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**SENATE BILL NO. 1450**

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee on February 27, 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 64.2-115, 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 64.2-115 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~~ *an 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.*

"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 including, if available, information that identifies the person with whom an account holder has engaged in an electronic communication, the time and date of the communication, and the electronic address of the person. "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*.

*"Unique identifier" means an email address, unique screen name or user name, user identification, or other identifier assigned by a service provider for the purpose of identifying the individual account.*

*"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

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*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 personal representative.***

*A. A court that has jurisdiction of the estate of the deceased user shall order a provider to disclose to the personal representative of such estate a user's records for the 18-month period prior to the date of death, but not the contents of the user's electronic communications or stored contents, upon the filing of a motion accompanied by an affidavit by a personal representative attesting, upon information and belief, to the following facts:*

*1. The user is deceased;*

*2. The deceased user was a subscriber of or customer of the provider;*

*3. The account belonging to the deceased user has been reasonably identified, including through a unique identifier assigned by the provider or other identifying information sufficient to enable the service provider to definitively identify the user;*

*4. There are no other authorized users or owners of the deceased user's account, or if there are other authorized users, that all such users expressly consented in written or electronic form to disclosure of the records to the personal representative;*

*5. The request for disclosure is tailored to effectuate the purpose of the administration of the estate; and*

*6. If the user has a will, that the request is not in conflict with the will.*

*The order shall be sent to the provider accompanied by a copy of evidence of consent from joint users, if applicable, and a copy of the death certificate. The personal representative may redact the social security number and cause of death information contained in the death certificate.*

*B. A court that has jurisdiction of the estate of a deceased user shall order a provider to disclose to the user's personal representative the contents of the deceased user's account, upon the filing of a motion accompanied by a copy of an excerpt of the will of the decedent providing consent for such disclosure, if applicable, and an affidavit by the personal representative attesting, upon information and belief, to the following facts:*

*1. The user is deceased;*

*2. The deceased user was a subscriber of or customer of the provider;*

*3. The account belonging to the deceased user has been reasonably identified, including through a unique identifier assigned by the provider or other identifying information sufficient to enable the service provider to definitively identify the user;*

*4. There are no other authorized users or owners of the deceased user's account or, if there are other authorized users, that all such users expressly consented in written or electronic form to disclosure of the contents of the account;*

*5. The user consented, through a will provision or by providing affirmative consent in an account setting within the product or service or an affirmative election with a provider, to disclosure of the contents of the user's account. Provisions within a terms of service agreement shall not constitute user consent to disclosure of the contents of the user's account; and*

*6. The request for disclosure is tailored to effectuate the purpose of the administration of the estate.*

*The order shall be sent to the provider accompanied by a copy of evidence of consent from joint users, if applicable, a copy of the death certificate, and an excerpt of the will containing the provision consenting to the disclosure, if applicable. The personal representative may redact the social security number and cause of death information contained in the death certificate.*

*A provider shall be required to disclose to the personal representative the contents specified in the order to the extent reasonably available.*

*C. The court may, upon a motion by the personal representative, order a provider to disclose records beyond the 18-month period if the court concludes that such records are necessary to administer the user's estate. Such an order may provide for the payment by the estate of reasonable costs incurred by the provider producing the records for such additional time period beyond the 18 months.*

*D. A motion filed pursuant to this section shall not require notice to the heirs or beneficiaries of the estate nor to the provider.*

*E. 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. 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 and shall be entitled to file a motion to quash within 60 days after receiving the order if:*

*1. The deceased user affirmatively (i) expressed an intent not to disclose the records or content of the account through an account setting within the product or service, (ii) made an election with a service provider not to disclose the contents of the user's account, or (iii) deleted the records or contents during the user's lifetime. Provisions within a terms of service agreement shall not constitute intent not to disclose the user's records or content;*

*2. The user is not deceased;*

*3. The decedent was not a subscriber or customer of the provider;*

*4. The account did not belong to the decedent;*

*5. Other authorized users of the account object to the disclosure unless otherwise ordered pursuant to § 64.2-113;*

*6. The disclosure would violate state or federal law; or*

*7. The provider can demonstrate to the court upon clear and convincing evidence that compliance with the order would create an undue burden upon the provider.*

*B. Nothing in this article shall be interpreted to confer upon any recipient any greater rights under copyright or other applicable law in the contents than those enjoyed by the deceased user.*

*C. Nothing in this article shall impair any contractual right that a decedent has in the records or contents of a digital account.*

***§ 64.2-113. Right to notify of a request; objections of joint users.***

*A provider may send a notice to the account that a request for records or content was made pursuant to § 64.2-111 and affording reasonable time for any authorized user of the account to object to the disclosure. If the provider receives an objection to disclosure from a person or entity claiming to be an authorized joint user of the account, the provider may file a motion to quash the order under § 64.2-112. If the person or entity objecting to disclosure is an authorized joint user of the account and the personal representative is unable to obtain such user's consent to disclose the records or content necessary to settle the user's estate, the personal representative may file a motion seeking appropriate relief.*

***§ 64.2-114. Use of the decedent's account prohibited.***

*A provider shall not be required to allow any personal representative to transmit electronic communications from, post content to, access, or make other use of the deceased user's account under § 64.2-111.*

***§ 64.2-115. Immunity for compliance in good faith.***

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

**2. That the Joint Commission on Technology and Science shall study the implementation of this act and develop legislative recommendations to address access to electronic communication records and digital account content by guardians ad litem, conservators, and other fiduciaries.**