

ADMINISTRATIVE & REGULATORY LAW NEWS

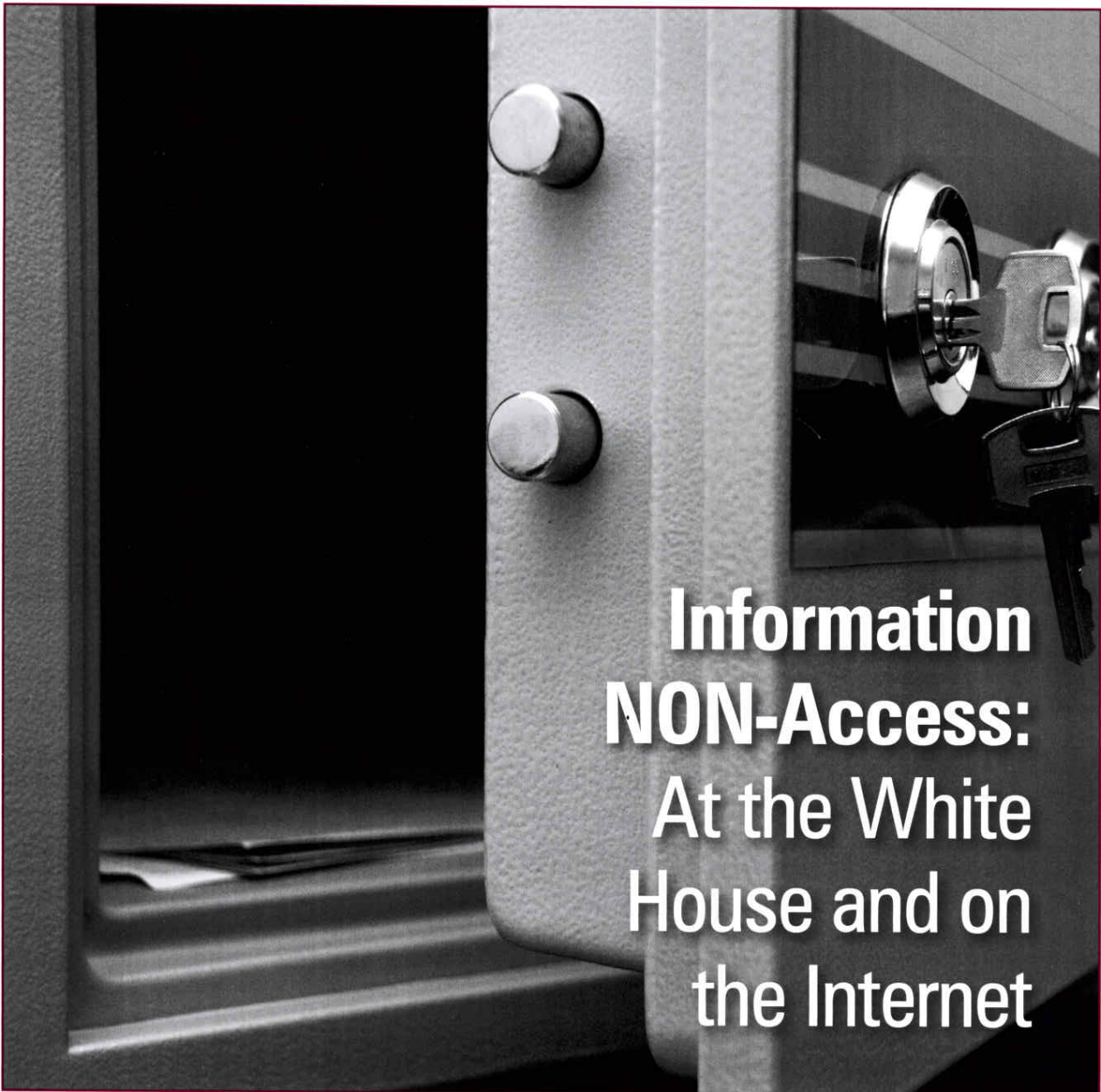


Section of Administrative Law & Regulatory Practice

Vol. 36, No. 3

American Bar Association

Spring 2011



**Information
NON-Access:
At the White
House and on
the Internet**

Also In This Issue

Whistleblower "About to" Cases

ACUS Antecedents

The Need for Lobbyists & Some Rules to Live By

EPA Advocacy Book Review

From FOIA Service to Lip Service: The Unexpected Story of White House Visitor Logs

By Daniel J. Metcalfe*

As much as any area of administrative law, the Freedom of Information Act (FOIA) is one in which public expectations matter greatly. The Act has been amended many times (sometimes in favor of FOIA requesters, sometimes not) and its governmentwide implementation can vary considerably from one presidential administration to the next. And when a new administration comes into power amid high expectations of more “liberal” disclosure held by the FOIA-requester community, there is all the more room for disappointment. Such is the case with the Obama Administration and its surprising handling of what are called White House “visitor logs.”

The FOIA has been in effect since 1967 and for several decades there was no question about its applicability to the federal records pertaining to those who enter the White House for one purpose or another. Over the years, whether called “WAVES” (White House Complex Workers and Visitors Entrance System) records or by a predecessor name, they have been created and maintained by the United States Secret Service as part of its presidential protection function. And from one administration to the next, the White House, the Secret Service, and the Department of Justice consistently recognized the records of White House visitors as “agency records” subject to both the FOIA and the Federal Records Act, not records of the White House itself subject to the Presidential Records Act. See, e.g., Memorandum to All Federal Agen-

cies Regarding White House Records (Nov. 3, 1993) (delineating White House records from “agency records” under the FOIA in such a way as to include visitor logs in the latter category, not the former), available at http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page4.htm.

Bush Administration Reversal

This changed radically in the second Bush Administration, which was motivated to carve White House visitor logs out of the FOIA if at all possible. It took the self-serving position that the Secret Service did not have “control” over its visitor records (the touchstone for “agency record” status under the FOIA) so that they no longer were subject to FOIA access, and it maintained this position despite district court precedents to the contrary.

During the run-up to the mid-term elections in 2006, with lobbyist Jack Abramoff’s White House connections central to a growing lobbying scandal, this issue nearly came to a head. *The Washington Post* not only filed FOIA requests for related “White House visitor” information, it brought a high-visibility lawsuit directly challenging the Bush Administration’s position. That change in longstanding FOIA practice was quite “transparent” in its own way, and it carried an odor redolent of the Abramoff lobbying scandal itself, which was not lost on the judge in the case. Indeed, District Court Judge Ricardo M. Urbina promptly ordered that the case be litigated according to an expedited schedule that plainly contemplated disclosures in time for the plaintiff to use them in newspaper articles written prior to the election.

After Judge Urbina pointedly established such a timetable, however, the

Bush Administration countered by seeking more time from the court of appeals. It succeeded in obtaining an emergency stay of Judge Urbina’s order, which had the effect of pushing the case beyond the time of the upcoming elections. With that, *The Washington Post* decided to abandon the case, which meant that the Bush Administration position on visitor logs continued to prevail through the remainder of the Bush Administration.

Enter the Obama Administration

By any measure, when it comes to secrecy across the board, the Obama Administration had “an easy act to follow.” Even beyond that, when President Obama famously declared that he was going to have “the most transparent administration in history,” the very opposite of his predecessor, the public’s expectations became commensurately high. And as regards the matter of White House visitor logs, every expectation was that this new administration would of course return their FOIA status to what it had been before the previous one so self-servingly altered it.

Yet as it settled in during its first several months, the Obama Administration was less than forthcoming about restoring visitor log access under the FOIA, even in the face of growing public criticism that it was not implementing President Obama’s transparency vision quickly or fully enough on several fronts. In fact it actually resisted, seemingly reflexively, FOIA requests that were made (to the Secret Service) for the records of its own White House visitors, as well as those that were “carved out” of the FOIA during the Bush Administration.

This led to a pile-up of FOIA litigation, most prominently a series of

continued on next page

* Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy (CGS), American University’s Washington College of Law; Contributing Editor, *Administrative & Regulatory Law News*; and Founding Director, United States Department of Justice’s Office of Information and Privacy (OIP).

lawsuits filed by a single public interest group that sought to press the issue and move the Obama Administration away from the Bush Administration on it as quickly as possible. These FOIA suits provided a focal point for the new administration.¹

“Voluntary” Disclosure Policy

Then, in September 2009, the Obama White House announced that it was establishing an “unprecedented” new disclosure policy for visitor logs whereby it henceforth would make regular Web site releases of them, albeit on a “voluntary” basis, not under the FOIA, and with a routine time lag of three to four months. In so doing, it managed to settle the pending FOIA suits, even though in its fine print the policy promised to respond to prospective visitor log requests only if it found them to be, among other things, sufficiently “narrow.” And it more vaguely mentioned that it would not include in its releases any visitor log information that it deemed to be “particularly sensitive.”

This of course can be viewed as a significant and positive step insofar as it yields the disclosure of far more visitor records than ever in the past, because it does so automatically, without any request for them being made. That aspect of the policy alone deserves much credit.

But hidden within this policy is the unattractive fact that its very “voluntariness” is premised on Obama’s continuation of the Bush Administration position that visitor logs have been “carved out” of the FOIA to begin with. In other words, if the FOIA were applied to these records as it was for decades, the only thing “voluntary” about the policy would be that it involves automatic releases at regular intervals—something that could readily be yielded by regular (e.g., monthly) FOIA requests without any difficulty.

What this amounts to is a current visitor log policy that actually has the following characteristics:

¹ This most active public interest group on this issue was Citizens for Responsibility and Ethics in Washington (CREW), which filed a total of four FOIA suits for White House visitor records. More recently, the most active such FOIA requester has been Judicial Watch.

Invisible Withholding. First and foremost, the White House’s use of a “voluntary disclosure policy,” instead of FOIA compliance, means that it can withhold from the public any visitor log it chooses, whenever it chooses, invisibly. Under its policy, any posting of those records could include all of them, 99% of them, or some lesser percentage of them for the time period involved—the public would never know. Bluntly put, nothing prevents the Obama Administration from either improperly or mistakenly shielding any such records from public view, silently, at any time. It is an axiom of good government accountability, not to mention basic administrative law, that such situations are strongly disfavored, to say the least.

No Specification. A further consequence of carving visitor logs out of the FOIA is that the Act’s “specification” requirements need not be met. Through a series of FOIA amendments over the years, Congress has required agencies to specify the volume, location, and exemption applicability of information withheld under the Act. *See* 5 U.S.C. § 552(b) (concluding sentences). The Obama Administration’s policy does nothing of the kind.

No Administrative Appeal. The new visitor log policy also falls far short of the FOIA regarding its administrative remedies, most particularly the requester’s right to have a second, higher-level review of any information withholding on administrative appeal. Even if someone were to succeed in pressing the White House with a targeted request for specific visitor information, once it is withheld as “sensitive” that administrative response is final.

No Judicial Review. Of course, the primary legal effect of the Obama Administration’s “voluntary” policy, and its embrace of the Bush Administration’s underlying “not an agency record” position, is that its disclosure/nondisclosure actions on visitor logs are now ostensibly insulated from judicial review. The prospect of such review is essential to ensuring sound agency action, both as a matter of administrative law in general and under the FOIA in particular, and its absence greatly diminishes accountability. No doubt that held strong appeal for the

Bush Administration when it first took the underlying position.

Pre-September 2009 Records.

Also lost in the shuffle with the current policy are the records of White House visits during the first eight months of the Obama Administration. It is odd for this White House to on one hand tout the value of its policy and on the other hand leave such a black hole to begin with. Even more oddly, this seems to include visitor records from the Bush Administration as well.

Time Lag. Last, and relatively least, is the time-lag element of the White House’s policy. Inherent in that policy’s “voluntary” timetable is that visitor information is withheld from public view for a minimum of ninety days in all instances. This is a far cry from the twenty-working-day standard that the FOIA contains.

In sum, if there were to be an Abramoff-type lobbying scandal during the Obama Administration, there would be nothing to prevent the White House from unilaterally withholding any visitor log evidence of questionable activity without challenge or even any public awareness that it was doing so. This is quite a remarkable position for a presidential administration that on the surface justifiably prides itself on standing for the very opposite when it comes to government accountability.

Indeed, perhaps the most remarkable thing here is not merely that the Obama Administration has chosen to follow the Bush Administration’s extreme position on visitor logs. It is that it has sought to obscure the very fact that it is doing so, shying away from anything that emphasizes its legal repudiation of the FOIA for these records.² Time and again, it actually has pointed to its visitor log policy as evidence of its transparency policy’s implementation success, even going so far as to place it (among little else) in the “FOIA” category. Call it a lack of “trans-

² This was most evident in the insistence by White House “transparency czar” Norm Eisen, at a program held by the Collaboration on Government Secrecy at American University’s Washington College of Law in March 2010, that there simply is “no need to make a FOIA request” for visitor log records.

continued on page 7

From FOIA Service to Lip Service *continued from page 4*

parency about transparency,” or worse, it is by any name far less than what was expected.

Prospective Resolution

So it appears that, despite great expectations, it will take litigation to force the Obama Administration to reconsider and replace its “voluntary” visitor log disclosure policy, not to mention openly admit that it has exploited the Bush Administration’s efforts to take such a step backward. There is a case presently pending that should bring the matter to

a head, one that includes both pre- and post-September 2009 visitor information, *Judicial Watch, Inc. v. United States Secret Service*, No. 09-2312 (HHK) (D.D.C., filed Dec. 7, 2009). It constitutes a direct, broad-based challenge to the Obama Administration’s “voluntary disclosure” policy overall.

Once that decision comes down, though, there is always the further question of appeal. To be sure, this is the type of FOIA issue that ordinarily would be expected to be taken to the appellate level for final resolution no matter which

side prevails below, and such an appeal could carry the issue forward beyond the end of this presidential term. But to do so in the most likely event that the government loses, the Solicitor General would have to be persuaded that appeal is warranted for what is, at bottom, a regressive Bush Administration position.

Either way, one can expect the entire subject—from the legal “FOIA status” issue to the more political transparency one—to have much higher visibility (if not true transparency) by that point. 