

**DETERMINATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 14-35**

**22 AUGUST 2014**

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The Requester, Amazon EU S.à.r.l, seeks reconsideration of ICANN staff's response to the Requester's request for documents pursuant to ICANN's Document Information Disclosure Policy ("DIDP"), including documents relating to ICANN's consideration of Requester's applications for .AMAZON and related internationalized domain names ("IDNs") in Japanese and Chinese.

**I. Brief Summary.**

The Requester applied for .AMAZON and related IDNs in Japanese and Chinese (collectively, "Amazon Applications").

In its Durban Communiqué, the GAC<sup>1</sup> informed the Board that it had reached consensus advice on .AMAZON and the related IDNs ("GAC Durban Advice"). On 14 May 2014, the NGPC<sup>2</sup> resolved to accept the GAC Durban Advice (see Resolution 2014.05.NG03), which meant that the Amazon Applications should not proceed ("Resolution").

The Requester then sought the following documents pursuant to ICANN's DIDP: "all documents directly and indirectly relating to: (1) the balance of the competing interests of each factor considered by the [NGPC] in approving [the Resolution] . . . and (2) the [GAC] advice in relation to the Amazon Applications" ("DIDP Request"). (DIDP Request, Pg. 1.) Specifically, the Requester sought the production of documents regarding: (i) ICANN's communications concerning the Amazon Applications (Items 1, 2, 3, 4, 5); (ii) ICANN's communications with

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<sup>1</sup> Governmental Advisory Committee.

<sup>2</sup> New gTLD Program Committee.

the Independent Expert M. Jérôme Passa concerning the Amazon Applications (Item 6); (iii) ICANN's communications with the Independent Objector M. Alain Pellet concerning the Amazon Applications (Items 7 and 8); and (iv) internal communications of the GAC concerning the Amazon Applications (Items 9, 10, 11, 12, 13, and 14).

On 30 May 2014, the Requester filed Reconsideration Request 14-27, seeking reconsideration of the Resolution. (<https://www.icann.org/en/system/files/files/request-amazon-30may14-en.pdf>.)

In response to the Requester's DIDP Request, ICANN identified and provided links to all publicly available responsive documents. With respect to some of the requests, ICANN stated that it "has not completed its review of documents that may be responsive to these Items" and that it would "produce all responsive documents, if any, that are not already publicly available or otherwise subject to any of the DIDP's Defined Conditions for Disclosure as soon as practicable." (*See, e.g.*, Response, Pg. 6; *see also* Response, Pg. 9.) With respect to Item 6, which sought communications between ICANN staff and Professor Passa, ICANN responded that because ICANN staff had no communications with Professor Passa, no responsive documents exist. (Response, Pg. 6.)

On 7 July 2014, the Requester filed the instant Reconsideration Request ("Request 14-35"), seeking reconsideration of ICANN's response to its DIDP Request. In particular, the Requester claims that the DIDP Response is "facially inadequate" and inconsistent with DIDP procedures and ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments. The Requester's claims are unsupported, as the Requester has failed to demonstrate that ICANN acted in contravention of established policy or procedure in responding the DIDP Request. The BGC therefore concludes that Request 14-35 be denied.

## II. Facts.

### A. Background Facts.

The Requester applied for .AMAZON and related internationalized domain names (“IDNs”) in Japanese and Chinese (collectively, “Amazon Applications”).

On 12 March 2013, ICANN’s Independent Objector (“IO”) filed a Community Objection to the Amazon Applications on behalf of the “Amazon Community,” i.e., the community of “South-American region with the same English name around the Amazon River.” (*See* Determination on Community Objection ¶¶ 40, 59, *available at* <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.)

On 11 April 2013, in its Beijing Communiqué, the GAC identified .AMAZON and the related IDNs as strings that warranted further GAC consideration and advised the Board not to proceed beyond Initial Evaluation on those strings (“GAC Beijing Advice”). (Beijing Communiqué, *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.)

On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on .AMAZON and the related IDNs (“GAC Durban Advice”). (Durban Communiqué, *available at* <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.)

On 27 January 2014, the ICC<sup>3</sup> Panel appointed to hear the IO’s Community Objection to the Amazon Applications rendered its Expert Determination. The Panel found in favor of the Requester. Specifically, the Panel determined that the IO had “not shown that there is a

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<sup>3</sup> International Chamber of Commerce.

substantial opposition to [the Applications] within [the Amazon Community] or that the [the Applications] would lead to substantial detriment.” (Expert Determination ¶ 107.)

On 7 April 2014, the NGPC provided the Requester and the GAC with an independent, third-party report it had commissioned from French Law Professor Jérôme Passa regarding specific issues of law raised by the Amazon Applications (“Expert Analysis”). (See <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>.)

On 14 May 2014, the NGPC passed Resolution 2014.05.14.NG03 (“Resolution”), accepting the GAC Durban Advice and determining that the Amazon Applications should not proceed. The NGPC noted that “[its] decision is without prejudice to the continuing efforts by [the Requester] and members of the GAC to pursue dialogue on the relevant issues.” (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#/2.b>)

On 23 May 2014, the Requester filed its DIDP Request, seeking “all documents directly and indirectly relating to (1) the balance of the competing interests of each factor considered by the [NGPC] in approving [the Resolution] . . . and (2) the [GAC] advice in relation to the Amazon Applications.” (DIDP Request, Pg. 1.) Specifically, the Requester sought:

1. All communications between individual members of ICANN’s Board and GAC representatives or other government officials acting as GAC representatives directly or indirectly relating to any of the Amazon Applications;
2. All communications between ICANN’s Board and the GAC directly or indirectly relating to any of the Amazon Applications;
3. All communications between individual members of ICANN’s Board and ICANN’s Staff directly or indirectly relating to any of the Amazon Applications;
4. All communications between individual members of ICANN’s Staff directly or indirectly relating to any of the Amazon Applications;
5. All communications between individual members of ICANN’s Board directly or indirectly relating to any of the Amazon Applications;

6. All communications between individual members of ICANN Staff and the Independent Expert M. Jérôme Passa directly or indirectly relating to any of the Amazon Applications;
7. All communications between individual members of ICANN Staff and/or the ICANN Board and the Independent Objector M. Alain Pellet directly or indirectly relating to any of the Amazon Applications;
8. All communications between individual members of ICANN Staff and the Independent Objector M. Alain Pellet directly or indirectly relating to ICANN policies around conflicts of interest and/or M. Pellet's ongoing representation of governments;
9. All GAC deliberations from behind closed doors directly or indirectly relating to any of the Amazon Applications;
10. All GAC communications, including but not limited to a GAC vote on whether or not the GAC could obtain consensus against any of the Amazon Applications during the April 2013 ICANN meeting in Beijing;
11. All GAC communications, including but not limited to the GAC's inability to obtain consensus against any of the Amazon Applications during the April 2013 ICANN Meeting in Beijing;
12. All GAC communications, including but not limited to communications directly or indirectly relating to the decision to hold another vote on the Amazon Applications during the April 2013 ICANN Meeting in Durban;
13. All GAC communications directly or indirectly relating to the decision to make the GAC deliberations during the April 2013 ICANN Meeting in Beijing closed;
14. All GAC communications directly or indirectly relating to the Amazon Applications between the April 2013 ICANN Meeting in Beijing and the July 2013 ICANN Meeting in Durban.

(*Id.*, Pgs. 1-2.)

On 30 May 2014, the Requester filed Reconsideration Request 14-27, seeking reconsideration of the Resolution. (<https://www.icann.org/en/system/files/files/request-amazon-30may14-en.pdf>.)

On 22 June 2014, ICANN responded to the Requester's DIDP Request. ICANN identified and provided links to all publicly available documents responsive to the DIDP Request. With respect to Items 1-5 and 7-14, all of which could potentially involve responsive documents

within ICANN’s custody or control, ICANN stated that it “has not completed its review of documents that may be responsive to these Items” and that it would “produce all responsive documents, if any, that are not already publicly available or otherwise subject to any of the DIDP’s Defined Conditions for Disclosure as soon as practicable.” (*See, e.g.*, Response, Pg. 6; *see also* Response, Pg. 9.) With respect to Item 6, which sought communications between ICANN staff and Professor Passa, ICANN responded that because ICANN staff had no communications with Professor Passa, no responsive documents exist. (Response, Pg. 6.)

On 7 July 2014, the Requester filed Request 14-35, seeking reconsideration of ICANN’s response to its DIDP Request.

**B. The Requester’s Claims.**

The Requester contends that reconsideration is warranted because ICANN staff violated established policy and procedure in responding to the Requester’s DIDP Request by:

1. Making “unfounded” objections based on scope and the time period for which documents were requested, (Request 14-35, § 8, Pgs. 4-5);
2. Giving “contradictory” responses, (*Id.*, § 8, Pgs. 5-6);
3. “[A]bus[ing]” the DIDP Defined Conditions of Nondisclosure Policy by “broadly assert[ing] privilege over any potentially responsive documents,” (*Id.*, § 8, Pgs. 6-7);
4. Refusing to produce responsive documents within ICANN’s custody and control, (*Id.*, § 8, Pgs. 7-8);
5. Improperly responding to Items 9-14 of the DIDP Request, including by failing to explicitly indicate whether there are documents responsive to those Items, (*Id.*, § 8, Pgs. 8-9); and

6. “[P]resent[ing] no compelling reason for confidentiality,” (*Id.*, § 8, Pgs. 10-11).

### **C. Relief Requested.**

The Requester asks the Board to require ICANN staff to: (i) finish their review of potentially responsive documents; (ii) endeavor to collect documents “indirectly” under ICANN’s custody and control; (iii) produce a privilege log “identifying the documents responsive to the DIDP Request and stating the specific grounds for privilege asserted;” (iv) produce redacted versions of privileged documents where possible; and (v) “provide an explanation identifying specific reasons why withholding documents outweighs the public interest in disclosure.” (Request 14-35, § 8, Pgs. 11-12). The Requester also asks that in considering the DIDP Request, the Board reach out to “any necessary parties,” including the GAC and the Independent Objector, “to determine whether any documents responsive to the DIDP Request exist.” (*Id.* § 8, Pg. 13.)

### **III. Issues.**

In view of the claims set forth in Request 14-35, the issues for reconsideration are whether ICANN staff violated established policy or procedure in responding to the Requester’s DIDP Request by:

1. Making “unfounded” objections based on scope and time period for which documents were requested, (Request 14-35, § 8, Pgs. 4-5);
2. Giving “contradictory” responses, (*Id.*, § 8, Pgs. 5-6);
3. “[A]bus[ing]” the DIDP Defined Conditions of Nondisclosure Policy by “broadly assert[ing] privilege over any potentially responsive documents,” (*Id.*, § 8, Pgs. 6-7);
4. Refusing to produce responsive documents within ICANN’s custody and control,

(*Id.*, § 8, Pgs. 7-8);

5. Improperly responding to Items 9-14 of the DIDP Request, including by failing to explicitly indicate whether there are documents responsive to those Items, (*Id.*, § 8, Pgs. 8-9); and
6. “[P]resent[ing] no compelling reason for confidentiality,” (*Id.*, § 8, Pgs. 10-11).

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests and the Documentary Information Disclosure Policy.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>4</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the 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 reconsideration criteria set forth in the Bylaws.

A principal element of ICANN’s approach to transparency and information disclosure is the commitment to make publicly available on its website a comprehensive set of materials concerning ICANN’s operational activities as a matter of course. In addition to making many documents public as a matter of course, the DIDP allows community members to request documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available. (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.)

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<sup>4</sup> Article IV, § 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
- (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
- (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.



ICANN reserves the right to withhold documents if they fall within any of ICANN’s Defined Conditions for Nondisclosure (“Nondisclosure Conditions”), which include, among others: (i) “[i]nformation provided by or to a government or international organization . . . in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN’s relationship with that party; (ii) “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process . . .;” (iii) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates . . .;” or (iv) “[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege.” (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) In addition, ICANN may refuse “[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive or vexatious purpose or by a vexatious or querulous individual.” (*See id.*)

ICANN staff has the discretion to disclose documents that fall within one of the Nondisclosure Conditions if it “determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.” (*Id.*) Finally, the DIDP does not require ICANN staff to “create or compile summaries of any documented information,” including logs of documents withheld under one of the Nondisclosure Conditions. (*Id.*)

**V. Analysis and Rationale.**

**A. ICANN Staff's Imposition of a Relevant Time Period on the DIDP Request Does Not Support Reconsideration.**

The DIDP Request did not specify any time period for which responsive documents were sought. As such, in its Response, ICANN explained that the lack of any relevant time period identified by the Requester rendered the DIDP Request overbroad. ICANN stated that “[b]ecause [the Requester] submitted its [A]pplications on 23 March 2012, ICANN understands the relevant time period as including documents created from 23 March 2012 to the present.” (*See, e.g.*, DIDP Response at 5, 7.)

The Requester appears to agree with the manner in which ICANN staff interpreted the relevant time period for purposes of the Requester's DIDP Request, conceding that “a timeframe post-dating March 23, 2012, is neither excessive nor overly burdensome.” (Request 14-35, § 8, Pgs. 4-5.) As such, to the extent the Request challenges ICANN staff's imposition of a relevant time period on the DIDP Request, reconsideration is not supported.

Further, the Requester does not identify any policy or procedure that ICANN purportedly violated in this regard. Nor could it. Pursuant to the DIDP, ICANN is obligated to respond only to “reasonable” document requests. ICANN staff plainly has the discretion to state that requests that are devoid of any reasonable time and scope limitations are overbroad. (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) The Requester's claim that ICANN's “objections based on scope and timeframe are unfounded” is therefore unsupported and the Requester has not stated a basis for reconsideration with respect to ICANN staff's imposition of a time limitation on the DIDP Request.

**B. The Requester's Claim that ICANN's DIDP Response is Contradictory and Inadequate is Unsupported.**

The Requester claims that ICANN’s Response to the DIDP Request is “contradictory” and “grossly inadequate” because ICANN “admits that its review of potentially responsive documents is incomplete” but also “claims that no responsive documents exist or would be disclosed at any rate.” (Request 14-35, § 8, Pgs. 5-6.) The Requester’s claim is unsupported.

The DIDP Response states that ICANN’s review of documents “thus far” showed that those responsive documents that had not been previously publicly disclosed on ICANN’s website fell within certain Nondisclosure Conditions and were therefore not appropriate for disclosure. (See Response, Items 1-5, Pg. 5; *Id.*, Items 7-8, Pg. 8.) The DIDP Response also makes clear that, with respect to certain Items in the DIDP Request, “ICANN has not completed its review of documents that may be responsive” and that “ICANN continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to any [Nondisclosure Conditions].” (See DIDP Response, Items 1-5, Pg. 5; *Id.*, Items 7-8, Pg. 8; *Id.*, Items 9-14, Pg. 9.)<sup>5</sup> Stating that those responsive documents that ICANN staff has already reviewed are subject to Nondisclosure Conditions is not inconsistent with stating that ICANN staff has not yet completed its search for responsive documents. As such, the Requester has not stated a proper basis for reconsideration with respect to its claim that the DIDP Response is “contradictory” and “inadequate.”

The BGC further notes that although ICANN continues its review of potentially responsive documents, many of the items appear to request documents facially subject to ICANN’s Nondisclosure Conditions. For example, Item 5, which requests “communications

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<sup>5</sup> As the Requester concedes, the DIDP does not require ICANN staff to complete its review of documents within 30 days. (Request 14-35, § 8, Pg. 5.) Instead, the DIDP requires only that ICANN staff “respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond.” (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) ICANN staff complied with that procedure by responding to the DIDP Request within 30 days and additionally explaining that its search was ongoing as to documents responsive to certain Items in the DIDP Request.

between individual members of ICANN’s Board” relating to the Amazon Applications, encompasses “internal information that, if disclosed, would be likely to compromise the integrity of ICANN’s deliberative and decision-making process . . . including internal documents, memoranda, and other similar communications to or from ICANN Directors.” (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) Similarly, Items 10-14, all of which request “GAC communications,” encompass “information exchanged, prepared for, or derived from the deliberative or decision-making process between ICANN . . . [and] 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 . . . [and] other entities . . . .” (*See id.*) Insofar as ICANN’s continued review uncovers responsive documents that are subject to Nondisclosure Conditions, those documents will not be produced.

**C. ICANN Staff Appropriately Applied the DIDP Nondisclosure Conditions.**

The Requester claims that “[d]espite [the Requester’s] explanation in its [DIDP Request] that the information sought did not meet any of the [Nondisclosure Conditions], ICANN staff withheld documents on such grounds.” (Request 14-35, § 8, Pg. 6.) The Requester’s claims do not support reconsideration.

The DIDP identifies a number of “conditions for the nondisclosure of information,” such as documents containing “[i]nformation subject to the attorney-client [privilege], attorney work product privilege, or any other applicable privilege” and/or containing “[i]nternal 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.” (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) It is ICANN’s responsibility

to determine whether requested documents fall within those Nondisclosure Conditions. The fact that the Requester provided its own view of how it believed ICANN should evaluate the DIDP Request does not bind ICANN to accept the Requester's position.

As noted above, many of the items in the DIDP Request appear to seek documents facially subject to Nondisclosure Conditions protecting information that, if disclosed "would or would be likely to compromise the integrity of . . . [the] deliberative and decision-making process." Thus far, ICANN's review of responsive documents has revealed documents that it has determined to be subject to those Nondisclosure Conditions and/or to the Nondisclosure Condition protecting information subject to the attorney-client privilege and/or other privileges. (*See, e.g.*, DIDP Response, Pg. 6.) The Requester's substantive disagreement with that determination is not a basis for reconsideration.

The Requester also claims that the DIDP Response was inadequate because it "merely recites the [Nondisclosure Conditions] verbatim." (Request 14-35, § 8, Pg. 6.) However, the Requester cites to no policy or procedure (because none exists) requiring ICANN staff to provide a further explanation for its application of the Nondisclosure Conditions than what is already set forth in those stated Conditions, which were narrowly crafted when the DIDP was adopted.

Because the Requester provides no evidence that ICANN staff failed to comply with the DIDP or its procedures, the Requester has not stated proper grounds for reconsideration.

**D. The Requester's Claim that ICANN Refused to Produce Responsive And Non-Privileged Documents Within Its Custody or Control is Unfounded.**

Item 6 of the DIDP Request seeks "[a]ll communications *between individual members of ICANN Staff* and the Independent Expert M. Jérôme Passa directly or indirectly relating to any of the Amazon Applications." (DIDP Request, Pg. 2) (emphasis added.) The DIDP Response states that because "Professor Passa was retained by ICANN's counsel, and ICANN staff did not

have any communications with him regarding the scope of his work or the substance of his conclusions . . . no responsive documents exist within ICANN.” (Response, Pg. 6.)

The Requester disputes this Response, arguing that it “implies that documents in possession of ICANN’s legal representative are outside of ICANN’s custody and/or control.” (Request 14-35, § 8, Pgs. 8-9.) Contrary to what the Requester argues, the Response does not state that responsive documents exist outside of ICANN’s custody or control. Rather, the Response states that because “ICANN did not have any communications with” Professor Passa, there are no documents responsive to a request for communications between Professor Passa and “individual members of ICANN Staff.” (DIDP Request, Pg. 2; Response, Pg. 3.) As such, the Requester has not stated a basis for reconsideration with respect to ICANN’s response to Item 6 of its DIDP Request.<sup>6</sup>

The Requester also disputes ICANN’s response to Items 7 and 8 of the DIDP Request, which seek documents relating to the Independent Objector’s objection to the Amazon Applications. In its Response, ICANN explained that other than “monitor[ing] the progress of all [objection] proceedings and [] tak[ing] steps, where appropriate, to coordinate with [dispute resolution service providers (“DSRPS”)] regarding individual applications for which objections are pending before more than one DRSP . . . ICANN is not [] involved in the objection proceedings and . . . generally does not communicate directly with the parties regarding the objection during the course of the proceedings.” (DIDP Response, Pgs. 7-8.) ICANN further responded that while “[t]hus far, [its] review of documents that may be responsive to Items 7 and 8 show that any responsive document that has not already been publicly disclosed on ICANN’s website is not appropriate for disclosure pursuant to the [Nondisclosure Conditions],” ICANN

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<sup>6</sup> In any event, documents of ICANN’s counsel are subject to the attorney-client privilege and other applicable privileges.

“continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to any [Nondisclosure Conditions].” (*Id.*, Pg. 8.)

Contrary to the Requester’s claim, ICANN’s response to Items 7 and 8 does not indicate any intent to either: (i) withhold responsive documents that are within ICANN’s custody and are not either publicly available or otherwise subject to Nondisclosure Conditions; or (ii) withhold documents based on “an argument that parties to the objection proceedings may have received certain documents.” (Request 14-35, § 8, Pg. 8.) As such, the Requester also has not stated a basis for reconsideration with respect to ICANN’s response to Items 7 and 8 of its DIDP Request.

**E. ICANN’s Response to Items 9-14 of the DIDP Request is Consistent with ICANN Policy and Procedure.**

The Requester disputes ICANN’s response to Items 9-14 of the DIDP Request, each of which seeks documents relating to “GAC deliberations” and/or “GAC communications” regarding the Beijing Advice, the Durban Advice, and the Amazon Applications. (Request 14-35, § 8, Pgs. 8-9.) Specifically, the Requester argues that “[i]t is unclear from [the] Response to Items 9-14 whether or not it is ICANN Staff’s position that it is not in possession of any relevant documents responsive to such requests.” (Request 14-35, § 8, Pg. 9.) The Requester’s claim is unsupported.

In its Response, ICANN explained that the GAC is an “advisory committee” which membership is “open to all national governments and distinct economies recognized in international fora,” and that because “ICANN does not hold membership in the GAC and does not participate or otherwise get involved in the GAC’s operations or decision-making processes . . . unless the GAC provided ICANN with copies of documents or correspondence concerning its communications . . . ICANN would not be in possession of such documents.”

(Response, Pg. 9.) Nonetheless, contrary to what the Requester argues, ICANN made clear that it has “not yet completed its search for [responsive] documents,” and that while “[t]hus far, ICANN’s search for responsive documents shows that there are no responsive documents within ICANN’s possession, custody, or control,” ICANN “continues to search for additional possibly responsive documents and will produce all responsive documents, if any, that are not already publicly available or otherwise subject to [Nondisclosure Conditions].” (Response, Pg. 9.)

The Requester also suggests that certain ICANN employees “seem primarily or substantially focused on work with the GAC,” and that documents within their possession are within the custody and control of ICANN. However, as noted, the Response specifically states that ICANN’s search for responsive documents has not yet concluded. If ICANN discovers responsive documents that are in the custody or control of ICANN, and which are not already publicly available or otherwise subject to Nondisclosure Conditions, ICANN will produce them.

Finally, the Requester objects to ICANN’s statement that “internal GAC documents . . . do not constitute ‘documents concerning ICANN’s operational activities’ and are therefore not appropriately subject to the DIDP.” (Request 14-35, § 8, Pg. 9; *see also* Response, Pg. 9; <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) The Requester claims that because the GAC’s “structure is created directly from the ICANN Bylaws” (Request 14-35, § 8, Pg. 9), the operational activities of the GAC necessarily constitute operational activities of ICANN subject to the DIDP. But as explained in the DIDP Response, the GAC is an advisory committee to ICANN and its role is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments.” (Bylaws, Art. XI, § 2.1.) ICANN is not a member of the GAC and is not involved in the GAC’s operations or decision-making processes. As such, the



Requester's claim that any internal GAC documents somehow constitute the operational activities of ICANN is unfounded and does not support reconsideration.<sup>7</sup>

**F. ICANN Staff Properly Withheld Responsive Documents that Fell within the DIDP's Nondisclosure Conditions.**

Under the DIDP, documents that fall within the Nondisclosure Conditions “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.” (*See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) The Requester argues that in its DIDP Request it articulated a “need for disclosure [] outweighing any harm” by stating “there can be no harm from disclosing the information,” and that “unless the requested information is published, the ICANN community will have no way to evaluate whether ICANN has met its obligations to act fairly, for the benefit of the community, and in accord with its own policies.” (Request 14-35, § 8, Pg. 10; DIDP Request, Pg. 3.)

It is ICANN's responsibility to determine whether requested documents fall within Nondisclosure Conditions and whether, in a particular circumstance, the public interest in disclosing information outweighs the harm that may be caused by such disclosure. The fact that the Requester believes that there “can be no harm from disclosing the information” does not bind ICANN to accept the Requester's analysis.

ICANN determined that the potential harm outweighed the public interest in the

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<sup>7</sup> As to Items 9-14, as well as the other Items in the DIDP Request, the Requester argues that “[i]f ICANN Staff contends that the universe of documents responsive to an individual DIDP Request consists of documents that are entirely public, ICANN should identify each of those public documents and then indicate explicitly in writing that there are no additional documents responsive to that Request.” (Request 14-35, § 8, Pg. 9.) Although it is not required to do so by the DIDP, the DIDP Response identifies and provides links to responsive documents that are publicly available. (*See* DIDP Response, Pgs. 2-5.) Further, for those Items where ICANN staff's review of potentially responsive documents was complete, the Response explicitly stated that there were no additional, non-privileged documents responsive to those Items. (*See, e.g.*, DIDP Response, Pg. 6.) ICANN was clearly not able to make such a statement with respect to Items for which its review of potentially responsive documents remains ongoing.

disclosure of certain documents. For example, as noted above, many of the items in the DIDP Request seek documents whose disclosure “would or would be likely to compromise the integrity of . . . [the] deliberative and decision-making process” or would implicate ICANN’s attorney-client privilege. The Requester identifies no policy or procedure that ICANN staff violated in making its determination regarding whether the potential harm of disclosure outweighs the public interest of disclosure, and the Requester’s substantive disagreement with that determination is not a basis for reconsideration.

## **VI. Determination.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 14-35. As there is no indication that ICANN violated any policy or procedure with respect to its response to the Requester’s DIDP Request, and given that portions of Request 14-35 are simply premature as ICANN has stated that it is still reviewing documents, the instant Request 14-35 should not proceed.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

In terms of timing of the BGC’s Recommendation, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (Bylaws, Art. IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 6 August 2014. Due to the volume of Reconsideration Requests received within recent months the first practical opportunity for the BGC to take a review this Request was on 22 August 2014.