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SENATE BILL NO. 1450

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 4, 2015)

(Patron Prior to Substitute—Senator Obenshain)

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 64.2-116, relating to creation of the Privacy Expectation Afterlife and Choices Act.

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 in Article 3 of Chapter 1 of Title 64.2 sections numbered 64.2-111 through 64.2-116 as follows:

Article 3.

~~Personal Representative Access to Digital Accounts~~ *Privacy Expectation Afterlife and Choices Act.*

§ 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, means any information concerning the substance, purport, or meaning of that communication and includes the subject line of a communication.

"Digital account" means an electronic account maintained, managed, controlled, or operated by a ~~minor~~ *individual* in accordance with a terms of service agreement legally executed by such ~~minor~~ *individual* 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. "Electronic communication" does not mean (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.

"Electronic communications service" means any service that provides users the ability to send or receive wire or electronic communications.

"Electronic communications system" means any wire, radio, electromagnetic, photoelectronic, or photooptical facilities for the transmission of wire or electronic communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

"Executor" means any executor, administrator, or 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 entity that provides an electronic communications service or remote computing service.

"Records" means information pertaining to a user or a minor who is a user of an electronic communications service or remote computing service. "Records" does not include the contents of an electronic communication.

"Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

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

"User" means any person, other than a minor, or entity that uses an electronic communications service and is duly authorized by the provider of such service to engage in such use.

§ 64.2-110. Power granted to personal representative of a deceased minor.

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 a provider~~ for purposes of consenting to and obtaining the disclosure of the contents of the deceased minor's electronic communications and ~~subscriber~~ records pursuant to 18 U.S.C. § 2702 unless such access is contrary to the express provisions of a will, trust instrument, power of attorney, or court order. Such

access shall be subject to the same license, restrictions, or legal obligations of the deceased minor.

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

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

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

§ 64.2-111. Power granted to executor.

A. A court that has jurisdiction of the estate of a deceased user shall order a provider to disclose to the executor of such estate any records of the user but not the contents of electronic communications or stored contents, if the court makes the following findings of facts:

1. The user is deceased;
2. The deceased user was the subscriber to or customer of the provider;
3. The account belonging to the deceased user has been identified with specificity, including a unique identifier assigned by the provider;
4. There are no other authorized users or owners of the deceased user's account;
5. Disclosure is not in violation of 18 U.S.C. Chapter 121 (18 U.S.C. § 2701 et seq.), 47 U.S.C. § 222, or other applicable law;
6. The request for disclosure is narrowly tailored to effectuate the purpose of the administration of the estate;
7. The executor demonstrates a good faith belief that account records are relevant to resolve the fiscal assets of the estate;
8. The request seeks information spanning no more than a year prior to the date of death; and
9. The request is not in conflict with the deceased user's will.

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

1. A written request for the contents of the deceased user's account;
2. A copy of the death certificate of the deceased user; and
3. A court order that:
 - a. Finds that the will of the deceased user or a setting within the product or service regarding how the user's contents can be treated after a set period of inactivity or other event expressly consents to the disclosure of the contents of the deceased user's account by the executor;
 - b. Orders that the estate shall first indemnify the provider from all liability in complying with the order;
 - c. Finds that the user is deceased;
 - d. Finds that the deceased user was the subscriber to or customer of the provider;
 - e. Finds that the account belonging to the deceased user has been identified with specificity, including a unique identifier assigned by the provider;
 - f. Finds that there are no other authorized users or owners of the account; and
 - g. Finds that disclosure of the contents is not in violation of 18 U.S.C. Chapter 121 (18 U.S.C. § 2701 et seq.), 47 U.S.C. § 222, or other applicable law.

C. Nothing in this section shall be construed to require a provider to disclose any information in violation of any applicable state or federal law.

§ 64.2-112. Undue burden restriction.

A court issuing an order pursuant to § 64.2-111, on a motion made promptly by the provider, shall quash or modify such order if compliance with such order otherwise would cause an undue burden on such provider or if any of the requirements in § 64.2-111 are not satisfied.

§ 64.2-113. Respecting user choices and applicable laws.

A. Notwithstanding § 64.2-111, a provider cannot be compelled to disclose any record or any contents of communications if:

1. The deceased user expressed a different intent through (i) deletion of the records or contents during the user's lifetime or (ii) affirmatively indicating through a setting within the product or service

122 regarding how the user's records or contents can be treated after a set period of inactivity or other
123 event;

124 2. The provider is aware of any indication of lawful access to the account after the date of the
125 deceased user's death or that the account is not that of the deceased user; or

126 3. Disclosure violates other applicable law.

127 B. Nothing in this article shall be interpreted to confer upon any recipient any greater rights in the
128 contents than those enjoyed by the deceased user.

129 **§ 64.2-114. Right to notify of a request.**

130 A provider may send a notice to the account that a request for information was made pursuant to
131 § 64.2-111 and may provide any current user of the account a reasonable period of time to object to
132 disclosure, during which time no disclosure shall be made. If a current user notifies the provider that he
133 objects, no disclosure shall be made.

134 **§ 64.2-115. Limiting posting as the deceased.**

135 A provider shall not be required to allow any executor to assume control of the deceased user's
136 account under § 64.2-111.

137 **§ 64.2-116. Immunity for compliance in good faith.**

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