

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

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Senator Gerald Ortiz y Pino
400 12th Street NW
Albuquerque, NM 87102

February 5, 2015

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

Dear Senator Ortiz y Pino and members of the committee:

We request that you defer consideration of SB 59 so that we can explain concerns and explore 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 could cause more harm than good by creating a rule that would make a decedent's private communications, public, *by default*. Such a rule conflicts with federal law, fails to account for the unique nature of digital stored content, and creates acute privacy concerns for decedents as well as the third parties with whom the decedent communicated. It is for these reasons that our associations as well as 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 allows fiduciaries to read private and/or confidential communications, such as spousal disagreements or a deceased doctor's communications with their patients. The bill also revokes privacy choices explicitly made by the deceased, such as their wish to have all of their digital account deleted upon death, or have the online service deliver email only to a designated alternate upon death.

The bill therefore fails to address 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?
- 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. 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.

Unfortunately, SB 59 will require online service providers to reconcile a new state disclosure mandate against existing federal privacy protections. 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. But the conflicting state and federal standard created by SB 59 will obstruct this kind of innovation by online services by making these tools, which promote user choice, unenforceable. Worse, these laws would empower an estate attorney to disregard the privacy wishes of the departed, which would impact the interests of all New Mexico residents using any form of Internet 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 complying with federal law. To that end, we advocate replacing SB 59 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 after 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 some mechanism indicating the user's choice. If the deceased allowed disclosure of these communications, then service providers must comply, subject to verification and indemnification processes.

It is not just our opinion that you replace SB 59 with the PEAC Act, but it is what your constituents want. Leading polling firm, Zogby Analytics surveyed adults across age, demographic and political spectrums on this issue.

Zogby's polling found:²

4-to-1 Americans prefer the approach in the PEAC Act to that 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).

Just 15% said an estate attorney should make the decision about sharing their private communications and photos. 43% say these items should be deleted upon proof of death. 30% say their estate could access these items only if they gave prior consent.

¹ Available at NetChoice.org/PEAC

² Available at NetChoice.org/Afterlife

For all these reasons, we urge that you oppose SB 59.

Thank you for considering our views. Please let me know if I can provide further information.

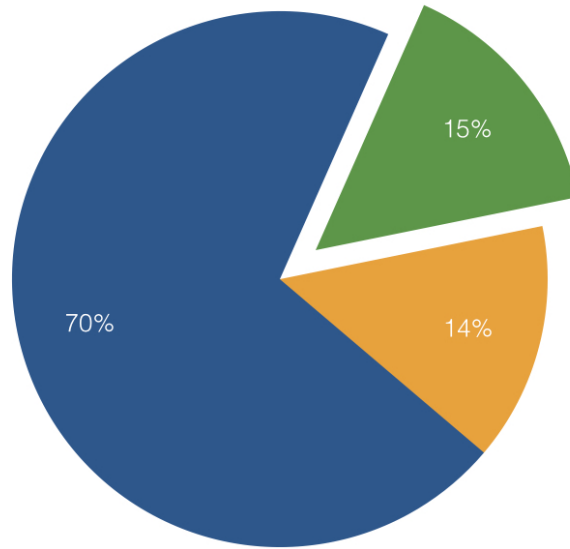
Sincerely,

A handwritten signature in cursive script, appearing to read "Carl Szabo".

Carl Szabo
Policy Counsel, NetChoice

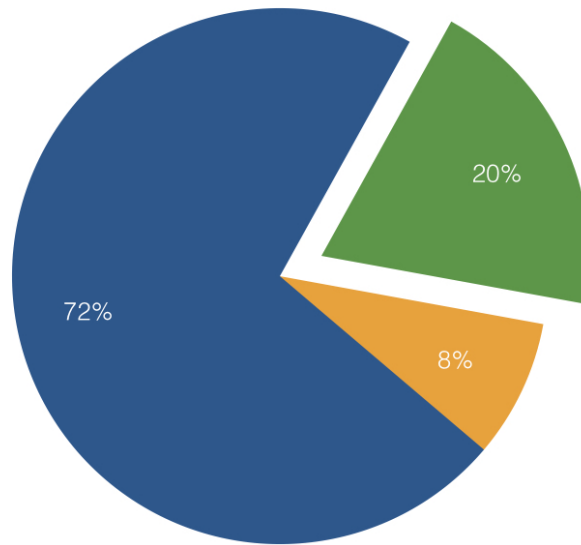
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After a person dies which of the following describes your view when it comes to keeping the emails and instant messages along with digital photos they have sent private?



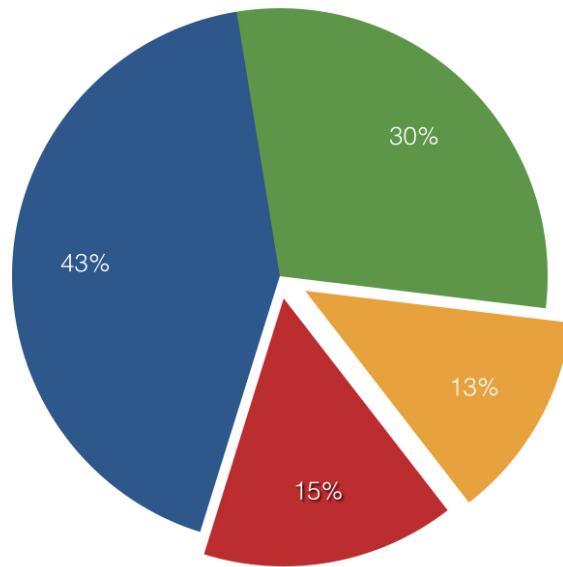
- Noone should access content after I die, unless I gave prior consent.
- Estate executors should control my private communications even if no consent.
- Not Sure

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?



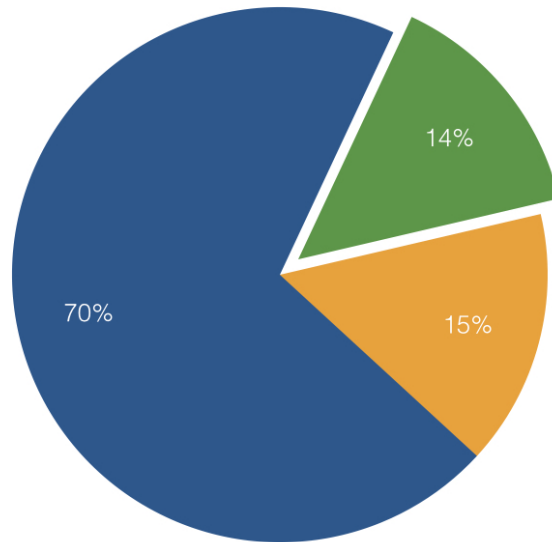
- It's against my privacy if those communications are shared without my consent.
- I don't care if my friends, family or others see my online
- Not Sure

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



- Content items should be deleted upon proof of death.
- Estate could access these items only with PRIOR consent.
- Not Sure
- Estate attorney should make the decision about sharing my private communications.

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



- Privacy should be the priority. We don't know if a deceased person wanted to share.
- Access should be the priority. It doesn't matter whether the deceased wanted to share.
- Not Sure