

White House office to delete its FOIA regulations



Gregory Korte, USA TODAY

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(Photo: Mark Wilson, Getty Images)

WASHINGTON — The White House is removing a federal regulation that subjects its Office of Administration to the Freedom of Information Act, making official a policy under Presidents Bush and Obama to reject requests for records to that office.

The White House said the cleanup of FOIA regulations is consistent with court rulings that hold that the office is not subject to the transparency law. The office handles, among other things, White House record-keeping duties like the archiving of e-mails.

But the timing of the move raised eyebrows among transparency advocates, coming on National Freedom of Information Day and during a national debate over the preservation of Obama administration records. It's also Sunshine Week, an effort by news organizations and watchdog groups to highlight issues of government transparency.

"The irony of this being Sunshine Week is not lost on me," said Anne Weismann of the liberal Citizens for Responsibility and Ethics in Washington, or CREW.

"It is completely out of step with the president's supposed commitment to transparency," she said. "That is a critical office, especially if you want to know, for example, how the White House is dealing with e-mail."



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Unlike other offices within the White House, which were always exempt from the Freedom of Information Act, the Office of Administration responded to FOIA requests for 30 years. Until the Obama administration, watchdog groups on the left and the right used records from the office to shed light on how the White House works.

"This is an office that operated under the FOIA for 30 years, and when it became politically inconvenient, they decided they weren't subject to the Freedom of Information Act any more," said Tom Fitton of the conservative Judicial Watch.

That happened late in the Bush administration, when CREW sued over e-mails deleted by the White House — as many as 22 million of them, by one accounting. The White House at first began to comply with that request, but then reversed course.

"The government made an argument in an effort to throw everything and the kitchen sink into the lawsuit in order to stop the archiving of White House e-mails," said Tom Blanton, the director of the National Security Archive at George Washington University, which has used similar requests to shed light on foreign policy decisions.



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In 2009, a federal appeals court in Washington ruled (https://ecf.cadc.uscourts.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc&dls_id=01205720044&caselid=23375&dktType=dktPublic) that the Office of Administration was not subject to the FOIA, "because it performs only

operational and administrative tasks in support of the president and his staff and therefore, under our precedent, lacks substantial independent authority."

The appeals court ruled that the White House was required to archive the e-mails, but not release them under the FOIA. Instead, White House e-mails must be released under the Presidential Records Act — but not until at least five years after the end of the administration.

In a notice to be published in Tuesday's *Federal Register* (<https://s3.amazonaws.com/public-inspection.federalregister.gov/2015-05899.pdf>), the White House says it's removing regulations on how the Office of Administration complies with Freedom of Information Act Requests based on "well-settled legal interpretations."

The rule change means that there will no longer be a formal process for the public to request that the White House voluntarily disclose records as part of what's known as a "discretionary disclosure." Records released by the Office of Administration voluntarily include White House visitor logs and the recipe for beer brewed at the White House.

"You have a president who comes in and says, I'm committed to transparency and agencies should make discretionary disclosures whenever possible, but he's not applying that to his own White House," Weismann said.

The White House did not explain why it waited nearly six years to formally acknowledge the court ruling in its regulations.

Blanton said the outdated regulation is part of a larger problem of outdated FOIA regulations: Most federal agencies haven't updated their rules to take into account changes in law, many of which benefit requesters.

White House spokeswoman Brandi Hoffine said the administration remains committed "to work towards unprecedented openness in government."

"Over the past six years, federal agencies have gone to great efforts to make government more transparent and more accessible than ever, including by making more information available to the public via our Open Government initiative and improving the FOIA process," she said.

In the notice to be published Tuesday, the White House said it was not allowing a 30-day public comment period, and so the rule will be final.

"It's a little tone deaf to do this on Sunshine Week, even if it's an administrative housecleaning," said Rick Blum, coordinator of the Sunshine in Government initiative for the Reporters Committee for Freedom of the Press.

The bigger issue, Blum said, is that the Office of Administration is itself responsible for presidential record-keeping. Given the controversy over former secretary of State Hillary Rodham Clinton's use of a personal e-mail account to conduct official business, there ought to be more scrutiny of record-keeping practices, he said.

"I think what we've all learned in the last few weeks is the person who creates a record — whether it's running a program or writing an e-mail — is the one who gets to decide whether it's an official record," Blum said. "And there ought to be another set of eyes on that. That's the essential problem."

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