

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

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President Dick Dever
Minority Leader Mac Schneider
PO Box 1000
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January 23, 2015

RE: *Opposition to SB 2106, Uniform Fiduciary Access to Digital Assets Act*

Dear President Dever, Minority Leader Schneider, and members of the Senate:

We urge you to oppose SB 2106.

Families and estate managers of the deceased face a wide variety of company policies and conflicting state and federal laws when attempting to access the deceased's online accounts. And the growing use of social media provides even more challenges and opportunities for grieving families.

However, the approach taken in SB 2106 could cause more harm than good -- partly by giving estate representatives the power to disregard the express privacy choices of North Dakota's residents.

SB 2106 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, SB 2106 allows fiduciaries to read private and/or confidential communications such as spousal communications or a deceased doctor's communications with their patients.

SB 2106 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, i.e. not the fiduciary or executor.

The approach in SB 2106 is opposed by online businesses and privacy advocates like the ACLU, Center for Democracy and Technology, and Electronic Frontier Foundation.

There are several other 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.

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:

- 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 this 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 North Dakota residents using any form of Internet communications or document storage.

Instead, of heading down this path, North Dakota should allow its citizens to choose their afterlife privacy while allowing the fiduciary to wrap-up the estate and complying with federal law. To that end, we advocate replacing SB 2106 with the Privacy Expectation Afterlife and Choices Act (PEAC) Act.¹

Under the PEAC Act:

- The privacy expectations, express statements of wills, and settings of users remain when the user dies. Unauthorized fiduciaries may not read private communications – privacy choices in life continue in death.
- Fiduciaries can see the banks, stock managers, and accountants with whom the deceased corresponded. This lets fiduciaries identify important interactions, like those with a bank or online broker, and then contact those institutions as part of closing the account.
- Fiduciaries can see the contents of communications only when the deceased expressly allowed it in their will or user choice mechanism. If the deceased allowed disclosure of these communications, service providers must comply subject to verification and indemnification processes.

For all these reasons, we urge that you oppose SB 2106.

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

¹ Available at NetChoice.org/PEAC