

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



Senator Stephen Brewer
Senator Jennifer Flanagan
Senator Richard Ross
Massachusetts State Senate
Massachusetts Legislature
Boston, Massachusetts

June 10, 2014

RE: *Opposition to Section 81J of S 2160 – Decedent Access*

Dear Senators Brewer, Flanagan, and Ross:

Floor Section 81J of S 2160 risks violating the privacy expectations of your constituents by turning over some of their most sensitive communications – even when they expected deletion upon death.

If passed, 81J would grant 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, 81J allows personal representatives to read private and/or confidential communications such as spousal communications or a deceased doctor's communications with their patients.

81J 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.

However, this problem can be avoided. We are working with the sponsors of the standalone bills, H 1314 and S 702, to amend them in ways that protect your constituents' privacy while address a number of other problems created by 81J.

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 81J 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 not include Section 81J of S 2160. 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