

## Response to Documentary Information Disclosure Policy Request

To: Bart Lieben, Bart Lieben BV ovve BVBA

Date: 31 October 2014

Re: Request No. 20141022-2

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Thank you for your Request for Information dated 22 October 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:

- (1) the agreement(s) between ICANN and the organizations and individuals involved in the Community Priority Evaluation, in particular the representations and warranties given and quality standards to be applied by such organizations and individuals;
- (2) the connection, experience level and qualification in regard to the targeted community of each of the members of the CPE Panel that were involved in reviewing the Requester’s application and the preparation of the CPE Report;
- (3) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered “policy” under ICANN Bylaws;
- (4) statements, documents, third-party input or similar information that is not in the public domain and which has been disclosed to the CPE Panel in connection with the Community Priority Evaluation of its Application;
- (5) internal reports, notes, meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application [for .GAY that did not prevail in the CPE];
- (6) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by the Community Priority Evaluation panel in view of the criteria set out in the Applicant Guidebook, and more in particular: [relating to the panel’s determination of each individual criterion].

## Response

Community Priority Evaluations (“CPEs”) are performed by an independent community panel that is coordinated by the Economist Intelligent Unit (“EIU”), an independent, third-party company that contracts with ICANN to perform that coordination role. The CPE standards set forth in Section 4.2 of the Applicant Guidebook (“Guidebook”) are available at <http://newgtlds.icann.org/en/applicants/agb>. The CPE Panel Process Document (at <http://newgtlds.icann.org/en/applicants/cpe>) and the CPE Guidelines (at <http://newgtlds.icann.org/en/applicants/cpe>) provide more information on the CPE process. The Guidebook, CPE Panel Process Document, and the CPE Guidelines set forth the guidelines, procedures, standards and criteria applied to CPEs, and make clear that the EIU and its designated panelists are the only persons or entities involved in the provision of CPEs.

For item 1, there is a single contract at issue, the contract between ICANN and the EIU for the coordination of the independent community panels to perform CPEs in the New gTLD Program. ICANN does not contract with individuals or individual panelists to perform CPEs. The contract between ICANN and the EIU is not appropriate for public disclosure through the DIDP. The contract includes a confidentiality clause barring ICANN from disclosing the agreement as requested. The following Defined Conditions for Nondisclosure apply to the requested contract:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information 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.
- Confidential business information and/or internal policies and procedures.

Item 2 seeks “the connection [to the targeted community], experience level and qualification[s]” of “the members of the CPE Panel” that reviewed the Requester’s application. ICANN (either Board or staff) is not involved with the selection of the CPE panel’s two individual evaluators that perform the scoring in each CPE process (the “CPE Panel”), nor is ICANN provided with information about who the evaluators on any individual panel may be. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU’s team. ICANN therefore does not have any documentation regarding the “connection, experience level and qualification[s]” of the CPE Panel members as requested in Item 2.

For item 3, which seeks “policies, guidelines, directives, instructions or guidance given by ICANN relating to” the CPE process, to the extent that this is seeking information external to the types of directives that would be incorporated into a contract, much of that information is already incorporated into the publicly available documents identified above. Similarly, for items 3, 4, 5 and 6, ICANN has previously indicated in response to Request No. 20140804-1 that ICANN has communications with persons at EIU that are not involved in the scoring of a CPE (but otherwise assist in the facilitation of a particular CPE), and also previously indicated that those communications are not appropriate for public disclosure.

Items 4, 5 and 6 seek extensive, detailed information regarding the materials reviewed and the analysis conducted by the CPE Panel in making its determination that the .GAY application did not prevail in the CPE. For instance, the Requester seeks “information that is not in the public domain,” “internal reports,” “detailed information in relation to [...] information disregarded or considered irrelevant,” and specific information regarding the CPE Panel’s determination as to each criterion.<sup>1</sup>

To help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained above and in the CPE Panel Process Document, is entirely within the work of the EIU’s team. ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE Panels (including the .GAY CPE Panel). The end result of the CPE Panel’s analysis is the CPE Report, which explains the CPE Panel’s determinations and scoring, and is available at <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

In accordance with the Panel Process Document, the CPE Panel reviews documents and communications that are publicly available through a number of resources, such as: (a) dotgay’s application for .GAY available at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/444>; (b) the New gTLD Correspondence webpage<sup>2</sup> available at <http://newgtlds.icann.org/en/program-status/correspondence>; (c)

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<sup>1</sup> ICANN is not aware of any “other individuals or organizations” outside of the EIU and the CPE Panel that were “involved in the Community Priority Evaluation” of dotgay LLC’s .GAY application.

<sup>2</sup> Some examples of communications from the Correspondence webpage relating to dotgay LLC’s application for .GAY include: Letter from Marc-Antoine Saumier, Quebec Gay Chamber of Commerce - <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-27may14-en.pdf>; Letter from Gregory T. Angelo, Log Cabin Republicans - <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-07may14-en.pdf>; Numerous letters of support from various organizations (submitted by dotgay) - <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-10oct13-en.pdf>; Letter from Andrew Merriam, Top Level Design, LLC (on behalf of other .gay and .lgbt applicants, Top Level Design, LLC, Top Level Domain Holdings, LTD, United TLD

the Applicant Comment Forum<sup>3</sup> available at <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>; and (d) the Objection Determinations<sup>4</sup> webpage available at <http://newgtlds.icann.org/en/program-status/odr/determination>.

As such, to the extent that ICANN has documentation responsive to Items 3, 4, 5 and 6, such documents are either already public or subject to certain of the Defined Conditions for Nondisclosure set forth in the DIDP:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process

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<https://www.icann.org/en/system/files/correspondence/merriam-to-chalaby-willet-06nov13-en.pdf>; and Email from Rob Schlein, Metroplex Republicans of Dallas - <https://www.icann.org/en/system/files/correspondence/schlein-to-chehade-icann-board-06nov13-en.pdf>.

<sup>3</sup> Some examples of comments from the Applicant Comment Forum relating to dotgay LLC's application for .GAY include: Comment from Dean Nelson, GayWhistler's WinterPRIDE – <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12473>; Comment from Christopher Wood, LGBT Technology Partnership - <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12448>; Comment from R. Bruce McDonald, Canadian Gay & Lesbian Chamber of Commerce - <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12453>; Comment from Grant - <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12441>; Comment from William T. Patton - <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12439>; and Comment from Nash Jones - <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12410>.

<sup>4</sup> The Objection Determination Page includes a determination on an objection to the dotgay llc application for .GAY, at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1713-23699-en.pdf>.

between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- 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.
- Confidential business information and/or internal policies and procedures.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Although your analysis in the Request concluded that no Conditions for Nondisclosure should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply. Here, for example, ICANN cannot violate contractual conditions that require ICANN to maintain items as confidential solely because the Request proffers that no such conditions apply. Similarly, ICANN does not release draft documentation – particularly if draft documentation was shared for the purpose of facilitating deliberations or decision making – because drafts are not reliable sources of information regarding what actually occurred or standards that were actually applied.

For each of the items identified above as subject to Defined Conditions of Nondisclosure, ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships and its contractors’ deliberative processes by the requested disclosure.

### **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).