

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

Steve DelBianco, Executive Director
Carl Szabo, Policy Counsel
NetChoice
1401 K St NW, Suite 502
Washington, DC 20005
202-420-7498
www.netchoice.org



The Honorable Stephen M. Brewer, Chair
Joint Committee on Ways and Means
Massachusetts Legislature
Boston, Massachusetts

May 21, 2014

RE: *Amendments to Floor Amendment 119, Access to a decedent's electronic mail accounts*

Dear Chairman Brewer:

Floor Amendment 119 risks violating the privacy expectations of your constituents by turning over some of their most sensitive communications – even when they expected deletion upon death.

Without amending, 119 grants personal representatives access to private online accounts and confidential communications and allows personal representatives to ignore the wishes of the deceased. By granting this access, 119 allows personal representatives to read private and/or confidential communications such as spousal communications or a deceased doctor's communications with their patients.

119 also revokes some privacy choices made by the deceased – overriding a user's wish to have all of their digital account deleted upon death or delivered only to a specific individual – not to the personal representative.

To protect your constituents' privacy and address a number of other problems created by 119, we ask you make the following amendments to 119 – bringing it in-line with the existing Rhode Island law § 33-27-3:

(28) gain reasonable access to the contents of an electronic mail account of the decedent upon receipt by the electronic mail service provider of: (i) a notarized written request for such access made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the letter of appointment as personal representative; ~~or~~ and (ii) an order of the probate court that has jurisdiction over the estate of the decedent, designating the personal representative as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. 2701, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.

The electronic mail service provider ~~shall~~ may provide access to the requested records ~~within 60 days of receipt of the request. Failure of the provider to comply within said 60 days shall be a violation of this paragraph, entitling the requestor to apply for an appropriate order of the court directing compliance.~~ This paragraph shall supersede provisions in the electronic mail service

provider's contractual limitations, terms and conditions or privacy policy; provided, however, that access to the contents of an electronic mail account shall not be provided if the provider shows, by clear and convincing evidence, that ~~it offered opt-out language, separate and distinct from the standard agreement or terms of service, whereby~~ the decedent affirmatively declined to have the decedent's electronic mail account released after death, or affirmatively designated consent for a named individual to have access to the decedent's electronic mail account after death. This paragraph shall not supersede language in the decedent's will to the contrary. Any provision of access or copies of electronic communication is subject to copyright and other law as well as any applicable and enforceable licensing terms.

As you know, every day, some Massachusetts residents die without having given enough thought to what happens to their email accounts and online documents after they're gone. Often, their families and personal representatives face a wide variety of company policies and conflicting state and federal laws. And the growing use of social media provides even more challenges and opportunities for grieving families.

However, the approach taken in 119 could cause more harm than good -- partly by giving personal representatives the power to disregard the privacy choices of Massachusetts's residents.

Along with the privacy concerns outlined above, there are several reasons to consider more carefully the question of how families and personal representatives may access the online communications of deceased persons.

There's the question of how online services can reconcile state disclosure mandates against existing federal privacy protections. As the committee knows, the Electronic Communications Privacy Act (ECPA) prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender.

There is an argument that personal representatives stand in the shoes of the deceased and are thus entitled to access their accounts if consistent with the intent of the deceased and if necessary to fulfill the personal representative's duties. However, this argument is untested with respect to ECPA's consent requirements.

Beyond ECPA, there are many other key questions about how to manage and legislate in the area of access to the digital legacy of deceased Americans. For example:

- Some users choose their online services based on the strong privacy protections and data deletion policies in the *Terms of Service*. Shouldn't that be enough to indicate a user's wishes?
- Should online services be required to retain emails and documents for a minimum period -- despite the subscriber's express wishes to delete their account upon death?
- When must personal representatives obtain probate court orders to force online services to retain or divulge documents and communications?

Questions like these prompted online service providers and social networks to develop innovative features and choices to users. For example, Facebook's "Memorialize" feature respects user's privacy wishes while also letting their friends and family post messages and memories. Other services allow users to designate a next of kin.

But creating a patchwork of conflicting state and federal laws will obstruct this kind of innovation by online services. Worse, these laws would empower a personal representative to disregard the privacy wishes of the departed, which would impact the interests of all Massachusetts residents.

For all these reasons, we urge that you amend 119 or carry 119 over to the next legislative session for further discussion. Thank you for considering our views. Please let us know if we can provide further information.

Sincerely,



Steve DelBianco
Executive Director, NetChoice



Carl M. Szabo
Policy Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org