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September 21, 2015

BY E-MAIL

ICANN
12025 Waterfront Drive
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Los Angeles, CA 90094-2536
dipd@icann.org

Re: Documentary Information Disclosure Policy Request — .SPA

Dear ICANN:

We write to you today on behalf of Donuts Inc. (“Donuts”) and its subsidiary Foggy Sunset, LLC (“Foggy Sunset” or collectively with Donuts, the “Requesters”). This correspondence is a request made under ICANN’s “Documentary Information Disclosure Policy” (“DIPD”) pertaining to the community priority evaluation (“CPE”) for the string .SPA.¹

Pertinent Background: As discussed in greater detail in the Request for Reconsideration submitted by Foggy Sunset on the subject,² the CPE report for .SPA relies heavily on a purported letter of support from the International Spa Association (“ISA”). Specifically, this support letter was *dated* July 2, 2014, but apparently *submitted* with certain other letters on April 9, 2015 and well after the procedurally allotted window of “14 days” from the date of CPE invitation.³ None of the letters included in ASWPC’s submission appears independently anywhere prior to April 9, 2015, so far as Requesters are aware. More importantly, they cannot be found in the supporting materials for ASWPC’s application, such as in its response to Question 20(f).⁴ Likewise, these letters do not appear to have been previously posted in either the ICANN Application Comment Forum⁵ or on ICANN’s primary correspondence page.⁶

¹ See <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>

² <https://www.icann.org/en/system/files/files/reconsideration-request-15-14-foggy-sunset-with-attachments-06aug15-en.pdf>

³ See <https://newgtlds.icann.org/en/applicants/cpe>: “**Important:** application comments and letters of support or opposition must be submitted within 14 days of the CPE Invitation Date in order to be considered by the CPE Panel.” (emphasis in original)

⁴ <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/123>

⁵ <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁶ <https://www.icann.org/resources/pages/correspondence-2012-09-24-en>

Rather, they seemingly make their first (and only) appearance in ASWPC's April 9, 2015 letter, which ASWPC's representative specifically describes as an "important update."⁷

This "update" was made over sixty days from the February 3, 2015 CPE invitation date, and as a result is untimely and should have had no bearing on the EIU's decision. Indeed, the ASWPC application itself includes just one letter of support – *unverified*, as the EIU acknowledged in its analysis⁸ – from an isolated facility in ASWPC's native Malaysia, the "Ka'andaman Spa."⁹ ASWPC does not explain why it failed to offer the ISA letter or other letters of support with its original application, nor does it list any locations where such items had been publicly posted prior to the expiration of the 14-day CPE deadline. Therefore, it appears that ASWPC either neglected to submit the letters at the time they were received or, alternatively, that ASWPC simply backdated them to *appear* timely.

As discussed in Foggy Sunset's Reconsideration Request, there is every indication that — but for the letters contained within the untimely submission — the ASWPC application for .SPA would likely not have earned the 14 points necessary to pass CPE. *See, e.g.*, Recon. Req. at 5-6.

Donuts complied with ICANN's published process by submitting its own comments to the ASPWC application within the prescribed 14-day period.¹⁰ Donuts and other applicants and ICANN stakeholders rely on such published processes and reasonably expects consistent adherence to them. Indeed, the EIU itself has created its own CPE process document which ICANN publishes on its CPE status page and that reinforces the deadlines and their rationale:

"The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. *Consistency of approach ... is of particular importance.*"

See <http://newgtlds.icann.org/en/applicants/cpe#status/panel-process-07aur14-en.pdf> at 1 (emphasis added). The public comments are provided to EIU by ICANN "following the close of the 14-day window" associated with the CPE invitation.¹¹

Notwithstanding the foregoing, the EIU appears to have relied upon ASWPC's late submission in its CPE decision and in fact makes explicit reference to the International Spa Association by name on multiple occasions. By way of example, on page 2 of the .SPA decision the EIU specifically identifies "[t]he International Spa Association (ISA), which the applicant cites as an example of a community organization *and from which the applicant has received a letter of support...*" (emphasis added)

⁷ <https://www.icann.org/en/system/files/correspondence/ng-to-icann-09apr15-en.pdf>

⁸ *See* .SPA CPE decision at page 7.

⁹ <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadattachment/137957?t:ac=123>

¹⁰ <https://www.icann.org/en/system/files/correspondence/donuts-inc-to-icann-17feb15-en.pdf>

¹¹ *Id.* at 2 (emphases added).

The EIU's .SPA decision included a chart detailing the number of support/opposition letters, public comments and other materials that were analyzed. A copy of that chart is included here:

Summary of Review & Verification of Support/Opposition Materials as of 22 May 2015				
	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	1	0	0	0
Attachments to 20(f)	1	1	1	0
Page 7				
Correspondence	12 ¹²	5	5	2
Grand Total	14	6	6	2

The chart lists a total of 14 items that were received “as of 22 May 2015” with little information given about the specific authors or dates of publication for each. It seems readily apparent that one of the items referred to under “Correspondence” is the ISA letter — as the organization was identified by name in the decision — but we are left to guess about the nature of the others. Based on Requesters’ own attempts to corroborate these results, a full list of the 14 items evaluated would read as follows:

1. *Application Comments*: A general comment by the “European Brands Association” that was unrelated to CPE or ASWPC’s specific application, calling for trademark “block lists” to reduce consumer confusion:
<https://gtldcomment.icann.org/applicationcomment/commentdetails/2698>
2. *Attachments to 20(f)*: The aforementioned letter from “Ka’andaman Spa” that was included with ASWPC’s original application: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadattachment/137957?t:ac=123>
3. *Correspondence*: 14 total items posted to ICANN’s Correspondence page, broken down into 3 general groupings:
 - a. 9 postings, made at various times prior to the February 2015 CPE invitation date, and all concerning an “objection” raised by the City of Spa, Belgium that the EIU characterized as “verified to have been withdrawn.”¹²
 - <https://www.icann.org/en/news/correspondence/lanotte-to-chehade-crocker-01jul13-en>

¹² See .SPA decision at Footnote 12.

- <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07feb14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/laurent-to-chehade-crocker-06mar14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/atallah-to-laurent-13mar14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/nevett-to-crocker-18mar14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/lanotte-to-chehade-crocker-20mar14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/willett-to-lanotte-30apr14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/lanotte-to-chehade-crocker-01jul14-en.pdf>
 - <https://www.icann.org/en/system/files/correspondence/chehade-to-lanotte-03oct14-en.pdf>
- b. The posting by Requesters on February 17, 2015 in opposition to ASWPC's application:
<https://www.icann.org/en/system/files/correspondence/donuts-inc-to-icann-17feb15-en.pdf>
- c. The (untimely) "update" submission by ASWPC on April 9, 2015, which included 4 support letters, including from the ISA and the City of Spa:
<https://www.icann.org/en/system/files/correspondence/ng-to-icann-09apr15-en.pdf>

Requests: To help clarify exactly which letters were evaluated (and when each was submitted) Requesters hereby respectfully request that ICANN produce the following documents and information pursuant to its DIDP:

- 1) All letters of support or opposition submitted to ICANN concerning the AWSPC community application for .SPA.
- 2) All documents evidencing the date on which each of the letters responsive to Request No. 1 was submitted to ICANN and became part of the public record for the .SPA CPE decision.
- 3) All documents that evidence or reflect the actions taken by the EIU or anyone acting on its behalf to verify each of the letters responsive to Request No. 1, in accordance with the process established by EIU for doing so at page 5 of its August 7, 2014 CPE process document.
- 4) All documents that state, reflect or refer to the basis (if any) upon which the EIU relied, if it did, on any letter responsive to Request No. 1 not publicly submitted to or for ICANN or the EIU on or before February 17, 2015.

- 5) All correspondence and communications between ICANN and the EIU regarding: (i) the AWSPC community application for .SPA; (ii) support for or opposition to the application; and/or (iii) the EIU's evaluation of the application for community priority.
- 6) All correspondence and communications between ICANN and the Government of Belgium, and/or the City of Spa, regarding .SPA.
- 7) Documents sufficient to identify all persons, whether ICANN staff, Board members or otherwise, who participated in the correspondence and communications referenced in Request No. 6.
- 8) Any and all drafts of the EIU's CPE report concerning .SPA.

In lieu of responding to Request Nos. 1 and 2, ICANN may confirm that the above list accurately depicts the online location for each of the items made "publicly available" for purposes of support/opposition on the ASWPC .SPA application, and that no other record of support or opposition exists.

Inapplicability of Defined Nondisclosure Conditions: Requesters have reviewed each of ICANN's "Defined Conditions for Nondisclosure" ("Conditions") and have determined that none of them applies to any of the foregoing requests. The Conditions purport to exclude from disclosure "drafts" of certain types of documents, including "reports," but this appears to apply to "draft ... reports" by ICANN itself, based on stated concerns elsewhere in the Conditions pertaining to "ICANN's deliberative and decision-making process" Draft reports by a third party in ICANN's possession do not implicate such concerns.

Public Interest Considerations: Further, even if the foregoing or any other Condition did apply in whole or in part to any particular request above, ICANN should deem that, under the circumstances, the public interest in disclosing the information outweighs any harm that may be caused by the disclosure. As ICANN is no doubt aware, CPE is a process with severe and potentially irreparable consequences, namely the elimination of all competing non-community applications that may be pending. The failure of ICANN's contracted vendor to follow the established policy and procedure has deprived Requesters of valuable rights, namely the opportunity to compete fairly for the .SPA domain, as a consequence of a CPE report by the EIU that failed to follow published processes. Indeed, any drafts of CPE reports by the EIU concerning .SPA would reflect changes in factual grounds or reasoning resulting in the final report, and whether any additional information may have been considered, including improperly so.

Refusal by ICANN to produce all or part of the information requested has also the potential to create a dangerous precedent that could adversely impact other applicants and constituent groups. Therefore, ensuring that the .SPA domain is awarded fairly and in strict conformance with published policies and procedures would most certainly be in the "public interest."

Conclusion: As noted in Art. III, § 1 of its Bylaws, ICANN is obliged to conduct its affairs to the "maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN therefore should grant and produce the documents responsive to the requests herein, as doing so will ensure both "transparency" and "fairness" and simultaneously should not compromise any "compelling reason for confidentiality."

THE IP AND TECHNOLOGY LEGAL GROUP, P.C.

ICANN (dipd@icann.org)

September 21, 2015

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Thank you for your attention to this important matter.

Sincerely,

/dcm/

Don C. Moody
of The IP and Technology Legal Group, P.C.