reasons set forth below, the Requestor's claims do not support reconsideration.

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.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.⁶⁰ Information subject to these Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public

⁵⁷ See DIDP Response to Request No. 20180423-1, 23 May 2018, at Pgs. 5-14, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁵⁸ *Id.* at Pg. 14.

⁵⁹ Reconsideration Request 18-8, § 6, at Pg. 9-11.

⁶⁰ DIDP.

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.⁶¹ In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in Second DIDP Response.⁶²

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in the Second DIDP Request. Instead, the Requestor claims that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.⁶³ According to the Requestor, “there is a significant public interest in providing for a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the [Second DIDP Request].”⁶⁴ The Requestor’s claims do not support reconsideration.

As an initial matter, as ICANN org previously explained to the Requestor, and the BAMC agrees,⁶⁵ the concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make *public* documents concerning ICANN org’s operations unless there is a compelling reason for confidentiality.⁶⁶ Moreover, the Requestor’s proposal asks ICANN org to treat the Requestor differently than other requestors,

⁶¹ *Id.*

⁶² See DIDP Response to Request No. 20180423-1, at Pg. 14, 23 May 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁶³ Reconsideration Request 18-8, § 6, at Pgs. 8-11.

⁶⁴ Reconsideration Request 18-8, § 6, Pg. 9.

⁶⁵ Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

⁶⁶ See DIDP.

and to act in a manner that is contrary to what is set forth in the DIDP Response Process, which could be in contravention of ICANN's Bylaws. Further, by proposing that the documents be made available only to the Requestor's outside counsel via a "confidentiality agreement," it appears that the Requestor concedes that the requested information is *not* appropriate for public disclosure. In short, the Requestor's proposal to enter into a confidentiality agreement to protect the information contained in the requested materials does not support reconsideration.

The Requestor otherwise lodges various unsupported allegations regarding Verisign's intentions and conduct in connection with the .WEB gTLD. The Requestor alleges that Verisign engaged in a "secretive scheme to obtain the .WEB license for itself [which] was not only unfair, deceptive, and lacking in transparency but was also carried out specifically to stifle ICANN's efforts to promote competition."⁶⁷ As a result, the Requestor claims, "allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC is inconsistent with the promotion of competition, contrary to ICANN's mandate, and constitutes a serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN's Bylaws."⁶⁸ The Requestor, however, does not provide any evidence or other support for its assertions; instead, all the Requestor offers is its own personal view. Nor does the Requestor explain how its unsubstantiated claims concerning Verisign's alleged conduct demonstrate that ICANN org violated a policy or procedure when it responded to the Requestor's Second DIDP Request. Without more, reconsideration is not warranted.

The BAMC further notes that, on 1 February 2017, the Antitrust Division of the United States Department of Justice (DOJ), issued a Civil Investigative Demand (CID) to ICANN org in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual

⁶⁷ Reconsideration Request 18-8, § 6, Pg. 10.

⁶⁸ *Id.* at Pgs. 10-11.

rights to operate .WEB. ICANN org provided DOJ with information responsive to the CID. ICANN org understands that Verisign also received a CID from DOJ requesting certain material related to Verisign's involvement with .WEB.⁶⁹ To ICANN org's knowledge, the DOJ closed its investigation in early 2018 without further action.

Ultimately, the BAMC does not agree that ICANN org violated the DIDP Response Process when it determined that the public interest does not outweigh the potential harm in the disclosure of the confidential and privileged documents. ICANN org takes seriously its commitment "where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market."⁷⁰ However, ICANN's Bylaws also recognize that "[s]ituations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."⁷¹

Two competing Core Values are relevant here. First, the BAMC concludes that ICANN org followed the DIDP Response Process in determining that the requested materials that are subject to Nondisclosure Conditions include sensitive information that, if disclosed, could result in serious harm to ICANN org as well as its constituents and contracting entities. The BAMC further finds that ICANN org followed the DIDP Response Process by concluding that disclosure could, among other things, undermine ICANN org's deliberative processes, materially prejudice the interests of ICANN org and other third parties, violate the attorney-client privilege, and

⁶⁹ See Verisign, Inc. Form 10-K for Year 2017, at Pg. 23, available at: <https://investor.verisign.com/static-files/0563ca8c-4bd1-48c6-8b37-fb338664dfa4>.

⁷⁰ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(iii).

⁷¹ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(c).

invade personal privacy; and that as a result, disclosure would run afoul to ICANN org’s Core Value of “[o]perating with efficiency and excellence.”⁷² Second, the BAMC concludes that ICANN org did not violate the DIDP Response Process in determining that because many of the materials requested reflect confidential business information of third parties, disclosure would subvert ICANN’s commitment to “striv[e] to achieve a reasonable balance between the interests of different stakeholders....”⁷³ Indeed, disclosure of third party information that was shared with ICANN org in confidence would not reflect a reasonable balance at all, but rather would reflect a one-sided decision to the detriment of the third party whose sensitive information was disclosed. Further, if ICANN org disclosed third party confidential information, community stakeholders would thereafter be hesitant to participate in the bottom-up, multistakeholder model that ICANN org has committed to support.

The DIDP, which was developed through the multistakeholder process with significant community input, specifically permits ICANN org to balance applicable competing Core Values and commitments in any given situation. Here, ICANN org’s commitment to promote competition in the DNS is in tension with its commitment to operate with efficiency and excellence, as well as ICANN org’s commitment to reasonably balance the interests of different stakeholders, and to support the multistakeholder process. Pursuant to the DIDP, ICANN org may exercise its discretion to withhold materials under these circumstances without violating its commitment to promoting competition.

⁷² ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(v).

⁷³ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(vii).

B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the Second 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 through open and transparent processes and to the maximum extent feasible in an open and transparent manner.”⁷⁴ The Requestor believes that, by not disclosing the requested materials, ICANN org “has failed to operate in a manner consistent with its Bylaws, which require that it operate with transparency and openness.”⁷⁵ The Requestor’s claims do not support reconsideration.

The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN org, which included extensive public comment and community input.⁷⁶ Following completion of this review, ICANN org sought public comment on the resulting recommendations, and summarized and posted the community feedback.⁷⁷ Based on the community’s feedback, ICANN org proposed changes to its frameworks and principles to “outline, define and expand upon the organisation’s accountability and transparency”⁷⁸ and sought additional community input on the proposed changes before implementing them.⁷⁹

Neither the DIDP nor ICANN’s commitments and Core Values supporting transparency and accountability obligates ICANN org to make public every document in its possession. As noted above, the DIDP sets forth Nondisclosure Conditions for which other commitments or Core Values may compete or conflict with the transparency commitment. These Nondisclosure

⁷⁴ Reconsideration Request 18-8, § 6, Pg. 7 (internal citations to ICANN’s Bylaws omitted).

⁷⁵ *Id.*

⁷⁶ 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>.

⁷⁷ See <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁷⁸ <https://www.icann.org/en/system/files/files/accttrans-frameworks-principles-17oct07-en.pdf>.

⁷⁹ <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

Conditions represent areas, vetted through public comment, that the community has agreed are presumed not to be appropriate for public disclosure. The public interest balancing test in turn allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and Core Values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June 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.⁸⁰

As noted above, 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 developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”⁸¹

Here, ICANN org set forth the basis for its determination 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.⁸² It is entirely within ICANN org’s discretion to make this finding, and ICANN org may conclude as

⁸⁰ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

⁸¹ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(c).

⁸² See DIDP Response to Request No. 20180423-1, at Pgs. 9-21, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

much without contravening its commitment to transparency. Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency and openness do not support reconsideration here.

VI. Recommendation.

The BAMC has considered the merits of Reconsideration Request 18-8, and, based on the foregoing, concludes that ICANN org did not violate ICANN's commitments, Core Values or established ICANN policy(ies) in the Second DIDP Response. Accordingly, the BAMC recommends that the Board deny Reconsideration Request 18-8.