

Peering behind the veil of ICANN's DIDP

One of the key elements of the process of enhancing democracy and furthering transparency in any institution which holds power is open access to information for all the stakeholders. This is critical to ensure that there is accountability for the actions of those in charge of a body which utilises public funds and carries out functions in the public interest.

As the body which “...coordinates the Internet Assigned Numbers Authority (IANA) functions, which are key technical services critical to the continued operations of the Internet's underlying address book, the Domain Name System (DNS)”¹, the centrality of ICANN in regulating the Internet (a public good if there ever was one) makes it vital that ICANN's decision-making processes, financial flows, and operations are open to public scrutiny. ICANN itself echoes the same belief, and upholds “...a proven commitment to accountability and transparency in all of its practices”², which is captured in their [By-Laws](#) and [Affirmation of Commitments](#). In furtherance of this, ICANN has created its own [Documentary Information Disclosure Policy](#), where it promises to “...ensure that information contained in **documents concerning ICANN's operational activities**, and within ICANN's possession, custody, or control, is **made available to the public unless there is a compelling reason for confidentiality**.”³

ICANN has a vast array of documents that are already in the public domain, listed [here](#). These include annual reports, budgets, registry reports, speeches, operating plans, correspondence, etc. However, their Documentary Information Disclosure Policy falls short of meeting international standards for information disclosure. In this piece, I have focused on an examination of their defined conditions for non-disclosure of information, which seem to undercut the entire process of transparency that the DIDP process aims towards upholding. The obvious comparison that comes to mind is with the right to information laws that governments the world over have enacted in furtherance of democracy. While ICANN cannot be equated to a democratically elected government, it nonetheless does exercise sufficient regulatory power of the functioning of the Internet for it to owe a similar degree of information to all the stakeholders in the internet community. In this piece, I have made an examination of ICANN's conditions for non-disclosure, and compared it to the analogous exclusions in India's Right to Information Act, 2005

ICANN's Defined Conditions for Non-Disclosure versus Exclusions in Indian Law :

ICANN, in its DIDP policy identifies a lengthy list of conditions as being sufficient grounds for non-disclosure of information. One of the most important indicators of a strong transparency law are said to be **minimum exclusions**.⁴ However, as seen from the table below, ICANN's exclusions are extensive and vast, and this has been a barrier in the way of free flow of information. An analysis of their responses to various DIDP requests (available [here](#)) shows that the conditions for non-disclosure have been invoked in over 50 of the 85 requests

¹ <https://www.icann.org/resources/pages/welcome-2012-02-25-en>

² <https://www.icann.org/resources/accountability>

³ <https://www.icann.org/resources/pages/didp-2012-02-25-en>

⁴ Shekhar Singh, *India: Grassroot Initiatives* in THE RIGHT TO KNOW 19, 44 (Ann Florin ed., 2007)

responded to (as of 11.09.2015); i.e., over two-thirds of the requests that ICANN receives are subjected to the non-disclosure policies.

In contrast, an analysis of India's Right to Information Act, considered to be among the better drafted transparency laws of the world, reveals a much narrower list of exclusions that come in the way of a citizen obtaining any kind of information sought. The table below compares the two lists:

No.	ICANN⁵	India	Analysis
1.	Information provided by or to a government or international organization which was to be kept confidential or would materially affect ICANN's equation with the concerned body.	Information, disclosure of which would prejudicially affect the sovereignty and integrity of India , the security, "strategic, scientific or economic" interests of the State, relation with foreign State or lead to incitement of an offense ⁶ / information received in confidence from foreign government ⁷	The threshold for both the bodies is fairly similar for this exclusion.
2.	Internal (staff/Board) information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process	Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers, provided that such decisions the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken , and the matter is complete, or over (unless subject to these exemptions) ⁸	The Indian law is far more transparent as it ultimately allows for the records of internal deliberation to be made public after the decision is taken.
3.	Information related to the deliberative and decision-making	No similar provision in Indian Law.	This is an additional restriction that ICANN introduces in addition to the one above, which in

⁵ In a proviso, ICANN's DIDP states that all these exemptions can be overridden if the larger public interest is higher. However, this has not yet been reflected in their responses to any DIDP requests.

⁶ Section 8(1)(a), Right to Information Act, 2005.

⁷ Section 8(1)(f), Right to Information Act, 2005.

⁸ Section 8(1)(i), Right to Information Act, 2005.

	<p>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</p>		<p>itself is quite broad.</p>
4.	<p>Records relating to an individual's personal information</p>	<p>Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual (but it is also provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied by this exemption);⁹</p>	<p>Again, the Indian law contains a proviso for information with "<i>relationship to any public activity or interest</i>"</p>
5.	<p>Proceedings of internal appeal mechanisms and investigations.</p>	<p>Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;¹⁰</p>	<p>While ICANN prohibits the disclosure of all proceedings, in India, the exemption is only to the limited extent of information that the court prohibits from being made public.</p>
6.	<p>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</p>	<p>Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is</p>	<p>This is fairly similar for both lists.</p>

⁹ Section 8(1)(j), Right to Information Act, 2005.

¹⁰ Section 8(1)(b), Right to Information Act, 2005.

	<p>position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.</p>	<p>satisfied that larger public interest warrants the disclosure of such information;¹¹</p>	
7.	<p>Confidential business information and/or internal policies and procedures.</p>	<p>No similar provision in Indian Law. This is encapsulated in the abovementioned provision</p>	<p>This is fairly similar in both lists.</p>
8.	<p>Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.</p>	<p>Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;¹²</p>	<p>This is fairly similar for both lists.</p>
9.	<p>Information subject to any kind of privilege, which might prejudice any investigation</p>	<p>Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature¹³/Information which would impede the process of investigation or apprehension or prosecution of offenders;¹⁴</p>	<p>This is fairly similar in both lists.</p>
10.	<p>Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.</p>	<p>No similar provision in Indian Law</p>	<p>This exclusion is not present in Indian law, and it is extremely broadly worded, coming in the way of full transparency.</p>

¹¹ Section (1)(d), Right to Information Act, 2005

¹² Section 8(1)(g), Right to Information Act, 2005.

¹³ Section 8(1)(c), Right to Information Act, 2005.

¹⁴ Section 8(1)(h), Right to Information Act, 2005.

11.	Information that relates in any way to the security and stability of the Internet	No similar provision in Indian Law	This is perhaps necessary to ICANN's role as the IANA Functions Operator. However, given the large public interest in this matter, there should be some proviso to make information in this regard available to the public as well.
12.	Trade secrets and commercial and financial information not publicly disclosed by ICANN.	Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; ¹⁵	This is fairly similar in both cases.
13.	Information requests: <ul style="list-style-type: none"> ● which are not reasonable; ● which are excessive or overly burdensome ● complying with which is not feasible ● which are made with an abusive or vexatious purpose or by a vexatious or querulous individual. 	No similar provision in Indian Law	Of all the DIDP exclusions, this is the one which is most loosely worded. The terms in this clause are not clearly defined, and it can effectively be used to deflect any request sought from ICANN because of its extreme subjectivity. What amounts to 'reasonable'? Whom is the process going to 'burden'? What lens does ICANN use to define a 'vexatious' purpose? Where do we look for answers?
14.	No similar provision in ICANN's DIDP.	Information available to a person in his fiduciary relationship , unless the	-

¹⁵ Section (1)(d), Right to Information Act, 2005

		competent authority is satisfied that the larger public interest warrants the disclosure of such information; ¹⁶	
15.	No similar provision in ICANN's DIDP.	Information which providing access to would involve an infringement of copyright subsisting in a person other than the State. ¹⁷	-

Thus, the net cast by the DIDP exclusions policy is more vast than even than that of a democratic state's transparency law. Clearly, the exclusions above have effectively allowed ICANN to dodge answers to most of the requests floating its way. One can only hope that ICANN realises that these exclusions come in the way of the transparency that they are so committed to, and does away with this unreasonably wide range on the road to the IANA Transition.

¹⁶ Section 8(1)(e), Right to Information Act, 2005.

¹⁷ Section 9, Right to Information Act, 2005.