

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

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Rep. Zachary J. Cook  
Chairman, House Judiciary Committee  
New Mexico Legislature  
Santa Fe, New Mexico

March 19, 2015

**RE: *Opposition to SB 59, Uniform Fiduciary Access to Digital Assets***

Chairman Cook and members of the committee:

While well intentioned, we respectfully request that you do not move forward SB 59 or, in the alternative, amend it so that it reflects alternative legislation that will work better for New Mexico residents and the businesses serving them.

Families and estate managers of the deceased face a 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 59 would cause more harm than good by making a decedent's private communications public, *by default*. This conflicts with federal law, ignores the unique nature of digital stored content, and creates acute privacy concerns for decedents and for third parties with whom the decedent communicated. That's why this legislation is opposed by our association and by privacy advocates such as the ACLU, Center for Democracy and Technology, and Electronic Frontier Foundation.

By granting fiduciaries unfettered access to private online accounts and confidential communications, SB 59 lets fiduciaries read private and confidential communications, such as spousal disagreements or a deceased doctor's communications with patients. The bill also revokes privacy choices explicitly made by the deceased, such as their wish to have their digital account deleted upon death, or directing the online service to deliver email only to a designated alternate upon death.

SB 59 fails to address key questions about access to the digital legacy of deceased Americans:

- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by the user?
- 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 have led online service providers and social networks to offer innovative features and choices to users about what happens to their digital accounts when they die.

Unfortunately, SB 59 would require online service providers to violate existing federal privacy laws. The federal Electronic Communications Privacy Act (ECPA) prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender.

SB 59 conflicts with federal law and would let estate attorneys disregard the privacy wishes of New Mexico citizens using any form of online communications or document storage.

Instead of heading down this path, New Mexico should allow its citizens to choose their afterlife privacy while allowing the fiduciary to wrap-up the estate and comply with federal law. To that end, we advocate replacing SB 59 with the Privacy Expectation Afterlife and Choices Act (PEAC) Act<sup>1</sup> -- passed unanimously by the Virginia General Assembly last month.

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 SB 59 is the wrong approach. It's also what your constituents believe. The national polling firm Zogby Analytics surveyed adults across age, demographics, and political spectrums on this issue. Zogby's poll found:<sup>2</sup>

**By nearly 5-to-1, Americans oppose the approach of SB 59.** 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. Only 15% say that estate attorneys should control their private communications and photos, even if they gave no prior consent for sharing.

**65% of Americans say it's against their privacy if communications and photos are shared without their consent** (as they would be under SB 59).

Key results of this polling are attached to our testimony.

For all these reasons, we urge that you not move SB 59. Thank you for considering our views. Please let me know if I can provide further information.

Sincerely,



Steve DelBianco  
Executive Director, NetChoice

**NetChoice** is a trade association of e-Commerce and online businesses. [www.netchoice.org](http://www.netchoice.org)

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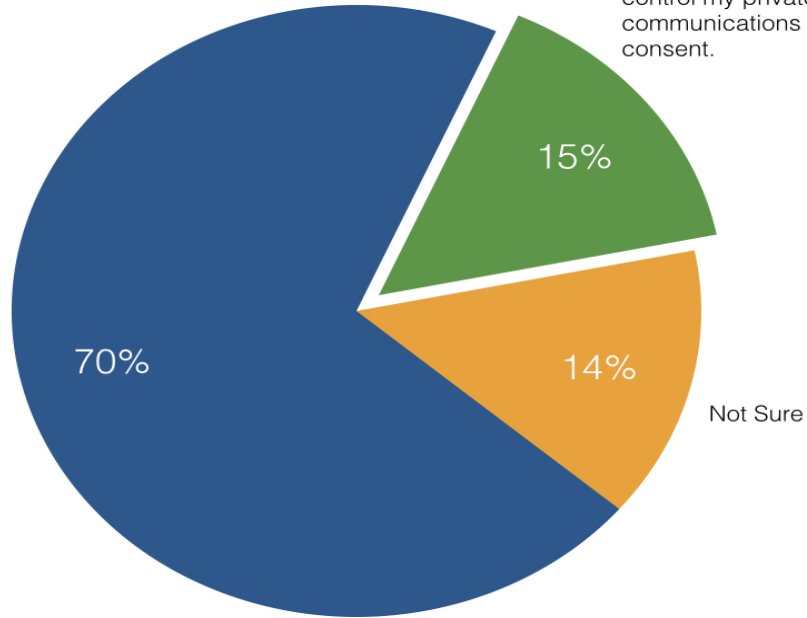
<sup>1</sup> Available at [NetChoice.org/PEAC](http://NetChoice.org/PEAC)

<sup>2</sup> Available at [NetChoice.org/Afterlife](http://NetChoice.org/Afterlife)

**After a person dies which of the following describes your view when it comes to keeping the emails and instant messages along with digital photos they have sent privately?**

No one should access content after I die, unless I gave prior consent.

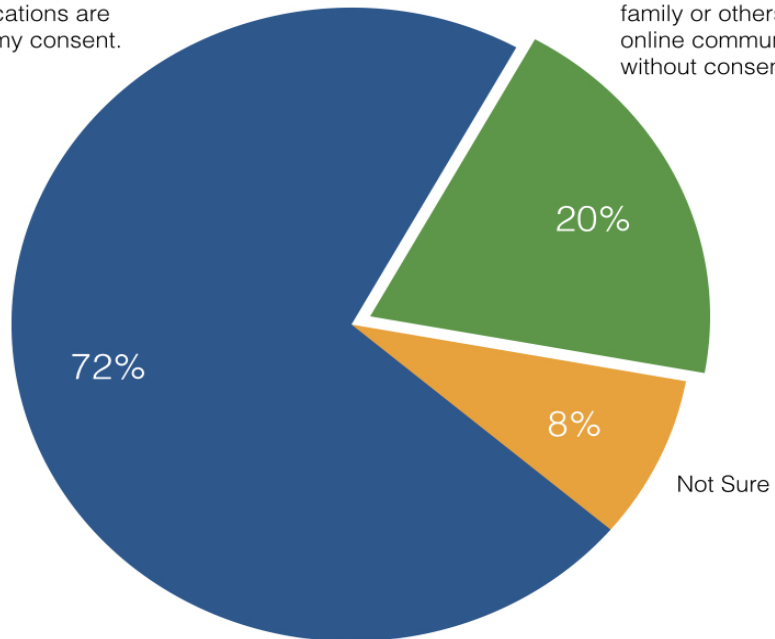
Estate executors should control my private communications even if no consent.



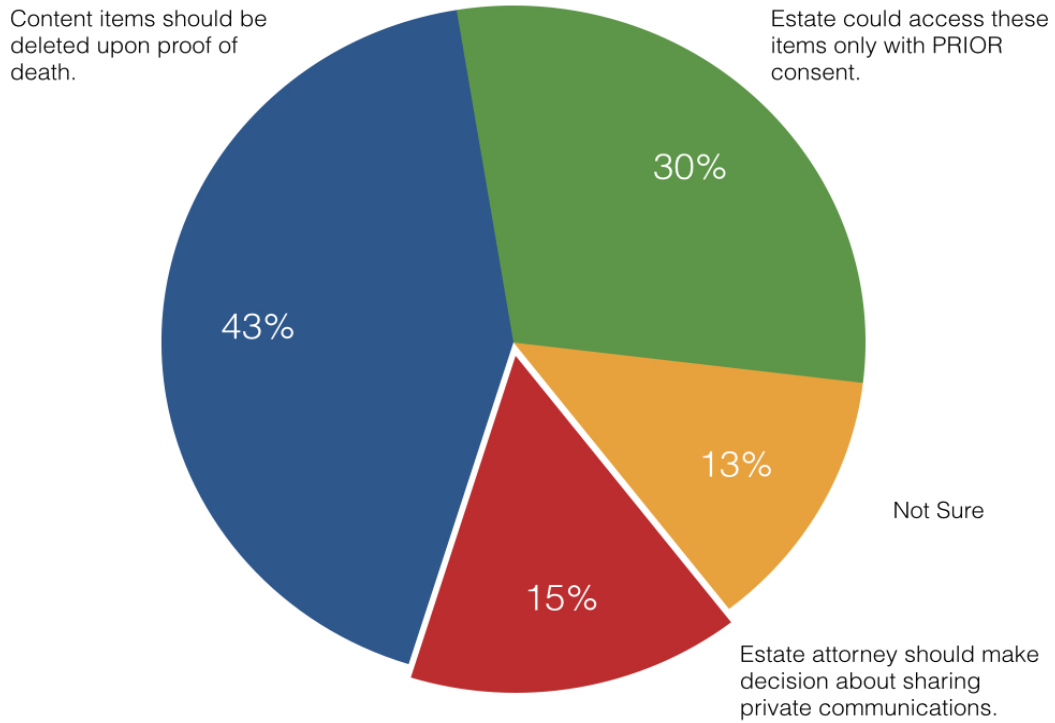
**Which of the following describes your view when it comes to keeping electronic communications and photos private, so they could not be shared without your consent?**

It's against my privacy if those communications are shared without my consent.

I don't care if my friends, family or others see my online communication without consent



**How do you want an online service to handle your private accounts when you die?**



**In your opinion, what should be the priority on privacy of online communications when someone dies?**

