

ELECTRONIC MESSAGE PRESERVATION ACT

JANUARY 27, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TOWNS, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1387]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1387) to amend title 44, United States Code, to require preservation of certain electronic records by Federal agencies, to require a certification and reports relating to Presidential records, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

At the end of the bill, add the following new sections:

SEC. 4. PROCEDURES TO PREVENT UNAUTHORIZED REMOVAL OF CLASSIFIED RECORDS FROM NATIONAL ARCHIVES.

(a) IN GENERAL.—The Archivist of the United States shall prescribe internal procedures to prevent the unauthorized removal of classified records from the National Archives and Records Administration or the destruction or damage of such records, including when such records are accessed or searched electronically. The procedures shall include the following prohibitions:

(1) No person, other than personnel of the National Archives and Records Administration (in this section hereafter referred to as “NARA personnel”), shall view classified records in any room that is not secure except in the presence of NARA personnel or under video surveillance.

(2) No person, other than NARA personnel, shall at any time be left alone with classified records, unless that person is under video surveillance.

(3) No person, other than NARA personnel, shall conduct any review of documents while in the possession of any cell phone or other personal communication device.

(4) All persons seeking access to classified records, as a precondition to such access, must consent to a search of their belongings upon conclusion of their records review.

(5) All notes and other writings prepared by persons during the course of a review of classified records shall be retained by the National Archives and Records Administration in a secure facility.

(b) DEFINITION OF RECORDS.—In this section, the term “records” has the meaning provided in section 3301 of title 44, United States Code.

SEC. 5. RESTRICTIONS ON ACCESS TO PRESIDENTIAL RECORDS.

Section 2204 of title 44, United States Code (relating to restrictions on access to presidential records) is amended by adding at the end the following new subsection:

“(f) The Archivist shall not make available any original presidential records to any individual claiming access to any presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.”.

PURPOSE AND SUMMARY

H.R. 1387, the Electronic Message Preservation Act, was introduced by Rep. Paul Hodes, Rep. Edolphus Towns, and Rep. Wm. Lacy Clay on March 9, 2009. H.R. 1387 modernizes the requirements of the Federal Records Act and the Presidential Records Act to ensure the preservation of e-mails and other electronic messages.

BACKGROUND AND NEED FOR LEGISLATION

The Federal Records Act requires federal agencies to make and preserve records that document “the organization, functions, policies, decisions, procedures, and essential transactions of the agency” and provide the “information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency’s activities.”¹ The Federal Records Act requires that all records be preserved, regardless of format. But agencies have broad discretion to determine how to preserve electronic communications and other electronic records.

Committee investigations and the Government Accountability Office (GAO) have found that many agencies rely on unreliable “print and file” systems for preserving electronic records, including e-mails.² As a result, many e-mails that should be saved as federal

¹44 U.S.C. § 3101.

²See Government Accountability Office, *Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management* (June 2008) (GAO-08-742).

records may be lost. A witness from GAO testified at a Committee hearing that if federal records, including e-mail records, are not adequately managed, “individuals might lose access to benefits for which they are entitled, the government could be exposed to unwarranted legal liabilities, and historical records of vital interest could be lost forever.”³

H.R. 1387 directs the Archivist to issue regulations requiring agencies to preserve electronic messages that are records in an electronic format. These regulations must cover, at a minimum, the capture, management, preservation, and electronic retrieval of electronic records, and must be implemented within four years of enactment.

The Federal Records Act applies to federal agencies while the Presidential Records Act applies to the President, the Vice President, and certain entities within the Executive Office of the President. The Presidential Records Act requires the President to:

Take all steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory or other official or ceremonial duties are adequately documented and that such records are maintained as presidential records pursuant to the requirements of this section and other provisions of law.⁴

Like the Federal Records Act, the Presidential Records Act requires that records be preserved and maintained regardless of whether the records are in paper or electronic form. But standards are needed to ensure that each administration has the controls needed to effectively manage the unique challenges of e-mails and other electronic messages that are presidential records.

Investigations by the Oversight Committee revealed significant deficiencies in the preservation of e-mail by the White House during the Bush Administration. Committee investigations revealed that numerous White House officials used e-mail accounts maintained by the Republican National Committee, which regularly deleted the e-mails from its servers. E-mails sent by White House officials over these RNC accounts included e-mails concerning official government business. In addition, the White House could not account for some official White House e-mails. Other administrations, including President Clinton’s, also encountered problems preserving e-mail records.

H.R. 1387 directs the Archivist to establish standards for the capture, management, and preservation of electronic messages that are presidential records. The bill requires the Archivist to annually certify whether the records management controls established by the President meet these standards.

LEGISLATIVE HISTORY

H.R. 1387 is substantially similar to H.R. 5811 which passed the House on July 9, 2008.

³ Government Accountability Office, *Federal Records: Agencies Face Challenges in Managing E-Mail* (Apr. 23, 2008) (GAO-08-699T).

⁴ 44 U.S.C. § 2203.

The Subcommittee on Information Policy, Census, and National Archives held a hearing on H.R. 5811 on April 23, 2008. The witnesses were Linda Koontz, Director, Information Management Issues, Government Accountability Office; Gary M. Stern, General Counsel, National Archives and Records Administration; Paul M. Wester, Director, Modern Records Program, National Archives and Records Administration; and Patrice McDermott, Director, OpenTheGovernment.org. The Subcommittee also received written testimony from Dr. Anna Nelson, Distinguished Historian in Residence at American University representing the National Coalition for History.

The Committee on Oversight and Government Reform held a business meeting on May 1, 2008, to consider H.R. 5811 and ordered the bill to be reported, as amended, by voice vote. H.R. 5811 passed the House on July 9, 2008, by a vote of 286–137.

H.R. 1387 was introduced by Reps. Hodes, Towns, and Clay on March 9, 2009, and referred to the Committee on Oversight and Government Reform. The Committee held a business meeting on March 10, 2009, and ordered the bill to be reported, as amended, by voice vote.

SECTION-BY-SECTION

Section 1. Short title

The short title of the bill is the Electronic Message Preservation Act.

Section 2. Preservation of electronic messages

Subsection (a) mandates the electronic preservation of electronic messages that are federal records. This subsection directs the Archivist to promulgate regulations governing agency preservation of these records within 18 months after enactment. The bill requires that the regulations include, at a minimum, the electronic capture, management, and preservation of electronic messages that are records in accordance with the requirements of the Federal Records Act. The regulations must require that electronic records are accessible through electronic searches.

The Archivist's regulations must establish mandatory minimum functional requirements for electronic records management systems to be used by federal agencies for these purposes and must establish a process to certify that agency systems meet these functional requirements. The Committee's intent is that the National Archives and Records Administration (NARA) could conduct this certification on its own, or work with other entities that have developed expertise in this area. The regulations would need to establish timelines requiring agency compliance no later than four years from enactment.

The Archivist is also directed, to the extent practicable, to include requirements for the capture, management, and preservation of other electronic records in these regulations. The Committee recognizes that, at some future date, federal agencies will be managing all of their electronic records electronically. While this legislation focuses on electronic messages, agencies should be encouraged to implement records management systems that encompass a broader range of records where appropriate.

This subsection requires federal agencies to comply with the regulations promulgated by the Archivist. The Archivist must periodically review and amend the required regulations.

The head of each federal agency is required under this subsection to report to the Archivist on the agency's compliance with the required regulations within four years of enactment. The Archivist must in turn report to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs on agency compliance within 90 days of receiving the reports from agencies.

Section 2(b) defines "electronic messages" as electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals. This subsection defines "electronic records management system" as a software system designed to manage electronic records within an information technology system, including by categorizing and locating records, ensuring that records are retained as long as necessary, identifying records that are due for disposition, and providing for the storage, retrieval, and disposition of records.

Section 3. Presidential records

Subsection (a) directs the Archivist to establish standards for the management of presidential records during the President's term of office, including specific standards to ensure electronic messages are properly captured, managed and preserved and accessible through electronic searches. The Archivist is directed to annually certify the electronic records management system used by the President for managing electronic messages.

Subsection (b) requires the Archivist to annually certify that the records management controls put in place by the President meet existing requirements of the Presidential Records Act as well as the standards developed by the Archivist. This subsection calls on the Archivist to report annually to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs on the status of the certification.

Under subsection (c), one year after a President leaves office, the Archivist must report to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs on the volume and format of presidential records provided by that President to NARA, and whether the records management controls of the President met the requirements of the Presidential Records Act as well as the standards developed by the Archivist. The one year delay in filing this report is intended to give the Archivist the opportunity to review the records received and make an independent determination of whether the law and the standards governing records preservation were met.

Subsection (d) provides that the amendments made by this section will take effect one year after enactment.

Section 4. Procedures to prevent unauthorized removal of classified records from National Archives

Subsection (a) requires the Archivist to prescribe internal procedures to prevent the unauthorized removal of classified records

from NARA or the destruction or damage of such records, including when such records are accessed or searched electronically. The procedures are required to include the following prohibitions: (1) no person, other than NARA personnel, shall view classified records in any room that is not secure except in the presence of NARA personnel or under video surveillance; (2) no person, other than NARA personnel, shall at any time be left alone with classified records without video surveillance; (3) no person, other than NARA personnel shall conduct any review of documents while in the possession of any cell phone or other personal communication device; (4) all persons seeking access to classified records, as a precondition to such access, must consent to a search of their belongings upon conclusion of their records review; (5) all notes and other writings prepared by persons during the course of a review of classified records shall be retained by the NARA in a secure facility.

Subsection (b) defines the term “records” as the meaning provided in the Federal Records Act.

Section 5. Restrictions on access to presidential records

This section prohibits the Archivist from making available any original presidential records to any individual claiming access to any presidential record as a designated representative of the President if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

EXPLANATION OF AMENDMENTS

Mr. Issa offered an amendment, which was adopted by unanimous consent, which added sections four and five discussed above.

COMMITTEE CONSIDERATION

On Tuesday, March 10, 2009, the Committee met in open session and favorably ordered H.R. 1387, as amended, to be reported to the House by a voice vote.

ROLL CALL VOTES

No roll call votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations. The bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report, including inconsistencies by the executive branch in preserving e-mails that are federal and presidential records.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including the need to ensure the preservation of government e-mails and other electronic records.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1387. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the meaning of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 1387 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1387. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1387 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 13, 2009.

Hon. EDOLPHUS TOWNS,
*Chairman, Committee on Oversight and Government Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1387, the Electronic Message Preservation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1387—Electronic Message Preservation Act

Summary: H.R. 1387 would amend federal law regarding the preservation and storage of electronic communications. The legislation would direct the National Archives and Records Administration (NARA) to issue regulations governing the preservation of e-mail and other electronic records in electronic format and establish procedures to prevent the unauthorized removal of classified records from NARA facilities. The bill also would require federal agencies to manage and preserve their e-mail records electronically. Finally, H.R. 1387 would amend the Presidential Records Act to give NARA additional authority to oversee management of electronic records of the President, including the authority to restrict access to those records.

CBO estimates that implementing H.R. 1387 would cost \$156 million over the 2010–2014 period, assuming appropriation of the necessary amounts. The legislation could also affect direct spending by agencies not funded through annual appropriations (such as the Tennessee Valley Authority) or by agencies considered to be off-budget (such as the U.S. Postal Service). CBO estimates, however, that any net increase in spending by those agencies would not be significant.

H.R. 1387 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the federal government: The estimated budgetary impact of H.R. 1387 is shown in the following table. The costs of this legislation fall within most budget functions that contain salaries and expenses.

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010– 2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	15	25	35	45	40	160
Estimated Outlays	14	24	34	44	41	156

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the end of fiscal year 2009 and that spending will follow historical patterns for similar activities.

Most of the provisions of H.R. 1387 would expand current practices of the federal government. Under the Federal Records Act, each federal agency is required to make and preserve records of its activities. To accomplish this, agencies are required to develop programs to ensure that they have appropriate systems to manage and preserve their records. The act also gives NARA the responsibility to oversee and issue guidance on managing federal records, including e-mail messages. Although current NARA regulations specifically require that e-mails be stored electronically, NARA allows agencies to print and file paper copies of e-mail records. H.R. 1387 would require agencies, over the next four years, to implement systems that would manage all e-mail records electronically.

CBO is unaware of any comprehensive information on the current capabilities of the federal government to manage records electronically or the costs to create an e-mail records system. Information from the Office of Management and Budget (OMB), the Government Accountability Office (GAO), some federal agencies, and NARA suggests that very few federal agencies currently archive all e-mail messages electronically as the bill would require. Most agencies currently maintain a print and file system for e-mail records.

While most government documents are created in a computer format, GAO has reported that financial constraints and technical challenges associated with electronic recordkeeping have hampered the development of electronic systems to archive records. GAO also reports that federal agencies generally have little experience with acquiring and operating an electronic filing system for e-mail records. The cost to create such a system would depend upon the specifications of each agency's system, the size of the agency, and the volume of work it performs.

Currently the federal government spends about \$24 billion a year on information technology, including mission support, infrastructure, enterprise architecture, and planning. Using information from selected federal agencies and private-sector vendors about the current status of government e-mail systems and the cost to enhance those systems to archive e-mail, CBO estimates that implementing H.R. 1387 would cost \$14 million in 2010 and about \$156 million over the 2010–2014 period, assuming appropriation of the necessary amounts. Those amounts would cover the initial costs of training and purchasing software products for archiving and disk-storage. Those initial expenses would total \$60 million and would be incurred over four years, beginning in 2010. Ongoing costs would total about \$100 million over the 2011–2014 period, mostly for renewal of software licenses and additional data storage.

Electronically archiving e-mail could reduce the administrative costs agencies incur to print and file paper copies and to perform other retrieval-based tasks, such as Freedom of Information Act requests. CBO expects that any such savings over the next five years would be small.

Intergovernmental and private-sector impact: H.R. 1387 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 44, UNITED STATES CODE

* * * * *

CHAPTER 22—PRESIDENTIAL RECORDS

Sec.
2201. Definitions.

* * * * *

2208. *Certification of the President’s management of Presidential records.*

§ 2201. Definitions

As used in this chapter—

(1) * * *

* * * * *

(5) *The term “electronic messages” has the meaning provided in section 2901(16) of this title.*

(6) *The term “electronic records management system” has the meaning provided in section 2901(17) of this title.*

* * * * *

§ 2203. Management and custody of Presidential records

(a) * * *

* * * * *

(f)(1) * * *

* * * * *

(4) *One year following the conclusion of a President’s term of office, or if a President serves consecutive terms one year following the conclusion of the last term, the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on—*

(A) *the volume and format of Presidential records deposited into that President’s Presidential archival depository; and*

(B) *whether the records management controls of that President met the requirements under sections 2203(a) and 2206(5) of this title.*

§ 2204. Restrictions on access to Presidential records

(a) * * *

* * * * *

(f) *The Archivist shall not make available any original presidential records to any individual claiming access to any presi-*

dential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

* * * * *

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) * * *

* * * * *

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; **[and]**

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code~~].~~; and

(5) *provisions for establishing standards necessary for the economical and efficient management of Presidential records during the President's term of office, including—*

(A) *records management controls necessary for the capture, management, and preservation of electronic messages;*

(B) *records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches; and*

(C) *a process to certify the electronic records management system to be used by the President for the purposes of complying with the requirements in subparagraphs (A) and (B).*

* * * * *

§ 2208. Certification of the President's management of Presidential records

(a) *ANNUAL CERTIFICATION.—The Archivist shall annually certify whether the records management controls established by the President meet requirements under sections 2203(a) and 2206(5) of this title.*

(b) *REPORT TO CONGRESS.—The Archivist shall report annually to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the status of the certification.*

* * * * *

CHAPTER 29—RECORDS MANAGEMENT BY THE ARCHIVIST OF THE UNITED STATES AND BY THE ADMINISTRATOR OF GENERAL SERVICES

Sec.
2901. Definitions.

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2911. *Electronic messages.*

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 31, and 33 of this title—

(1) * * *

* * * * *

(14) the term “Federal agency” means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol); **[and]**

(15) the term “Administrator” means the Administrator of General Services **[.]**;

(16) the term “electronic messages” means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals; and

(17) the term “electronic records management system” means a software system designed to manage electronic records within an information technology system, including by—

(A) categorizing and locating records;

(B) ensuring that records are retained as long as necessary;

(C) identifying records that are due for disposition; and

(D) the storage, retrieval, and disposition of records.

* * * * *

§ 2911. Electronic messages

(a) *REGULATIONS REQUIRED.*—Not later than 18 months after the date of the enactment of this section, the Archivist shall promulgate regulations governing agency preservation of electronic messages that are records. Such regulations shall, at a minimum—

(1) require the electronic capture, management, and preservation of such electronic records in accordance with the records disposition requirements of chapter 33 of this title;

(2) require that such electronic records are readily accessible for retrieval through electronic searches;

(3) establish mandatory minimum functional requirements for electronic records management systems to ensure compliance with the requirements in paragraphs (1) and (2);

(4) establish a process to certify that Federal agencies’ electronic records management systems meet the functional requirements established under paragraph (3); and

(5) include timelines for agency compliance with the regulations that ensure compliance as expeditiously as practicable but not later than four years after the date of the enactment of this section.

(b) *COVERAGE OF OTHER ELECTRONIC RECORDS.*—To the extent practicable, the regulations promulgated under subsection (a) shall also include requirements for the capture, management, and preservation of other electronic records.

(c) *COMPLIANCE BY FEDERAL AGENCIES.*—Each Federal agency shall comply with the regulations promulgated under subsection (a).

(d) REVIEW OF REGULATIONS REQUIRED.—The Archivist shall periodically review and, as necessary, amend the regulations promulgated under this section.

(e) REPORTS ON IMPLEMENTATION OF REGULATIONS.—

(1) AGENCY REPORT TO ARCHIVIST.—Not later than four years after the date of the enactment of this section, the head of each Federal agency shall submit to the Archivist a report on the agency's compliance with the regulations promulgated under this section.

(2) ARCHIVIST REPORT TO CONGRESS.—Not later than 90 days after receipt of all reports required by paragraph (1), the Archivist shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on Federal agency compliance with the regulations promulgated under this section.

* * * * *

MINORITY VIEWS

The Electronic Message Preservation Act (H.R. 1387) is intended to modernize and improve the Federal Records Act and the Presidential Records Act to ensure the preservation of emails and other electronic messages. H.R. 1387 directs the Archivist to issue regulations requiring agencies to preserve electronic messages that are records in an electronic format. These regulations are intended to provide clear guidance to the agencies and the Executive Office of the President in establishing standards for the capture, management, preservation, and electronic retrieval of these electronic records.

However, a series of recent losses at various National Archives and Records Administration (NARA) installations cast doubt on the agency's ability to manage the responsibilities that would be assigned by H.R. 1387. NARA has pledged to change the culture that allowed systemic asset management problems to develop and fostered an institutional disregard for security.

Subsequent to the markup of this bill, the Committee's investigation of the loss of a drive from NARA's College Park facility in 2009 revealed troubling flaws. The missing hard drive contained one terabyte of record data from the Clinton presidency. One terabyte of data is the approximate equivalent of millions of books, according to the Inspector General. Data on the drive included more than 100,000 social security numbers (including Al Gore's daughter), contact information (including addresses) for various Clinton administration officials, Secret Service and White House operating procedures, event logs, social gathering logs, political records and other highly-sensitive information. The full extent of the contents of the drive is still being investigated.

The hard drive was moved from a "secure" storage area to a workspace while in use as part of the conversion of Clinton Administration records to digital files. The drive was left unsecured on a shelf above a workstation. NARA IG Paul Brachfeld characterized the personally-identifying information violation as "the greatest loss ever and troubling and amazing."

The loss appears to stem from a systemic lack of internal controls at this NARA facility. At least 100 "badge-holders" had access to the area where the drive was left unsecured. In addition to those with official access to sensitive material, the IG claims that janitors, visitors, interns and others passed through the area where the drive was being kept. The IG described the workspace as an area that Archives employees pass through on their way to the restroom.

This is just the most recent example of carelessness at the agency. In 2007, an annual inventory identified as missing approximately 559 equipment items with memory storage capability and the potential for storing sensitive personal identifying information.

A report published in 2006 revealed the CIA and other federal agencies had to re-classify over 55,000 pages of records taken from the open shelves at the Archives. In 2005, President Clinton's former National Security Advisor Sandy Berger pled guilty to unlawfully removing documents from the Archives. Ranking Member Issa offered an amendment to this bill, which was accepted by unanimous consent, to ensure this type of breach will not occur again.

In addition, the Majority's stated rationale for H.R. 1387 mischaracterizes the Committee's investigative record from the 110th Congress relating to White House email records. Between 2002 and 2004, the White House Office of Administration migrated the White House email system from Lotus Notes to Microsoft Exchange. During the course of this migration certain email records were temporarily archived. The arrangement under this temporary system led to some records being misfiled and otherwise difficult to access. These records were retrieved later using back up recovery tapes. The Committee has no evidence that any email records went missing.

Electronic recordkeeping issues are not new to the Presidency. During the Clinton Administration this Committee held hearings on whether emails pertinent to the Lewinsky investigation had been intentionally destroyed. The Clinton-era inquiry involved allegations that White House staff were participating in a cover-up to destroy potentially incriminating emails.

We are concerned that NARA, which has had difficulty preserving and protecting its own records, will be able to establish regulations for all federal agencies. The Committee must continue to closely oversee NARA as its new leadership works to remedy internal problems. Unless and until there are signs of improvement, however, we are reluctant to support any legislation imposing additional responsibilities on the agency.

DARRELL ISSA,
Ranking Member.

