Response to Documentary Information Disclosure Policy Request

To: Noncommercial Users Stakeholder Group (NCSG)

Date: 24 August 2013

Re: Request No. 20130724-1

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Thank you for your Request for Information dated 24 July 2013 ("Request"), which was submitted by Robin Gross pursuant to the Internet Corporation for Assigned Names and Numbers' (ICANN) Documentary Information Disclosure Policy (DIDP). For reference, the text of each of the portions of your Request is set forth below.

**Items Requested**

Your Request seeks the following items:

1. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, concerning and / or leading to the staff action of the imposition of the policy announced in the 20 March 2013 staff memo titled *"Trademark Claims Protection for Previously Abused Names.*

2. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, leading to adoption of staff recommendation of the so-called "Trademark +50" policy, including, but not exclusively, any information, data, facts or rationale, per article 7 of the Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation For Assigned Names and Numbers, leading to the determination that the number "50" was the appropriate enumerator for this unprecedented extension of property rights and if any other numbers were considered.

3. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, involved in the preparation, compilation and production of Fadi

Chehade's 19 September 2012 letter to members of the United States Congress.

4. All correspondence between ICANN, staff and Board, and third parties, including but not exclusively government officials, trade associations, corporate and legal firms and interests, concerning the extension of trademark protection beyond the GNSO-approved 'exact match' standard in the Trademark Clearinghouse (TMCH).

5. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, concerning the meeting convened by Fadi Chehade in Los Angeles on 15-16 November 2012 to discuss the creation of new trademark privileges in new gtld policy. This request explicitly includes but is not limited to materials relating to the meeting's organization, the substance of its discussions, and any follow-up materials related to the meeting.

6. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, concerning staff memo of 29 November 2012, and the 3 December 2013 update, titled "Trademark Clearinghouse: Strawman Solution", involving any aspect of allegedly abusively registered strings and policy / implementation concerns thereof.

7. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, provided to or used by Mr. Chehade and/or staff in compiling Mr. Chehade's 26 November 2012 blog post concerning strings and allegedly abusive registrations and policy / implementation issues thereof. This request explicitly includes but is not limited to any such materials relating to the post-publication change, deletion, addition, or other editing of the text of the blog post.

8. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, used in

the creation of Mr. Chehade's e-mail to GNSO Chair Jonathan Robinson asking for "policy guidance" on the portion of the Strawman Model relating to the scope of trademark claims.

9. All documentation, contracts, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, including any and all communication between staff and Board, relating to ICANN, staff, board and external contractor's, consideration of and response to Reconsideration Request 13-3.

10. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, including any and all communication between staff and Board, relating to the Board Governance Committee's memo of 16 May 2013 concerning Reconsideration Request 13-3. This request includes but is not limited to materials related to the BGC's 16 May meeting in which NCSG's request was discussed, including board discussions, staff briefings or any notes, records or other information related to those staff briefings or board discussions.

11. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, including any and all communication between staff and Board, relating to the Board Governance Committee's Revised Recommendation of 25 June 2013, concerning Reconsideration Request 13-3, including but not limited to any materials relating to the reason for the revision. This request includes but is not limited to materials related to the BGC's 25 June meeting in which NCSG's request was discussed, including staff briefings or any notes, records or other information related to those staff briefings or board discussions.

12. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, including any and all communication between staff and Board, relating to the New gTLD Program Committees action of 2 July 2013 relating to Reconsideration Request 13-3.

13. All correspondence, and / or records thereof, between ICANN, staff and Board, and United States Senator Pat Leahy from 1 May 2012 to the present.

14. All correspondence, and / or records thereof, between ICANN, staff and Board, and Yahoo! Inc., including that between ICANN and Yahoo!'s representatives and agents, from 1 May 2012 to the present.

15. All documentation, memos, reports, analysis, correspondence, preparatory documents or any other information type not heretofore specified, both internal and external to ICANN in it's possession, in any and all formats, form and media, including contracts and invoices, relating to the involvement and / or contracting of outside counsel in any matter concerning Reconsideration Request 13-3.

**Response**

Your Request seeks the disclosure of various categories of documents related to the Trademark Clearinghouse ("Clearinghouse") Strawman Solution (the "Strawman Solution"). Because of the similarity of the many of the items requested, the items are broken into groups for the purposes of this Response. Within each portion of the Response, to the extent ICANN identified documentary information that is already publicly available, we have included the relevant links for transparency and ease of location.

Items 1, 2, 4, 5, 6, 7, and 8

Items 1, 2, 4, 5, 6, 7, and 8 seek the disclosure of documentary information related to the development and implementation of the Clearinghouse Strawman Solution, including: documents related to the implementation of the Strawman Solution (Items 1, 2, 4, 5, 6, 7, 8); documents related to selection of the number 50 as the limit for the "Trademark +50" standard that was incorporated through the Strawman work (Item 2); documents relating to the November 2012 meetings convened by ICANN to discuss the creation of the Strawman Solution (Item 5); documents relating to ICANN's announcement of the Strawman Solution proposal (Item 6); documents related to ICANN's blog posts regarding the development of the Strawman Solution (Item 7); and documents relating to ICANN's request for policy guidance from the GNSO Council (Item 8).

The Clearinghouse facilitates the protection of trademark rights during the initial allocation and registration periods for domain names in new generic top level domains (gTLDs). All new gTLD registries are required to use the Clearinghouse to ensure that a set of mandatory rights protection mechanisms are applied to all new domain registrations occurring in at least the first ninety days of domain registration. The Clearinghouse Strawman Solution was developed with the input of community members representing a broad spectrum of interests – including members of the NCSG – to address

a variety of concerns raised by stakeholders regarding the implementation of the Clearinghouse and its associated rights protection mechanisms.

Following the ICANN Toronto meeting in October 2012, ICANN convened a series of meetings with the stakeholder representatives (including NCSG members) to discuss the implementation of the Clearinghouse. These meetings took place in Brussels, Belgium and Los Angeles, California in November 2012. Among other subjects, the meetings addressed the proposal from the Business Constituency and Intellectual Property Constituency on improvements and enhancements to new gTLD rights protection mechanisms (the "IPC/BC Improvements and Enhancements to the RPMs for New gTLDs"), available at http://newgtlds.icann.org/en/program-status/correspondence/metalitz-to-pritz-17oct12-en.pdf. For the Los Angeles meeting held on 15-16 November 2012, documentary information has already been made public, including the transcripts and audio recordings from the meeting, posted at http://newgtlds.icann.org/en/about/trademark-clearinghouse/transcript-15nov12-en.pdf, http://audio.icann.org/new-gtlds/tmch-15nov12-en.mp3, http://audio.icann.org/new-gtlds/tmch-16nov12-en.mp3, http://newgtlds.icann.org/en/about/trademark-clearinghouse/transcript-16nov12-en.pdf. The meetings that took place in Brussels were not recorded, and therefore there are no transcripts or recordings available for those sessions. ICANN's search for documentary information in response to this Item revealed that the meeting participants communicated with each other over email regarding logistics leading up to the meetings as well as discussions regarding the substance of the proposals under consideration. We note that at least two members of the NCSG (Robin Gross and Kathy Kleiman) were participants in these email discussions and should already have copies of these exchanges.

On 16 November 2012, ICANN's President and CEO Fadi Chehadé provided the community with an update of the Strawman Solution discussions, available at http://blog.icann.org/2012/11/trademark-clearinghouse-update/. On 26 November 2012, Mr. Chehadé penned another blogpost with further updates, available at http://blog.icann.org/?s=TMCH. In addition to the materials referenced in the preceding paragraph related to meetings, documents responsive to Item 7 include the blog post by Mr. Chehade of 16 November 2012 and the IPC/BC Improvements and Enhancements to the RPMs for New gTLDs. Moreover, the request for the disclosure of preparatory materials and internal documents relating to any change, deletion, or editing of the 26 November 2012 blog seeks information that is clearly excluded from public release pursuant to the Defined Conditions for Nondisclosure set forth below.

On 29 November 2012, ICANN posted for public comment the proposed Strawman Solution developed through those community meetings (*see* http://www.icann.org/en/news/public-comment/tmch-strawman-30nov12-en.htm). The posting was updated on 3 December 2012 for clarification and inclusion of a list of meeting participants. Many of the links available within that comment box posting are responsive to multiple items within the Request. The comment period closed on 15 January 2013 and the Summary and Analysis of the comments is available at

http://www.icann.org/en/news/public-comment/report-comments-tmch-strawman-20mar13-en.pdf.

In addition to the public comment period, ICANN sought policy implementation guidance from the GNSO Council. On 4 December 2012, Mr. Chehadé sent an email to the Chair of the GNSO Council, Jonathan Robinson, requesting the GNSO Council to provide policy guidance on the Strawman Solution and the IPC/BC proposal for limited defensive registrations within the Clearinghouse. (*See* http://gnso.icann.org/en/correspondence/chehade-to-robinson-04dec12-en.pdf.) Mr. Robinson's response to Mr. Chehadé on 28 February 2013 is posted at http://gnso.icann.org/en/correspondence/robinson-to-chehade-28feb13-en.pdf.

On 20 March 2013, after review and consideration of all comments and the GNSO's guidance on each of the elements of the Strawman Solution proposal, ICANN announced the implementation of the Strawman Solution, at http://newgtlds.icann.org/en/about/trademark-clearinghouse/strawman-solution-memo-20mar13-en.pdf.

Because of the sequential process through which the Strawman Solution was developed, each of the documents identified above informed the development of further work on the Strawman Solution. Therefore, all the above-identified documents are responsive to the items of your Request referenced in this section.

To the extent additional documentary information currently exists that may be responsive to Items 1, 2, 4, 5, 6, 7, and 8, that documentation is not appropriate for disclosure pursuant to the following DIDP Defined Conditions of Nondisclosure.

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

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

- 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.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; or (iii) complying with which is not feasible.

Items 3 and 13

Item 3 seeks all documents related to Fadi Chehadé's letter of 19 September 2012 to Members of the United States Congress. This request overlaps with Item 13, which seeks all correspondence and related documents between ICANN Staff, Board, and United States Senator Pat Leahy from 1 May 2012 to the present.

Mr. Chehadé's letter of 19 September 2012 to Members of the United States Congress was written in response to a 7 August 2012 letter from Sens. Patrick Leahy, Chuck Grassley, and Reps. Lamar Smith and John Conyers to Akram Atallah, interim CEO and President of ICANN at that time. Both letters are available at https://www.icann.org/en/news/correspondence/chehade-to-leahy-et-al-19sep12-en and http://www.icann.org/en/news/correspondence/leahy-et-al-to-atallah-07aug12-en.pdf, respectively. To the extent appropriate for public dissemination, all correspondence and related documents between ICANN Staff, Board, and United States Senator Pat Leahy from 1 May 2012 to the present have been posted on ICANN's correspondence page at https://www.icann.org/en/news/correspondence.

To the extent additional documentary information currently exists that may be responsive to these Items, that documentation is not appropriate for disclosure pursuant to the following DIDP Defined Conditions of Nondisclosure.

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

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

- 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.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; or (iii) complying with which is not feasible.

Items 9, 10, 11, 12, and 15

These Items seek documents related to Reconsideration Request No. 13-3 that was submitted by the NCSG on 19 April 2013. Specifically, Item 9 seeks all documents relating to the "ICANN Staff, Board, and external contractor's consideration of and response to Reconsideration Request No. 13-3." To the extent appropriate for public dissemination, the documents responsive to this Item have been posted at http://www.icann.org/en/groups/board/governance/reconsideration, including the Reconsideration Request 13-3 itself (http://www.icann.org/en/groups/board/governance/reconsideration/request-ncsg-19apr13-en.pdf), the Recommendation by the Board Governance Committee ("BGC") of 16 May 2013 which was revoked on 25 June 2013 (http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-ncsg-16may13-en.pdf), the revised BGC Recommendation issued on 25 June 2013 (http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-ncsg-25jun13-en.pdf), the New gTLD Program Committee ("NGPC") action of 2 July 2013 adopting the Recommendation of the BGC (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.a), the Approved Resolution of the 2 July 2013 NGPC meeting (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm), the briefing materials from the 2 July 2013 NGPC meeting (http://www.icann.org/en/groups/board/documents/briefing-materials-3-02jul13-en.pdf), and the Minutes of the 2 July 2012 NGPC meeting (http://www.icann.org/en/groups/board/documents/minutes-new-gtld-02jul13-en.htm).

Item 10 seeks documents relating to the BGC's memo of 16 May 2013 concerning Reconsideration Request No. 13-3. To the extent appropriate for public dissemination, the documents responsive to this Item have been posted on ICANN's website at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-

ncsg-16may13-en.pdf and http://www.icann.org/en/groups/board/documents/minutes-bgc-16may13-en.htm.

Item 11 seeks documents relating to the BGC's revised Recommendation of 25 June 2013. To the extent appropriate for public dissemination, the documents responsive to this item are the revised BGC Recommendation issued on 25 June 2013 (http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-ncsg-25jun13-en.pdf), the minutes of the 25 June 2013 BGC meeting (http://www.icann.org/en/groups/board/documents/minutes-bgc-25jun13-en.htm), and the minutes of the 18 June 2013 BGC meeting (http://www.icann.org/en/groups/board/documents/minutes-bgc-18jun13-en.htm). In addition, the BGC received correspondence from members of the GNSO Council, such as Jeff Neuman's 13 June 2013 email to Cherine Chalaby and other members of the BGC regarding the BGC's Recommendation, and a 19 June 2013 email from Jonathan Robinson to the BGC on the same topic, each of which is available on the GNSO Council email list.

Item 12 seeks documents relating to the New gTLD Program Committee's (NGPC) action of 2 July 2013 concerning Reconsideration Request No. 13-3. To the extent appropriate for public dissemination, the documents responsive to this Item include the NGPC's Approved Resolution of the 2 July 2013 NGPC meeting adopting the BGC's revised Recommendation, (http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm), as well as the Minutes from the 2 July 2013 NGPC meeting (http://www.icann.org/en/groups/board/documents/minutes-new-gtld-02jul13-en.htm)m and the briefing materials from the 2 July 2013 NGPC meeting (http://www.icann.org/en/groups/board/documents/briefing-materials-3-02jul13-en.pdf).

Item 15 seeks documents relating to the involvement and/or contracting of outside counsel in any matter concerning Reconsideration Request 13-3. To the extent any documentary information currently exists that is responsive to this Item, that documentation is not appropriate for disclosure pursuant to the following DIDP Defined Conditions of Nondisclosure:

- 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 between and among ICANN, its constituents, and/or other

entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- 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.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Likewise, to the extent any additional documentary information exists that may be responsive to Items 9-12, that documentation is not appropriate for public dissemination pursuant to the same Defined Conditions of Nondisclosure set forth above.

Item 14

This item seeks documents relating to all correspondence and records thereof between ICANN Staff, Board, and Yahoo! Inc. from 1 May 2012 to the present. This requested category seeks over 14 months of correspondence between those within ICANN and Yahoo! Inc., a company that has representatives that have or do participate within ICANN at many different contact points, including as an applicant in the New gTLD Program, within the GNSO structure, and even the Nominating Committee during the relevant time frame. As the Request does not attempt to limit the information sought in any meaningful way, this Item is far too broad for any meaningful response. Accordingly, responding to this Item as stated is not feasible and would be overly burdensome. The following Defined Conditions for Nondisclosure apply to this Item of the Request:

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

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

- 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.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; or (iii) complying with which is not feasible.

For all of the Items within the Request, as ICANN reviewed documentary information in accordance with the DIDP, ICANN evaluated whether the public interest in disclosing any information that is not already publicly available would outweigh the harm caused by such disclosure. As noted above, as final versions of blogs, letters and documents sought in the Request have been publicly posted, the disclosure of iterative drafts and internal communications supporting the drafting of such materials 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.

**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, which is contained within the ICANN Accountability & Transparency: Framework and Principles please see http://www.icann.org/en/about/transparency/didp. 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.