Senator William N. Brownsberger, Senate Chair
Representative John V. Fernandes, House Chair
Joint Committee on the Judiciary
State House
Boston, MA 02133

June 24, 2015

RE: Opposition to SB 758, An Act relative to access to a decedent's electronic mail accounts.

Dear Chairman Brownsberger, Chairman Fernandes and members of the committee:

While well intentioned, SB 758 will cause unintended confusion among Massachusetts's residents, and likely litigation, by allowing a fiduciary or executor "access to the contents of an electronic mail account of the decedent." The bill creates confusion and potential liability under federal law for providers, fails to account for the unique nature of digital stored content, and creates acute privacy concerns for decedents and for third parties with whom the decedent communicated.

We believe it is important and possible to address the above concerns by developing legislation that takes into consideration all stakeholder interests. That is why the industry groups represented on this memo pledge to work in good faith with the sponsors and other legislators on a bill that would be a far better model for Massachusetts than SB 758.

SB 758 creates confusion and potential liability for violating privacy protections granted by federal law

The federal Electronic Communications Privacy Act (ECPA) (18 U.S.C. 2702) creates a strict bar against disclosure of the contents of communications without the express consent of one of the parties to the communication. In addition to its criminal provisions, ECPA contains a private right of action through which any person aggrieved by an unlawful disclosure can bring suit against a provider.

While the federal law creates a default rule of "private unless permission is granted for disclosure," SB758 creates an almost entirely opposite rule. Under SB 758, "contents of an electronic mail account of the decedent" must be disclosed regardless of whether a court has determined a party's consent was granted. As such, providers will be forced to reject requests from estates under this law where a party has not consented to the disclosure.

Indeed, a recent decision of the California Court of Appeals has held that "the lawful consent exception to the prohibitions of the Act . . . is not satisfied by consent that is merely constructive, implied in law, or otherwise imputed to the user by a court. . . but must be 'consent in fact.'" (*See, Negro v. Superior Court of Santa Clara* County, 230 Cal. App. 4th 879 (2014)). By neglecting the consent requirements of federal law, SB 758 will create needless confusion and expense for estates.

In addition, the bill fails to take into consideration the privacy of third parties whose personal information may have been included in communications with the decedent. For example, consider the situation of a high profile or public official who routinely communicates through email with his or her sponsor in Alcoholics Anonymous or any other support group. Under SB 758, when the sponsor passes away, the highly personal contents of those emails would be disclosed to the fiduciary compromising the personal details of the third party.

Obtaining a court order could help address federal privacy law requirements. However, SB 758 fails to create a pathway for providers to obtain a court order based on a finding that a party has indeed consented and disclosure is permitted under ECPA. The federal law grants providers immunity for disclosures in good faith compliance with court orders, so ensuring providers can rely on such orders to the extent they disclose contents is necessary in avoiding the aforementioned federal liability.

SB 758 creates potential for confusion as to when digital information is the property of an estate. In the digital marketplace, terms of service agreements often determine whether and under what conditions a particular piece of information is the property of a consumer. These same agreements may govern the transferability, descendibility, or other rights pertaining to access, disclosure, and control of a piece of information. Some service providers make contractual privacy promises in their terms of service. Sometimes these promises include deleting the account at the user's death. By revoking these contracts and requiring disclosure despite promises to the contrary, SB 758 places providers, estates, and courts in the untenable circumstance of determining the estate's property rights notwithstanding the very document that creates and governs those rights.

Finally, consumers may wish to sign up for a particular social media account or email service precisely because of default policies that delete all content upon death. We believe that given the wide variety of choices available to consumers, including new tools companies are developing to provide users with granular "afterlife" choices for their social media accounts, legislation should not disregard these choices and preferences.

SB 758 should be amended to the PEAC Act - an alternative that has the support of Privacy and Industry Groups.

Instead of heading down this path, we advocate replacing SB 758 with the Privacy Expectation Afterlife and Choices Act (PEAC) Act.[1]

The PEAC Act would achieve the goals of SB 758 to "help a decedent's loved ones wind down the decedent's personal and legal affairs in a time when many people have digital bank accounts" without overriding the deceased's privacy choices and expectations. Moreover, rather than limiting the scope of records and communications to only emails, the PEAC Act covers all electronic communications.

Privacy advocates like the ACLU, EFF, and CDT and industry created the PEAC Act. Moreover, the PEAC Act is now law in Virginia and is moving through the California legislature.

Under the PEAC Act:

- The privacy expectations, statements in a will, and settings chosen by users would remain after the user dies. Unauthorized fiduciaries may not read private communications, since privacy choices in life continue after death.
- Fiduciaries can see the banks, investment managers, and accountants with whom the deceased corresponded. This lets fiduciaries identify important interactions and contact those institutions as part of settling the estate.
- Fiduciaries can see the contents of communications *only* when the deceased expressly allowed it in their will, or when there is some other evidence of user consent. If the deceased allowed disclosure of these communications, then service providers must comply, subject to verification.

It's not just our view that the PEAC Act is the correct approach, but it's also what Massachusetts citizens believe. The national polling firm Zogby Analytics surveyed adults across age, demographics, and political spectrums on this issue. Zogby's poll found: (available at NetChoice.org/Afterlife)

> **By nearly 5-to-1, Americans oppose disclosure by default.** Over 70% of Americans say their private online communications and photos should remain private after they die, unless they gave prior consent for others to access.

[1] Available at NetChoice.org/PEAC

Just 15% said an estate attorney should make the decision about sharing their private communications and photos.

For these reasons, we oppose SB 758 as drafted. We remain hopeful that we can work with all stakeholders on an approach that helps citizens choose their afterlife privacy while allowing the fiduciary to wrap-up the estate and comply with federal law.