

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

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Sen. William N. Brownsberger, Chairman
Rep. Christopher M. Markey, Vice-Chair
Joint Committee on the Judiciary Committee
Massachusetts Legislature
Boston, Massachusetts

April 9, 2014

RE: *Opposition to HB 1314, An Act relative to access to a decedent's electronic mail accounts*

Dear Chairman Brownsberger, Vice-Chair Markey, and Members of the Committee:

We urge that you not support HB 1314 in its current form.

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 estate managers 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 HB 1314 could cause more harm than good -- partly by giving estate representatives the power to disregard the express privacy choices of Massachusetts's residents.

There are several reasons to consider more carefully the question of how families and estate managers 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 executors 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 executors' duties. However, this argument is untested and mandating access by executors would raise new questions.

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?
- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by the user?

- 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 estate representatives obtain probate court orders to force online services to retain or divulge documents and communications?
- When states empower a representative to take control of an account, will that cause online services to violate their obligation to prevent unauthorized access?

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 that kind of innovation by online services. Worse, these laws would empower an estate attorney to disregard the privacy wishes of the departed, which would impact the interests of all Massachusetts residents using any form of Internet communications or document storage.

Instead, of heading down this path, Massachusetts should look to the existing Rhode Island law, § 33-27-3. This 2011 law protects user settings unless the fiduciary sends the provider:

- A written request for access,
- A copy of the death certificate and copy of appointment certificate, and
- An order of the probate court designating the fiduciary as an agent as defined in ECPA, and ordering the estate to indemnify the provider from liability in complying with the order.

For all these reasons, we urge that you not support HB 1314 in its current form. Thank you for considering our views. Please let me know if I can provide further information.

Sincerely,



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