

ELECTRONIC MESSAGE PRESERVATION ACT OF 2017

JULY 16, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 1376]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1376) 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 without amendment and recommend that the bill do pass.

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SUMMARY AND PURPOSE OF LEGISLATION

H.R. 1376, the Electronic Message Preservation Act of 2017, requires agencies to capture, preserve, and manage federal records electronically if they were created electronically. The Archivist of the United States is directed to issue regulations directing agencies to implement the bill. The bill also requires the heads of each federal agency to report to the Archivist on compliance with the regulations and make the report publicly available on the agency's website.

BACKGROUND AND NEED FOR LEGISLATION

The federal government urgently needs to modernize its record-keeping infrastructure. When Congress enacted the *Federal Records Act of 1950*, the variety of electronic platforms that agencies now use to create federal records did not exist.¹ With new forms of information technology constantly emerging, applications and methods that federal agencies currently employ to create and preserve records may not be viable in the future, threatening the availability of federal records and making their preservation more difficult and expensive, if they can be preserved at all.²

While the federal government's use of electronic communications continues to rise, several agencies still employ a "print-to-file" method of electronic record preservation. The volume of business conducted via electronic media, especially email, increases the likelihood of unintentional loss or deletion of federal records. Additionally, there are a multitude of challenges with recordkeeping systems that require paper copies of electronic records, ranging from their susceptibility to error to their overall cost.³ Complicating matters, the statutes governing the capture and storage of electronic records are often ambiguous.

H.R. 1376 will help address these shortcomings by codifying a directive from the Office of Management and Budget and the National Archives and Records Administration (Archives) requiring agencies to preserve records electronically if they were created electronically.⁴ By codifying this requirement, H.R. 1376 will help close a number of gaps in current law and ensure federal agencies are using methods approved and standardized by the Archives to capture and store electronic files. The bill also requires presidential records be held to the same standard.

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 Commit-

¹ Federal Records Act of 1950, Pub. L. No. 81-754, Title V, 64 Stat. 583 (codified as amended at 44 U.S.C. Chapters 29, 31, & 33).

² Cong. Research Serv., R43165, *Retaining and Preserving Federal Records in a Digital Environment: Background and Issues for Congress* (2013).

³ Nat'l Archives & Records Admin., *Why Federal Agencies Need to Move Towards Electronic Recordkeeping*, <http://www.archives.gov/records-mgmt/policy/prod1afn.html> (last updated Aug. 15, 2016).

⁴ Memorandum from Beth F. Cobert, Deputy Director for Mgmt., Office of Mgmt. & Budget, and David S. Ferriero, Archivist of the U.S., Nat'l Archives & Records Admin., to Heads of Executive Dep'ts and Agencies and Independent Agencies, M-14-16 (2014), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2014/m-14-16.pdf>.

tee's oversight findings and recommendations are reflected in the previous section.

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 goal or objective of this bill is 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.

LEGISLATIVE HISTORY

On March 7, 2017, Representative Elijah Cummings (D-MD) introduced H.R. 1376, the Electronic Message Preservation Act of 2017. H.R. 1376 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 1376 at a business meeting on March 15, 2018 and ordered the bill favorably reported by voice vote.

In the 114th Congress, Representative Cummings introduced H.R. 2319, the Electronic Message Preservation Act of 2015, a substantially similar bill to H.R. 1376. On July 12, 2016, the Committee ordered H.R. 2319 favorably reported by voice vote.

COMMITTEE CONSIDERATION

On March 15, 2018, the Committee met in open session and, with a quorum being present, ordered the bill favorably reported by voice vote.

ROLL CALL VOTES

There were no roll call votes requested or conducted during Committee consideration of H.R. 1376.

EXPLANATION OF AMENDMENTS

There were no amendments to H.R. 1376 offered or adopted during Committee consideration of the bill.

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 the terms and conditions of employment or access to public services and accommodations. This bill amends title 44, United States Code, to require preservation of certain electronic records by Federal agencies and to require a certification and reports relating to Presidential records. As such, this bill does not relate to employment or access to public services and accommodations.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 2(c)(5) of rule XIII no provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public

Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The bill directs the completion of a specific rule making within the meaning of 5 U.S.C. 551. The bill requires the Archivist of the United States to promulgate regulations governing federal agency preservation of electronic federal records.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATES STATEMENT

Pursuant to section 423 of the Congressional Budget and Impoundment Control Act (Pub. L. 113–67) the Committee has included a letter received from the Congressional Budget Office below.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the House of Representatives.

COMMITTEE ESTIMATE

Pursuant to clause 3(d)(2)(B) of rule XIII of the Rules of the House of Representatives, the Committee includes below a cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402 of the Congressional Budget Act of 1974 is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 12, 2018.

Hon. TREY GOWDY,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1376, the Electronic Message Preservation Act of 2017.

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

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 1376—Electronic Message Preservation Act of 2017

H.R. 1376 would direct the National Archives and Records Administration (NARA) to issue regulations governing the preservation of email and other electronic records in an electronic format. Under H.R. 1376, NARA would have 120 days to promulgate regulations and agencies would have two years to comply. The bill also would amend the Presidential Records Act to authorize NARA to manage the President's electronic records.

Under the Federal Records Act, each agency is required to make and preserve records of its activities and to have appropriate systems to manage and preserve those records. That act also requires NARA to oversee and issue guidance on managing federal records, including email messages. In 2012, the Office of Management and Budget issued Managing Government Records Directive (M-12-18), which required federal agencies to manage all email records in an electronic format by 2016. Although current NARA regulations require that government email messages be stored electronically, NARA allows agencies to print and file paper copies instead.

Using information from NARA, CBO estimates that implementing the bill would have no significant effect on federal spending because most of the provisions of H.R. 1376 would codify current practices. NARA anticipates that by December 2019 all federal agencies will have email and other electronic records stored electronically. Having NARA manage Presidential electronic records would not have a significant effect on the federal budget, according to the agency.

Enacting H.R. 1376 could affect direct spending by agencies that use fees, receipts from the sale of goods, and other collections to cover operating costs. Therefore, pay-as-you-go procedures apply. Because most agencies can adjust the amounts collected as their operating costs change, CBO estimates that any net changes in direct spending by those agencies would be insignificant. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 1376 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 1376 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title of the bill.

Section 2. Preservation of electronic messages and other records

Section 2 adds a new section to chapter 29 of title 44, United States Code, requiring the Archivist, within 120 days of enactment, to issue regulations governing federal agency preservation of electronic federal records. The regulations require: (1) electronic capture, management, and preservation of electronic records; (2) electronic records to be readily accessible through electronic searches; and (3) timely agency compliance with the regulations. Not later than two years after enactment, the Archivist must establish mandatory minimum functional requirements for electronic records management. The Archivist is further required to establish a process whereby agency electronic records systems meet the functional requirements established by the Archivist. Agencies must comply with the Archivist's regulations. Section 2 also requires agencies to report to the Archivist within one year of enactment on compliance with the regulations and for the Archivist, in turn, to issue a report on overall agency compliance.

Finally, section 2 adds definitions of "electronic messages" and "electronic records management system" to section 2901 of title 44, United States Code.

Section 3. Presidential records

Section 3 amends section 2206 of title 44, United States Code, to require the Archivist to establish standards for the economical and efficient management of electronic presidential records during the President's term of office. This section also adds definitions for "electronic messages" and "electronic records management system" to section 2201 of title 44, United States Code, and establishes the effective date of the section as one year after enactment. The Archivist will certify whether a presidential administration's electronic records management system is sufficient to meet the electronic records management requirements of the *Presidential Records Act*. The Archivist will also submit a report to Congress one year after a President leaves office detailing the volume and format of the electronic presidential records deposited into that President's archival depository.

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, and existing law in which no change is proposed is shown in roman):

TITLE 44, UNITED STATES CODE

* * * * *

CHAPTER 22—PRESIDENTIAL RECORDS

Sec.
2201. Definitions.

* * * * *

2210. *Certification of the President's management of Presidential records.*

§ 2201. Definitions

As used in this chapter—

(1) The term “documentary material” means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

(2) The term “Presidential records” means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President’s staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term “personal records” means all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President’s own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term “Archivist” means the Archivist of the United States.

(5) The term “former President”, when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

(6) *The term “electronic messages” has the meaning given that term under section 2901(15).*

(7) *The term “electronic records management system” has the meaning given that term under section 2901(16).*

* * * * *

§ 2203. Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President’s staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President’s term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that—

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President’s term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to

such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) When the President considers it practicable and in the public interest, the President shall include in the President's budget transmitted to Congress, for each fiscal year in which the term of office of the President will expire, such funds as may be necessary for carrying out the authorities of this subsection.

(4) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

(5) *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 electronic Presidential records deposited into that President's Presidential archival depository; and

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

* * * * *

§ 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) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

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

* * * * *

§ 2210. Certification of the President's management of Presidential records

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

(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.

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

Sec.
2901. Definitions.

* * * * *

2912. Preservation of electronic messages and other records.

§ 2901. Definitions

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

(1) the term “records” has the meaning given it by section 3301 of this title;

(2) the term “records management” means the planning, controlling, directing, organizing, training, promoting, and other

managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations;

(3) the term “records creation” means the production or reproduction of any record;

(4) the term “records maintenance and use” means any activity involving—

(A) location of records of a Federal agency;

(B) storage, retrieval, and handling of records kept at office file locations by or for a Federal agency;

(C) processing of mail by a Federal agency; or

(D) selection and utilization of equipment and supplies associated with records and copying;

(5) the term “records disposition” means any activity with respect to—

(A) disposal of temporary records no longer necessary for the conduct of business by destruction or donation;

(B) transfer of records to Federal agency storage facilities or records centers;

(C) transfer to the National Archives of the United States of records determined to have sufficient historical or other value to warrant continued preservation; or

(D) transfer of records from one Federal agency to any other Federal agency;

(6) the term “records center” means an establishment maintained and operated by the Archivist or by another Federal agency primarily for the storage, servicing, security, and processing of records which need to be preserved for varying periods of time and need not be retained in office equipment or space;

(7) the term “records management study” means an investigation and analysis of any Federal agency records, or records management practices or programs (whether manual or automated), with a view toward rendering findings and recommendations with respect thereto;

(8) the term “inspection” means reviewing any Federal agency’s records or records management practices or programs with respect to effectiveness and compliance with records management laws and making necessary recommendations for correction or improvement of records management;

(9) the term “servicing” means making available for use information in records and other materials in the custody of the Archivist, or in a records center—

(A) by furnishing the records or other materials, or information from them, or copies or reproductions thereof, to any Federal agency for official use, or to the public; or

(B) by making and furnishing authenticated or unauthenticated copies or reproductions of the records or other materials;

(10) the term “unauthenticated copies” means exact copies or reproductions of records or other materials that are not certified as such under seal and that need not be legally accepted as evidence;

(11) the term “National Archives of the United States” means those official records which have been determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the Federal Government, and which have been accepted by the Archivist for deposit in the Archivist’s custody;

(12) the term “Archivist” means the Archivist of the United States;

(13) the term “executive agency” shall have the meaning given such term by section 102 of title 40;

(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.】

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

(16) the term “electronic records management system” means software designed to manage electronic records, 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) ensuring the storage, retrieval, and disposition of records.

* * * * *

§ 2912. Preservation of electronic messages and other records

(a) *REGULATIONS REQUIRED.—The Archivist shall promulgate regulations governing Federal agency preservation of electronic messages that are determined to be 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;

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

(3) include timelines for Federal agency implementation of the regulations that ensure compliance as expeditiously as practicable.

(b) *ENSURING COMPLIANCE.—The Archivist shall promulgate regulations that—*

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

(2) establish a process to ensure that the electronic records management system of each Federal agency meets the functional requirements established under paragraph (1).

(c) *COVERAGE OF OTHER ELECTRONIC RECORDS.—To the extent practicable, the regulations promulgated under subsections (a) and*

(b) shall also include requirements for the capture, management, and preservation of other electronic records.

(d) COMPLIANCE BY FEDERAL AGENCIES.—Each Federal agency shall comply with the regulations promulgated under subsections (a) and (b).

(e) REVIEW OF REGULATIONS REQUIRED.—The Archivist shall periodically review and, as necessary, amend the regulations promulgated under subsections (a) and (b).

* * * * *

