

2015 SESSION

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SB1450

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SENATE BILL NO. 1450

Offered January 23, 2015

A BILL to amend and reenact §§ 64.2-109 and 64.2-110 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3 of Chapter 1 of Title 64.2 sections numbered 64.2-111 through 64.2-115, relating to creation of the Privacy Expectation Afterlife and Choices Act.

Patron—Obenshain

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-109 and 64.2-110 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections in Article 3 of Chapter 1 of Title 64.2 numbered 64.2-111 through 64.2-115 as follows:

§ 64.2-109. Definitions.

As used in this article, unless the context requires otherwise:

"Contents" when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication, as defined in 18 U.S.C. § 2510(8) and includes the subject line of a communication.

"Digital account" means an electronic account maintained, managed, controlled, or operated by a minor in accordance with a terms of service agreement legally executed by such minor and includes blogging, email, multimedia, personal, social networking, and other online accounts or comparable items as technology develops. "Digital account" excludes accounts as such term is defined in § 6.2-604 to which a financial institution, financial institution holding company, or affiliate or subsidiary of a financial institution is a party.

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not—

(i) any wire or oral communication;

(ii) any communication made through a tone-only paging device;

(iii) any communication from a tracking device; or

(iv) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds, as defined in 18 U.S.C. § 2510(12).

"Electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications, as defined in 18 U.S.C. § 2510(15).

"Electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications, as defined in 18 U.S.C. § 2510(14).

"Executor" means any executor, administrator, curator, or a person that performs substantially the same function under the laws of the Commonwealth.

"Personal representative" has the same meaning as provided in § 64.2-100.

"Provider" means an electronic communications service or remote computing service as defined in this 18 U.S.C. § 2510 or 2711.

"Record or other information pertaining to a user" shall have the meaning given that term in 18 U.S.C. § 2705(c).

"Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system, as defined in 18 U.S.C. § 2711(2).

"Terms of service agreement" means any legally executed agreement that controls a relationship between a minor and any person or entity that maintains, manages, or supervises a digital account of a minor.

"User" means any person or entity who—

(i) uses an electronic communication service; and

(ii) is duly authorized by the provider of such service to engage in such use, as defined in 18 U.S.C. § 2510(13).

§ 64.2-110. Power granted to personal representative.

A. A personal representative of a deceased minor who was domiciled in the Commonwealth at the time of his death may assume the deceased minor's terms of service agreement for a digital account with an Internet service provider, communications service provider, or other online account service provider

59 for purposes of consenting to and obtaining the disclosure of the contents of the deceased minor's
60 communications and subscriber records pursuant to 18 U.S.C. § 2702 unless such access is contrary to
61 the express provisions of a will, trust instrument, power of attorney, or court order. Such access shall be
62 subject to the same license, restrictions, or legal obligations of the deceased minor.

63 B. An Internet service provider, communications service provider, or other online account service
64 provider shall provide to the personal representative access to the deceased minor's communications and
65 subscriber records pursuant to subsection A within 60 days from the receipt of (i) a written request for
66 such access by the personal representative and (ii) a copy of the death certificate of the deceased minor.
67 However, if the Internet service provider, communications service provider, or other online account
68 service provider receives notice of a claim or dispute regarding providing access to the deceased minor's
69 communications and subscriber records pursuant to this subsection, such provider is not required to
70 comply with any written request received pursuant to this subsection until a final nonappealable
71 judgment is rendered by a court of competent jurisdiction determining the rights in or entitlement to any
72 content in the deceased minor's digital account.

73 C. Nothing in this section shall be construed to require an Internet service provider, communications
74 service provider, or other online account service provider to disclose any information in violation of any
75 applicable state or federal law.

76 D. No person may maintain a cause of action against an Internet service provider, communications
77 service provider, or other online account service provider for acting in compliance with this section.

78 E. *A court of probate that by law has jurisdiction of the estate of a deceased user shall order a*
79 *provider of electronic communications service to the public or a provider of remote computing service*
80 *to the public to disclose to the executor of such estate a record or other information pertaining to the*
81 *deceased user as described in 18 USC § 2702 but not including the contents of communications or*
82 *stored contents, if the court makes the following findings of facts:*

83 (a) *the user is deceased;*

84 (b) *the deceased user was the subscriber to or customer of the provider;*

85 (c) *the account(s) belonging to the deceased user have been identified with specificity, including a*
86 *unique identifier assigned by the provider;*

87 (d) *there are no other authorized users or owners of the deceased user's account(s);*

88 (e) *disclosure is not in violation of 18 U.S.C. § 2701 et seq., 47 U.S.C. § 222, or other applicable*
89 *law;*

90 (f) *the request for disclosure is narrowly tailored to effect the purpose of the administration of the*
91 *estate;*

92 (g) *the executor demonstrates a good faith belief that account records are relevant to resolve the*
93 *fiscal assets of the estate;*

94 (h) *the request seeks information spanning no more than a year prior to the date of death; and*

95 (i) *the request is not in conflict with the deceased user's will or testament.*

96 F. *A provider shall be required to disclose to the executor of the estate of a deceased user the*
97 *contents of the deceased user's account to the extent reasonably available only if the executor gives the*
98 *provider all of the following:*

99 (a) *A written request for the contents of deceased user's account;*

100 (b) *A copy of the death certificate of the deceased user; and*

101 (c) *An order of the court of probate that by law has jurisdiction of the estate of a deceased user:*

102 (i) *finding that the will of the deceased user or setting within the product or service regarding how*
103 *the user's contents can be treated after a set period of inactivity or other event expressly consented to*
104 *the disclosure of the contents of the deceased user's account by the executor of the estate of the*
105 *deceased user;*

106 (ii) *ordering that the estate shall first indemnify the provider from all liability in complying with the*
107 *order;*

108 (iii) *finding that the user is deceased;*

109 (iv) *finding that the deceased user was the subscriber to or customer of the provider;*

110 (v) *finding that the account(s) belonging to the deceased user have been identified with specificity,*
111 *including a unique identifier assigned by the provider;*

112 (vi) *finding that there are no other authorized users or owners of the deceased user's account(s); and*

113 (vii) *finding that disclosure of the contents is not in violation of 18 U.S.C. § 2701 et seq., 47 U.S.C.*
114 *§ 222, or other applicable law.*

115 **§64.2-111. Undue burden restriction.**

116 *A court issuing an order pursuant to §64.2-110(E-F), on a motion made promptly by the provider,*
117 *shall quash or modify such order, if compliance with such order otherwise would cause an undue*
118 *burden on such provider, or any of the requirements in §64.2-110(E-F) are not satisfied.*

119 **§64.2-112. Respecting user choices and applicable laws.**

120 *Notwithstanding §64.2-110(E-F), a provider cannot be compelled to disclose any record or any*

121 contents of communications if:

122 (a) the deceased user expressed a different intent through (1) deletion of the records or contents
123 during the user's lifetime, or (2) affirmatively indicating through a setting within the product or service
124 regarding how the user's records or contents can be treated after a set period of inactivity or other
125 event;

126 (b) the provider is aware of any indication of lawful access to the account after the date of the
127 deceased user's death or that the account is not that of the deceased user; or

128 (c) disclosure violates other applicable law.

129 Nothing in this Act shall be interpreted to confer upon the recipient any greater rights in the
130 contents than those enjoyed by the deceased user.

131 **§64.2-113. Right to notify of a request.**

132 A provider may notify the account that a request for information was made pursuant to
133 §64.2-110(E-F), and may provide any current user of the account a reasonable period of time to object
134 to disclosure, during which no disclosure shall be made. If a user notifies the provider that he or she
135 objects, no disclosure shall be made.

136 **§64.2-114. Limiting posting as the deceased.**

137 A provider shall not be required to allow any requesting party to assume control of the deceased
138 user's account under §64.2-110(E-F).

139 **§64.2-115. Compliance in good faith liability protection.**

140 A provider shall not be held liable in any civil or criminal action for compliance in good faith with
141 a court order issued pursuant to this article.