

Governor Jack Markell
150 Martin Luther King Jr. Blvd. South
2nd Floor
Dover, DE 19901

July 8, 2014

RE: *Veto Request of HB 345, An Act To Amend Title 12 Of The Delaware Code Relating To Fiduciary Access To Digital Assets And Digital Accounts*

Dear Governor Markell:

The undersigned urge you to veto HB 345.

HB 345 removes privacy protections for Delaware citizens, overrides user privacy choices, sets the privacy of Delaware residents lower than the federal standard, forces businesses to choose between violating a state law and risking violating a federal one, and ignores contract provisions long respected by the state.

HB 345 grants fiduciaries with unfettered access to private online accounts and confidential communications and allows fiduciaries to ignore the wishes of the deceased. By granting this access, HB 345 allows fiduciaries to read private and/or confidential communications such as spousal communications or a deceased doctor's, psychiatrist's, or addiction counselor's communications with patients, who are still living and in most cases would be seriously offended by a fiduciary looking through his/her sensitive personal communications.

Our users and your constituents care more about privacy than ever. However, HB 345 states that unless deceased account holders have made an affirmative choice, the privacy of their communications is set to the lowest standard – transferring all their communications to and setting the default for Delaware residents to “least private.” HB 345 also revokes some privacy choices made by the deceased – overriding users' expressed wishes to have all of their digital accounts deleted upon death or delivered only to a specific individual, i.e. someone other than the fiduciary or executor.

The federal Electronic Communications Privacy Act (ECPA) prevents providers of online services from sharing the contents of communications in civil court proceedings unless they first obtain consent from the subscriber or sender. However, HB 345 disregards this protection and sets the privacy standard for Delaware residents lower than most of the country – requiring online service providers to disclose communications *without* lawful consent.

The lower privacy settings of HB 345 conflict with the plain language of ECPA and put businesses in a pincer between violating the federal law or the state one. ECPA requires lawful consent before disclosure of stored communications in the civil context; HB 345 requires disclosure even without lawful consent. So businesses must choose between violating federal law or HB 345.

Over and above the privacy concerns it raises, HB 345 overrides contracts protected by Delaware law¹ by explicitly disregarding terms of service and choice of law agreements. This sets a dangerous precedent for Delaware businesses that want their contract terms to be enforced by other states. If Delaware does not respect contract provisions, why should Maryland or Virginia respect the contracts of Delaware businesses?

¹ See, e.g., Del. Code § 2708.

We spent many hours working with the author to craft legislative language that protects privacy, allows disclosure, and complies with federal law. This included our suggesting that HB 345 follow a solution in Rhode Island law² that allows fiduciary access after a court order and commitment to indemnify third parties for privacy claims due to disclosures that may violate ECPA. Unfortunately, we could not reach consensus and the legislature passed a fundamentally flawed bill that fails to properly protect the privacy of Delaware residents.

The good news is that online businesses are addressing this issue and designing tools for users to control what happens to their digital accounts when they die.

For example, Facebook’s “Memorialize” feature respects users’ privacy wishes while also letting their friends and family post messages and memories. Google enables users to choose if they want their account transferred and/or deleted after inactivity. Unfortunately, these innovations, user choices, and privacy concerns are ignored by the “give everything to the fiduciary” nature of HB 345.

We ask you to respect the privacy of Delaware residents, avoid setting a precedent for overriding contract terms, and allow the online industry to continue providing new tools to its users so they are the ones in control of their privacy – not the state or a fiduciary.

For all these reasons, we urge that you veto HB 345.

Thank you for considering our views. Please let us know if we can provide further information.

Sincerely,

The logo for AOL, consisting of the letters "Aol." in a bold, black, sans-serif font.The logo for NetChoice, consisting of the word "NetChoice" in a blue, sans-serif font.The logo for Google, consisting of the word "Google" in its multi-colored, sans-serif font.

State Privacy & Security Coalition

Internet Coalition

The logo for Yahoo!, consisting of the word "YAHOO!" in a purple, serif font.

² For example, Rhode Island law ([§ 33-27-3](#)) says, “An order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2701, on behalf of his/her estate, and **ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.**”