

116TH CONGRESS
2D SESSION

S. 5059

To amend chapter 22 of title 44, United States Code, to ensure Presidential records are preserved, duly created when non-official electronic messaging accounts are used, and made available to the public and the next administration in a timely fashion to advance national security and accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 17, 2020

Mr. MURPHY introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend chapter 22 of title 44, United States Code, to ensure Presidential records are preserved, duly created when non-official electronic messaging accounts are used, and made available to the public and the next administration in a timely fashion to advance national security and accountability, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Promoting Account-
5 ability and Security in Transitions Act of 2020” or the
6 “PAST Act”.

1 **SEC. 2. SENSE OF CONGRESS.**

2 The sense of Congress is the following:

3 (1) The preservation of Presidential records (as
4 defined in section 2201 of title 44, United States
5 Code) is a legal obligation for every Presidential ad-
6 ministration, as Presidential records are the most
7 important and widely used source for studying how
8 the executive branch of the Federal Government
9 works, how it has changed over time, and how it
10 might evolve to serve the needs of a new era.

11 (2) The preservation of Presidential records is
12 therefore vital for—

13 (A) the public to be able to understand
14 and learn from the past;

15 (B) future policymaking to build on the
16 past administration's successes and experience;

17 (C) ensuring accountability for results,
18 performance, and conduct; and

19 (D) other purposes that serve to strength-
20 en American democracy.

21 (3) Any effort to destroy, alter, or remove Pres-
22 idential records in violation of chapter 22 of title 44,
23 United States Code—

24 (A) threatens the values described in para-
25 graph (2); and

1 (B) may subject a person engaging in such
2 efforts to other criminal penalties under section
3 641 or 2071 of title 18, United States Code.

4 (4) The lawful disposal of Presidential records
5 that no longer have administrative, historical, infor-
6 mational, or evidentiary value must follow a process
7 as described in section 2203 of title 44, United
8 States Code.

9 (5) What constitutes a Presidential record is
10 determined solely by whether the record relates to
11 the “carrying out of constitutional, statutory, or
12 other official or ceremonial duties of the President”,
13 as indicated in the definition of the term “Presi-
14 dential records” in section 2201 of title 44, United
15 States Code, and by the content of the information
16 contained in the record.

17 (6) For communication between agencies and
18 the Executive Office of the President, the copy of
19 the record belonging to the agency is retained as an
20 agency record pursuant to section 3301 of title 44,
21 United States Code.

22 (7) Consistent with section 2203 of title 44,
23 United States Code, any Presidential records created
24 with non-official electronic media shall be “pre-
25 served”, which includes a comprehensive documenta-

tion of all records and associated metadata and attachments.

(8) Applications or software with an automatic deleting functionality are antithetical to the legal and historical obligations described under chapter 22 of title 44, United States Code.

(9) Periods of Presidential transition are moments where the national security of the United States is most vulnerable, necessitating an early, good faith, and consistent commitment by the outgoing administration to ensure continuity of operations as it relates to national security and protecting critical infrastructure, among other reasons.

(10) Agencies and the Executive Office of the President are required by law to cooperate with the Archivist of the United States and the Federal Transition Coordinator of the General Service Administration, who is tasked with ensuring agencies comply with all statutory requirements relating to transition planning under section 4(c) of the Presidential Transition Act of 1963 (3 U.S.C. 102 note).

(11) During a Presidential transition, Presidential records, which contain valuable information regarding agreements or negotiations with foreign governments and international organizations and the

1 actions and beliefs of foreign nations or actors are
2 of enormous value to the national security.

3 (12) Any effort to delay briefings, coordination,
4 and sharing information regarding key national se-
5 curity relationships, threats, and operations with an
6 incoming administration or the destruction, removal,
7 or alteration of Presidential records that attest to
8 the information described in this section could pose
9 a grave danger to the national security.

10 (13) An expeditious ascertainment of the plau-
11 sible President-elect and Vice-President-elect by the
12 Administrator of General Services plays a vital role
13 in ensuring continuity of Government and protecting
14 national security such that the risk of redundant ex-
15 penditure is overwhelmed by the advantages of an
16 early access to transition resources to allow for tran-
17 sition planning.

18 (14) The National Archives and Records Ad-
19 ministration plays an essential role in ensuring the
20 official proceedings of Government are documented
21 to improve democracy in the United States, protect
22 national security, provide continuity of Government
23 during a transition, and promote accountability for
24 actions taking during a Presidency.

1 (15) The robust funding of the National Ar-
2 chives and Records Administration and protection of
3 its officers and employees from political interference
4 is a national imperative and must be a priority for
5 Congress.

6 **SEC. 3. DEFINITIONS.**

7 Section 2201 of title 44, United States Code, is
8 amended—

9 (1) in paragraph (1), by inserting “, and in-
10 cludes the metadata associated with all such mate-
11 rial” before the period; and

12 (2) by adding at the end the following:

13 “(6) The term ‘electronic messaging account’
14 includes electronic mail, chat or instant messaging,
15 text messaging, voicemail messaging, and other mes-
16 saging platforms or apps, such as social media or
17 mobile applications, among other applications.

18 “(7) The term ‘official electronic messaging ac-
19 count’ includes electronic messaging accounts pro-
20 vided by an executive agency or the Executive Office
21 of the President.

22 “(8) The term ‘dispose’, with respect to docu-
23 mentary material, means to remove, deface, alter,
24 corrupt, delete, erase, or otherwise destroy the docu-
25 mentary material.”.

1 **SEC. 4. MANAGEMENT AND CUSTODY OF PRESIDENTIAL**
2 **RECORDS.**

3 (a) IN GENERAL.—Section 2203 of title 44, United
4 States Code, is amended—

5 (1) by redesignating subsections (e), (f), and
6 (g) as subsections (g), (h), and (i), respectively;

7 (2) by redesignating subsection (d) as sub-
8 section (e);

9 (3) by striking subsection (c) and inserting the
10 following:

11 “(c) The President shall obtain the advice of the Ar-
12 chivist in applying standards, procedures, and techniques
13 designed to—

14 “(1) improve the management of records;

15 “(2) promote the maintenance and security of
16 records determined appropriate for preservation; and

17 “(3) facilitate the segregation and disposal of
18 records of temporary value.

19 “(d)(1) During the President’s term of office, if the
20 President wishes to dispose of those Presidential records
21 of such President that no longer have administrative, his-
22 torical, informational, or evidentiary value—

23 “(A) the President shall request, in writing, the
24 views of the Archivist concerning the proposed dis-
25 posal of such Presidential records; and

1 “(B) the Archivist shall indicate, in writing,
 2 whether the Archivist intends to take any action
 3 under subsection (g) of this section with respect to
 4 the Presidential records.

5 “(2) Not later than 5 business days after the date
 6 on which the Archivist provides a written indication under
 7 paragraph (1)(B), the Archivist shall make publicly avail-
 8 able on a website any communications received or sent by
 9 the Archivist regarding the potential disposal of Presi-
 10 dential records under paragraph (1).”;

11 (4) in subsection (e), as so redesignated—

12 (A) by striking “subsection (c)” and in-
 13 serting “subsection (d)”; and

14 (B) by striking “subsection (e)” and in-
 15 serting “subsection (g)”; and

16 (5) by inserting after subsection (e), as so re-
 17 designated, the following:

18 “(f) In January of each even-numbered year, the Ar-
 19 chivist shall, in coordination with the Office of Administra-
 20 tion of the Executive Office of the President, submit to
 21 the Chairman and Ranking Member of each committee of
 22 jurisdiction of either House of Congress, of the Committee
 23 on Appropriations of the Senate, and of the Committee
 24 on Appropriations of the House of Representatives and to
 25 the President a report that—

1 “(1) is based on inspections conducted by the
 2 Archivist, in coordination with the Office of Admin-
 3 istration of the Executive Office of the President, of
 4 the Presidential records management programs of
 5 the Executive Office of the President; and

6 “(2) evaluates—

7 “(A) the records management activities
 8 and training conducted and standard operating
 9 procedures and guidance issued pursuant to
 10 this section; and

11 “(B) responses to any recommendations
 12 resulting from inspections or studies conducted
 13 under this section.”.

14 (b) CONFORMING AMENDMENTS.—

15 (1) Section 2105(a)(2) of title 44, United
 16 States Code, is amended by striking “paragraph
 17 (f)(2)” and inserting “subsection (i)(2)”.

18 (2) Chapter 22 of title 44, United States Code,
 19 is amended—

20 (A) in section 2204(b)(2)(A), by striking
 21 “section 2203(d)(1)” and inserting
 22 “2203(i)(1)”; and

23 (B) in section 2206(1), by striking “sec-
 24 tion 2203(f)(3)” and inserting “section
 25 2203(i)(4)”.

1 **SEC. 5. RESTRICTIONS ON ACCESS TO PRESIDENTIAL**
2 **RECORDS.**

3 Section 2204 of title 44, United States Code, is
4 amended—

5 (1) in subsection (b)(3), by striking “shall not
6 be subject to judicial review, except as provided” and
7 inserting “shall be subject to judicial review, includ-
8 ing as provided”; and

9 (2) in subsection (e)—

10 (A) by inserting “(1)” before “The United
11 States”; and

12 (B) by adding at the end the following:

13 “(2)(A) A person seeking access to a Presidential
14 record to which access is restricted under subsection (a)
15 may file an action in the United States District Court for
16 the District of Columbia seeking release of the Presi-
17 dential record.

18 “(B) In an action filed under subparagraph (A), the
19 court shall direct the release of a Presidential record, or
20 a reasonably segregable portion thereof, if the court deter-
21 mines that the Presidential record, or the reasonably seg-
22 regable portion thereof, is not within any of the categories
23 specified in subsection (a) and there is not a valid claim
24 of constitutionally based privilege against disclosure.”.

1 **SEC. 6. EXCEPTIONS TO RESTRICTED ACCESS.**

2 Section 2205(2)(C) of title 44, United States Code,
3 is amended—

4 (1) by striking “to any committee or sub-
5 committee thereof” and inserting “upon request by
6 the Chairman or Ranking Member of a committee or
7 subcommittee thereof, to such Chairman or ranking
8 member,”; and

9 (2) by striking “its business” and inserting
10 “the business of the committee or subcommittee”.

11 **SEC. 7. REGULATIONS.**

12 Section 2206 of title 44, United States Code, is
13 amended—

14 (1) by inserting “(a)” before “The Archivist”;

15 (2) in subsection (a), as so designated—

16 (A) in paragraph (3), by striking “and” at
17 the end;

18 (B) in paragraph (4), by striking the pe-
19 riod and inserting a semicolon; and

20 (C) by adding at the end the following:

21 “(5) provisions—

22 “(A) for what constitutes official and non-
23 official electronic messaging accounts; and

24 “(B) establishing procedures for docu-
25 menting—

1 “(i) Presidential records created on
 2 non-official electronic messaging accounts
 3 (including emerging technologies, applica-
 4 tions, and platforms); and

5 “(ii) required metadata;

6 “(6) provisions for the preservation of digital
 7 media, including from social media accounts, that
 8 may appear to be personal records or private prop-
 9 erty but the preservation of which may be required
 10 under this chapter; and

11 “(7) provisions for the appropriate cir-
 12 cumstances and controls for the use of messaging
 13 applications and software with automatic deleting or
 14 other similar functionalities.”; and

15 (3) by adding at the end the following:

16 “(b) The Archivist shall issue, and shall annually up-
 17 date, implementation guidance with respect to the regula-
 18 tions described in paragraphs (5) and (6) of subsection
 19 (a).”.

20 **SEC. 8. DISCLOSURE REQUIREMENT FOR OFFICIAL BUSI-**
 21 **NESS CONDUCTED USING NON-OFFICIAL**
 22 **ELECTRONIC MESSAGING ACCOUNTS.**

23 (a) IN GENERAL.—Section 2209(a) of title 44,
 24 United States Code, is amended—

1 (1) in the matter preceding paragraph (1), by
 2 striking “create or send” and inserting “create,
 3 send, or receive”;

4 (2) by redesignating paragraphs (1) and (2) as
 5 subparagraphs (A) and (B), respectively, and adjust-
 6 ing the margin accordingly; and

7 (3) by striking “The President,” and inserting
 8 the following:

9 “(1) LIMITATIONS.—Not later than 90 days
 10 after assuming office, the President shall publicly re-
 11 lease guidelines for officers and employees of the Ex-
 12 ecutive Office of the President who create or receive
 13 documentary material that—

14 “(A) prohibit the use of non-official elec-
 15 tronic messaging accounts that cannot be easily
 16 copied or forwarded to an official electronic
 17 messaging account for official business; and

18 “(B) prohibit the use of messaging ac-
 19 counts or software with automatic deleting or
 20 other similar functionalities.

21 “(2) REQUIREMENTS FOR USE.—The Presi-
 22 dent,”.

23 **SEC. 9. PRESIDENTIAL TRANSITION ACT OF 1963.**

24 The Presidential Transition Act of 1963 (3 U.S.C.
 25 102 note) is amended—

1 (1) in section 3—

2 (A) in subsection (a)(8)(A), by striking
3 clause (v) and inserting the following:

4 “(v)(I)(aa) Activities under this paragraph shall in-
5 clude the preparation of a detailed classified, compart-
6 mented summary by the relevant outgoing executive
7 branch officials of—

8 “(AA) specific strategic, tactical, and oper-
9 ational threats to national security;

10 “(BB) major military or covert operations; and

11 “(CC) pending decisions on possible uses of
12 military force or covert actions.

13 “(bb) The summary prepared under item (aa) shall
14 be provided to the President-elect and members of office
15 staff with appropriate clearances that are designated by
16 the President-elect as soon as possible after the date of
17 the general elections held to determine the electors of
18 President and Vice President under section 1 or 2 of title
19 3, United States Code.

20 “(II) The Archivist of the United States shall collabo-
21 rate with the Federal Transition Coordinator and agen-
22 cies, including the Executive Office of the President, to
23 ensure that the President-elect and members of office staff
24 with appropriate clearances that are designated by the
25 President-elect can easily access national security informa-

1 tion (including documents, videos, audio, and briefings)
 2 created by the previous administration after the inaugura-
 3 tion of the President-elect.

4 “(III) The Archivist of the United States shall submit
 5 to the Chairman and Ranking Member of each committee
 6 of jurisdiction of either House of Congress, of the Com-
 7 mittee on Appropriations of the Senate, and of the Com-
 8 mittee on Appropriations of the House of Representatives
 9 a report if the Archivist of the United States believes there
 10 appears to be noncompliance with the requirements under
 11 this clause.”; and

12 (B) in subsection (c)—

13 (i) by inserting “(1)” before “The
 14 terms”; and

15 (ii) by adding at the end the fol-
 16 lowing:

17 “(2)(A) Not later than 6 days after the date of a gen-
 18 eral election described in paragraph (1), the Administrator
 19 shall make the ascertainment described in paragraph (1)
 20 without any interference or undue pressure from the
 21 President or a candidate for President, or any representa-
 22 tive thereof, based on provisional results from State elec-
 23 tion officials and expert analysis of results.

24 “(B) Given the imperatives of an orderly transition,
 25 if there is a plausible chance that the apparent successful

1 candidate for the office of President and Vice President,
 2 respectively, are not the incumbent, or if the incumbent
 3 was not a candidate, the Administrator shall provide a
 4 portion of the services and facilities authorized to be pro-
 5 vided under this section to all parties with a plausible
 6 chance of being the successful candidate.”; and

7 (2) in section 4—

8 (A) in subsection (d)—

9 (i) in paragraph (2)—

10 (I) in subparagraph (B), by
 11 striking “and” at the end;

12 (II) in subparagraph (C), by
 13 striking the period at the end and in-
 14 serting “; and”; and

15 (III) by adding at the end the
 16 following:

17 “(D) under the guidance of the Archivist
 18 of the United States, monitor compliance with
 19 chapter 22 of title 44, United States Code, in-
 20 cluding the preservation of all records and pre-
 21 vention of any records from being disposed un-
 22 less done in accordance with such chapter.”;

23 (ii) in paragraph (3)—

1 (I) by redesignating subpara-
2 graphs (C) and (D) as subparagraphs
3 (D) and (E), respectively; and

4 (II) by inserting after subpara-
5 graph (B) the following:

6 “(C) the Archivist of the United States;”;

7 and

8 (iii) by adding at the end the fol-
9 lowing:

10 “(5) ROLE OF THE ARCHIVIST.—

11 “(A) IN GENERAL.—Not later than 120
12 days before the date of a Presidential election,
13 the Archivist of the United States shall send a
14 written communication to all officers and em-
15 ployees of the Executive Office of the President
16 who create or receive documentary material (as
17 defined under section 2201 of title 44, United
18 States Code)—

19 “(i) describing the requirements under
20 chapter 22 of title 44, United States Code;
21 and

22 “(ii) establishing a timeline for co-
23 operation with the Archivist of the United
24 States to ensure an orderly and timely

1 transition of records subject to such chap-
2 ter if there is a Presidential transition.

3 “(B) REPORTING.—

4 “(i) IN GENERAL.—Not later than 30
5 days after the date of a Presidential elec-
6 tion which results in a Presidential transi-
7 tion, the Archivist of the United States, in
8 coordination with the Federal Transition
9 Coordinator, shall submit to the Chairman
10 and Ranking Member of each committee of
11 jurisdiction of either House of Congress, of
12 the Committee on Appropriations of the
13 Senate, and of the Committee on Appro-
14 priations of the House of Representatives a
15 report discussing the status of the transi-
16 tion activities of the White House Transi-
17 tion Coordinating Council and identifying
18 concerns, if any, regarding compliance with
19 chapter 22 of title 44, United States Code.

20 “(ii) NONCOMPLIANCE.—The Archi-
21 vist of the United States shall submit to
22 the Chairman and Ranking Member of
23 each committee of jurisdiction of either
24 House of Congress, of the Committee on
25 Appropriations of the Senate, and of the

1 Committee on Appropriations of the House
2 of Representatives a report if the Archivist
3 of the United States believes there appears
4 to be noncompliance with the requirements
5 or timeline described in subparagraph
6 (A).”;

7 (B) in subsection (e)(2)—

8 (i) in subparagraph (D), by striking
9 “and” at the end;

10 (ii) in subparagraph (E), by striking
11 the period at the end and inserting “;
12 and”; and

13 (iii) by adding at the end the fol-
14 lowing:

15 “(F) under the guidance of the Archivist of
16 the United States, monitor compliance with
17 chapter 22 of title 44, United States Code, in-
18 cluding the preservation of all records and pre-
19 ventions of any records from being disposed un-
20 less done in accordance with such chapter.”;

21 (C) by redesignating subsection (i) as sub-
22 section (j); and

23 (D) by inserting after subsection (h) the
24 following:

25 “(i) ROLE OF THE ARCHIVIST.—

1 “(1) IN GENERAL.—Not later than 120 days
2 before the date of a Presidential election, the Archi-
3 vist of the United States shall send a written com-
4 munication to the head of each agency—

5 “(A) describing the requirements under
6 chapter 33 of title 44, United States Code; and

7 “(B) establishing a timeline for coopera-
8 tion with the Archivist of the United States to
9 ensure an orderly and timely transition of
10 records subject to such chapter if there is a
11 Presidential transition.

12 “(2) REPORTING.—

13 “(A) IN GENERAL.—Not later than 30
14 days after the date of a Presidential election
15 which results in a Presidential transition, the
16 Archivist of the United States, in coordination
17 with the Federal Transition Coordinator, shall
18 submit to the Chairman and Ranking Member
19 of each committee of jurisdiction of either
20 House of Congress, of the Committee on Appro-
21 priations of the Senate, and of the Committee
22 on Appropriations of the House of Representa-
23 tives a report discussing the status of the tran-
24 sition activities of agencies and identifying con-

1 cerns, if any, regarding compliance with chapter
2 33 of title 44, United States Code.

3 “(B) NONCOMPLIANCE.—The Archivist of
4 the United States shall submit to the Chairman
5 and Ranking Member of each committee of ju-
6 risdiction of either House of Congress, of the
7 Committee on Appropriations of the Senate,
8 and of the Committee on Appropriations of the
9 House of Representatives a report if the Archi-
10 vist of the United States believes there appears
11 to be noncompliance with the requirements or
12 timeline described in paragraph (1).”.

13 **SEC. 10. FORMER PRESIDENTS.**

14 The Act entitled “An Act to provide retirement, cler-
15 ical assistants, and free mailing privileges to former Presi-
16 dents of the United States, and for other purposes”, ap-
17 proved August 25, 1958 (commonly known as the
18 “Former Presidents Act of 1958”) (3 U.S.C. 102 note),
19 is amended by adding at the end the following:

20 “(h) If the Archivist of the United States determines
21 that a former President did not comply with major re-
22 quirements under chapter 22 of title 44, United States
23 Code, or the Presidential Transition Act of 1963 (3 U.S.C.
24 102 note), the monetary amounts described in subsections
25 (a) and (b) shall be withheld until the later of—

1 “(1) 1 year after the date on which the Archi-
2 vist makes that determination; or

3 “(2) the date on which the Archivist determines
4 the former President has adequately complied with
5 the requirements.”.

6 **SEC. 11. PRESIDENTIAL ARCHIVAL DEPOSITORY.**

7 Section 2112 of title 44, United States Code, is
8 amended—

9 (1) in subsection (b)—

10 (A) by striking “When the Archivist” and
11 inserting “(1) Subject to paragraph (2), when
12 the Archivist”; and

13 (B) by adding at the end the following:

14 “(2) The Archivist may not deposit papers, doc-
15 uments, or other historical materials accepted under
16 section 2111 of this title or other Federal records
17 appropriate for preservation in a Presidential archi-
18 val depository relating to a former President under
19 paragraph (1) until after the date on which the Ar-
20 chivist determines that the former President has
21 adequately complied with the requirements under
22 chapter 22 relating to Presidential records (as de-
23 fined in section 2201).”;

24 (2) in subsection (g), by adding at the end the
25 following:

1 “(6)(A) Notwithstanding paragraphs (3), (4), and (5)
 2 (to the extent that such paragraphs are inconsistent with
 3 this paragraph), this subsection shall be administered in
 4 accordance with this paragraph with respect to any Presi-
 5 dential archival depository created as a depository for the
 6 papers, documents, and other historical materials and
 7 Presidential records pertaining to any President who takes
 8 any action, including destruction, alteration, concealment,
 9 or removal, that threatens or damages the integrity and
 10 statutory preservation requirements under chapter 22 for
 11 Presidential records (as defined in section 2201).

12 “(B) For purposes of subparagraphs (A)(ii),
 13 (B)(i)(II), and (B)(ii)(II) of paragraph (3) the percentage
 14 of 100 percent shall apply instead of 60 or 20 percent.”;
 15 and

16 (3) by adding at the end the following:

17 “(h) None of the funds in the account in the National
 18 Archives Trust Fund that may be expended for the benefit
 19 and in the interest of a Presidential archival depository
 20 relating to a former President may be used for the cost
 21 of digitizing records the former President wishes to de-
 22 posit in and make available through the Presidential archi-
 23 val depository.”.

○