

**2013 HOUSE INDUSTRY, BUSINESS, AND LABOR**

**HB 1455**

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1455  
January 29, 2013  
Job 17927

Recording also contains HB 1460

Conference Committee

Committee Clerk Signature

## Explanation or reason for introduction of bill/resolution:

Personal representatives relating to internet accounts, workplace privacy of social media accounts

## Minutes:

Attachments 1-5

**Representative Ben Hanson, District 16:** Refer to written testimony, attachment 1. Distributed attachments 2, 3, and 4. Elaborated on written testimony.

I would be open to amendments to better define some of the terms involved, especially the word *social networks*. You have information in front of you, and I can provide you with more. Six states have passed similar legislation this year, and it has been tried at the federal level but has not passed yet. It is a bipartisan issue.

4:03 **Representative Ruby:** With this language, what would prevent an employer from doing some social network snooping or creeping? There are ways to seek people out. You're not privy to all their information. Would this prevent some of the searching?

**Representative Ben Hanson:** No, it would not, because that information is made public and is chosen by the individual to be made public. What this bill would do is to prevent that which is private from being intruded upon by said employer. Privacy settings are the choice of those individuals, and if the information can be accessed viewed by the employer, it will be as the information has been made public.

5:07 **Chairman Keiser:** I saw a news segment about people who have died wanted to keep a web presence for posterity. Would this preclude that?

**Representative Ben Hanson:** It would not. We should check with Legislative Council, but their inheritors would have to abide by their will.

**Chairman Keiser:** What if they don't?

**Representative Ben Hanson:** Whatever they are giving to them in the inheritance, it would be done by clause, so it is implied to me that whatever is in the will would have to be obeyed by said inheritors.

6:05 **Representative Beadle:** Section 1 does not have much language. Is it safe to say that the intent is that the social media provider, such as Facebook, does not take over ownership of the account if someone dies, but rather the descendants or inheritors by will or whatever would have access to it? Is that the intention of Section 1?

**Representative Ben Hanson:** That is correct. That includes social media accounts for their business, should they conduct business through a social networking page.

6:52 **Representative Ruby:** Employers often make background checks, drug screenings, and so on, and some of those are much more invasive than requesting something on a social networking site. Why do you think this is more protective than background checks and criminal history?

**Representative Ben Hanson:** It is a bit of a gray area. I find the answer in the question. The background checks, etcetera, tend to revolve around information that is public.

7:53 **Representative N. Johnson:** If I read this correctly, it also has that an employee cannot download to their personal accounts information which is proprietary to employers. Is that accurate? Top of page 3, lines 2 and 3. That's employer protection for proprietary information.

**Representative Ben Hanson:** That is correct.

8:52 **Chairman Keiser:** Since it is an employer's proprietary information or financial data, you cannot download it to a personal website or a social networking site. But there are other types of sites to which an employee could download the information? Is that a good thing that they're stealing proprietary information?

**Representative Ben Hanson:** That is correct. Certainly stealing proprietary information is not a good thing, but I think that individual case is up to the employer or maybe for a separate bill.

**Representative Becker:** To me, Section 1 seems incomplete.

**Representative N. Johnson:** In the Century Code, section 30.1-18-15 covers the duties and responsibilities of a personal representative in the case that someone has passed away. This adds another duty which they are permitted to do.

10:34 **Chairman Keiser:** If an employee is using a company computer to view their own site, does the employer have access to that information once it happens?

**Representative Ben Hanson:** Depending on the computer system, for the most part not to my knowledge. Again, that could go back to logging into a personal e-mail, banking information, and so on.

**Chairman Keiser:** But they are doing it on my company's computer on my company's time, time which they are being paid for.

**Representative Ben Hanson:** Correct. If you are not allowing them to do that, then they are prohibited from doing that as your employee.

**Chairman Keiser:** If they do it, do I have access to it?

**Representative Ben Hanson:** No, they are simply prohibited from that activity.

**Support:**

**Opposition:**

12:18 **Pat Ward, attorney with the law firm of Zuger, Kirmis, and Smith, representing the Motion Picture Association of America:** Refer to written testimony, attachment 5. The Motion Picture Association of America urges a do not pass or an amendment concerning Section 1.

**Representative Beadle:** If my father has a collection of DVDs, and he passes away, am I allowed to take possession of those DVDs?

**Pat Ward:** Yes, if they had been paid for.

**Representative Beadle:** If I assume that the content stored in an iTunes account is downloaded content which has been purchased through an iTunes account and was stored on the cloud service, or it was a DVD or Blu-ray I had purchased which included a digital copy which could be uploaded to my iPad. If that content is on a digital device on the cloud service for ease of transport and my father who had that passes away, what is the difference? Why could I not have that content?

16:09 **Pat Ward:** It would depend on the terms under which you have purchased it. If it is for your personal use, you are not to redistribute it to another person. We're saying that the way the bill is written now is that it is overly broad; it does not take into consideration all of those other issues that are being looked at by the Uniform Laws Committee. Section 1 is premature and overbroad. If you look at the language there, it is talking about uniform probate code, which is the powers and duties of a personal representative. The bill says take control of, conduct, continue, or terminate an account. If it was limited to taking control of for purposes of terminating the account, that would be one thing. But when it comes to passing on or distributing the content, it would have to be subject to whatever the contractual arrangements are with respect to that content. Our big concern is downloaded materials which have been taken illegally.

**Representative Beadle:** If the content was taken illegally, it was unlawful for that person to possess it to begin with, correct? (Pat Ward agrees.) If the next person takes it and tries to do anything with it, it would still be unlawful for them to do anything with it. (Pat Ward agrees.) It would still be against the law for them to do something with it. Where is the fear

that they're going to start transferring it? It would still be illegal; this does not give them an exemption under the law.

18:00 **Pat Ward:** They may not know how the material was obtained.

**Representative Boschee:** Using that same story, if my father dies and I inherit his car but he had obtained the car illegally, I still have possession of it illegally, correct? (Pat Ward agrees.) How would that be different when it comes to digital information?

**Pat Ward:** There are a lot fewer stolen cars being passed around than movies and music and other things where we worry about copyright infringement.

**Representative Beadle:** If Section 1 of this bill were amended so that it included social networking websites or personal e-mail without cloud storage systems, would the Motion Picture Association of America have opposition?

**Pat Ward:** I would have to get back to you. This is where we would urge caution because it is being looked at by the Uniform Law Commission, and they are very careful about how the vet laws. They are working on this now, and we expect that by June of this year that they will have some kind of model legislation. I have no problem with the concept of a personal representative to take on the account for the purpose of termination. I think there is a lot more to be considered than these three lines.

22:28 **Representative Kasper:** Who is the Uniform Law Commission, how long has it been in existence, and do they do model legislation for all fifty states?

**Pat Ward:** Please talk to Representative Klemin about that. It has been around a long time, and they work on a lot of issues. When I was in law school, North Dakota had adopted more Uniform Laws than any other state. All fifty states use it.

**Chairman Keiser:** We do pay a fee to belong to it, and we pay to send representatives to the meeting.

21:33 **Representative Boschee:** The purpose of the ULC is so that the federal government does not have to create laws, so that the laws are created at the state level versus the federal government interfering..

**Neutral:**

22:20 **Hearing closed**

Motion on a **do not pass:** Motion made by Representative Kasper and seconded by Representative Frantsvog.

22:42 **Representative N. Johnson:** I am going to resist that motion. There is a lot other stuff in here other than the first section that is good and would be appropriate to take a look at.

**Representative Beadle:** I am going to resist that motion as well. If we resist this motion, I would like an amendment on the first section just in case there is any discussion on the floor about it. I'd like to put in there that this does not include services that include cloud storage systems.

**Chairman Keiser:** If the motion is defeated, then we will hold the bill over until you get the amendment.

**Representative Kasper:** I do not have a problem with Section 1 other than the clarification that Mr. Ward indicated. I do have a problem with the rest of the bill. Prohibiting me as an employer from having access to things employees are doing on my time, with my pay when the person could be doing something illegally and I don't know what their activity is and it's supposed to be private, I have a problem with that.

**Chairman Keiser:** I, too, have a lot of frustration with that. I do think that a personal account should be personal; I don't object to that concept unless I am paying them to look at it.

**Representative Becker:** There are options for an employer to block specific websites. I would liken the ability of the employer to delve into the nonpublic aspect of the social media as if there were a repository in the city for people to store their diaries, and my employer wanted to look into my diary. I would hope they would not be allowed to do so. The nonpublic portion of social media is nonpublic. I have had my own problems with my employees. But to allow an employer access to my private life is not the answer. Having good website blockage, good employee manuals, and good oversight is the answer.

**Chairman Keiser:** We think we have pretty good manuals, but I do not want to pay a great deal of money to provide the blocking, to hire experts to make sure I'm blocking all the things. It is simple. If you want to use your private information on my dime, then it is open. I don't have a problem with that.

26:18 **Representative Gruchalla:** Most of the employees I know or work with, they were on the computer during their lunch hour or on their coffee break. If you open it up and say you as the employer get to look at everything, it would be hard to discern what was done during lunch.

**Roll call on motion to do not pass. Motion carries.**

**Yes = 7**  
**No = 6**  
**Absent = 2**

**Carrier: Sukut**

28:16 Recording moves to continued discussion on HB 1460

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1455  
January 30, 2013 am  
Recording Job 17954

Conference Committee

Committee Clerk Signature

## Explanation or reason for introduction of bill/resolution:

Personal representatives relating to internet accounts, workplace privacy of social media accounts

## Minutes:

No attachments

**Chairman Keiser:** Yesterday we heard 1455, and it was a very close vote on the Do Not Pass, and we were missing some people. I think we can get some amendments prepared for that bill that will make it more palatable. Maybe we could give Representative Beadle and others the opportunity to propose amendments so that we can get it into shape where we can get a majority.

**Motion to reconsider:** Motion made by Representative Louser and seconded by Representative Kreun

**Representative Kasper:** I'd like to have some idea about what those working on amendments are considering. That will help me to make an informed vote on whether to reconsider.

**Representative Beadle:** I spoke with Patrick Ward after the hearing and went over some things regarding opposition of the Motion Picture Association of America. Their opposition was primarily on Section 1. I am working on an amendment to exempt online storage devices such as sky drives. It would make it so that they are personal networking or micro-blogging sites, not company sites. Section 2, looking at adding some legislative intent to ensure that if an employer had probable cause that the employee was doing something illegal, malicious, or taking away propriety information, the employer would be able to take course of action at that point. Counsel felt that was already covered on the last page of the bill, subsection 4, starting at line 18. But we might be able to provide some additional language in there.

**Representative Kasper:** The one thing I did not hear about in your amendments is the fact that if an employer suspects that an employee is simply wasting time being on the internet instead of doing his or her job, that the employer has not access to checking whether that is going on. How would you address that?

**Representative Beadle:** This bill does not address that whatsoever. If you have an employee handbook or if it's happening on a company computer or something you have authority on, you would have full right to go in there and look at the history. What this bill says is that you cannot look at the personal, private data that they have on their social networking sites. I would remind that this is a right to work state. If your employee is wasting time, fire him.

**Representative Kasper:** Could you as an employer simply prohibit any employee from using the workplace computer for social networking or similar?

**Representative Beadle:** Absolutely. If you wanted to make it so that they did not even have the temptation to do that, we could hook you up with someone who could block the site on the computer. Nobody has the right or privilege to be able to access a social networking site whenever they want to do so, especially as an hourly employee on the clock. This bill is saying that as an employer, you cannot demand access to their private information or their online journal unless you feel that there is wrongdoing or have been unlawful acts committed through that site. If you feel they are wasting time, you have full recourse of action. You can ban the sites; you can make it so they are no longer employed at the company. That is all separate from the bill.

6:30 **Representative Kasper:** Because we are a right to work state, would this bill make a situation whereby an employee could use this bill as an excuse to file an action against an employer if the employer terminated the employee for cause? Assuming the employer does not violate the law.

7:20 **Representative Beadle:** The intention of this bill is that it would in no way change our current right to work laws. If your employee is wasting time or being unproductive, you can terminate them for whatever reason. This is just saying that the employee does not have to give you information to their private information online.

7:40 **Representative Louser:** Just to confirm. As an employer, I have the ability to verify if the computer was used to access those sites, just not the information on the sites.

**Representative Beadle:** Yes, especially if it is a computer that is fully or partially owned by the employer. I believe that is covered in Section 2, page 3, line 11.

8:45 **Representative Becker:** The process of blocking these social websites is readily being done. Provided examples. The way I read the bill, I do not see this as a hindrance for the employers. You can view the history, and you can fire an employee for wasting time.

9:21 **Representative Gruchalla:** We at the legislature can pay \$10 a month to use the state computer for our own personal use. How would this law play into that? Would there have to be a separate section for that?

**Chairman Keiser:** We will have Representative Beadle ask that question of counsel.

**Representative Beadle:** I can ask that question of counsel, but I think Representative Boschee had a comment.

**Representative Boschee:** I think that would be covered on page 3, line 6. The chapter does not limit an employer's right to adopt workplace policies. In our workplace, we pay our \$10 to access personal use, but with the limitation is that we cannot use it for our campaigns.

**Chairman Keiser:** This is just a request to reconsider, not a debate on the bill.

**Roll call vote on the motion to reconsider HB 1455.**

Yes = 12

No = 0

Absent = 3

**Motion to reconsider prevails, and the bill is back before the committee.**

**Chairman Keiser:** We will reconsider when we have the amendments.

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1455

February 4, 2013

Job 18248, starting 1:01:01

Recording contains committee action on other bills

Conference Committee

Committee Clerk Signature

## Explanation or reason for introduction of bill/resolution:

Personal representatives relating to internet accounts, workplace privacy of social media accounts

## Minutes:

Attachment

Begins at minutes of 1:01:01 of recording.

Chairman Keiser: Reminded committee that the bill received a recommendation of do not pass but was then brought back for reconsideration.

1:02:23 **Representative Beadle:** Provided refresher on HB 1455. Provided overview of amendment 13.0714.01002, attachment 1. Provided overview of two additional potential amendments he would consider for page 2, lines 6 and 25, pertaining to the phrase *username or*.

1:08:48 **Representative Becker:** When we vote on the amendments, can we partition the written one from the ones presented verbally? My feeling on the username and password is that if as an employee I am required to give my username, that sets up a situation where my employer can troll for things I post.

**Representative Beadle:** I agree, which is one of the reasons why that is not included in the original written amendments. That is not something I would prefer to have removed from the wording, but removing *username* may increase some members' comfort level with the bill.

1:10:06 **Representative M. Nelson:** I am wondering why were are going as far as copyrighted material on a particular type of hosting site. Some photographers put their own material on file sharing sites with the intention of selling. They are the copyright holder. Yet this would say that the executor of the estate cannot get ahold of the password to take the material owned by that person off the site. Wouldn't it be better to say that you cannot remove things to which you do not own the rights?

1:10:55 **Representative Beadle:** Personally I agree. The reason why the copyrighted material was put in there is because one of the comments by Mr. Ward made on behalf of MPAA was that the initial person who purchases the copyrighted material might have purchased only a single-user access. My understanding is that if the copyright was being held with the LLC or whatever, the heir of the person doing his or her own photography would probably be able to retain that copyrighted material based on holding that copyright.

1:12:24 **Chairman Keiser:** Page 1, lines 7, 8, and 9, deal with a very special situation. There has to be a decedent to make that section hold. Asked for clarification regarding the type of account to which Representative M. Nelson referred.

1:13:10 **Representative Beadle:** That would be correct. Let's say that an individual has the sole account on there and they do their own transactional work through it. Then that person would be the sole access point on and off that account. If that sole access person passes away, my indication would be that whoever would take over the business would have access to it because the business still lives. But if was a personal account, there might be some issues there.

**Chairman Keiser:** But if it is the estate of the person, they take possession through the courts.

1:14:02 **Representative Ruby:** Was not the concern that there would not be much control over if they would use it and how they would use it. There are copyright laws, but I think they were trying to limit the access to that. This says that they are not supposed to use it but they are still going to have it. I think that would still be there concern.

**Representative Beadle:** This might not address their entire concerns. What they were concerned with was illegal transportation. Illegal activity would be illegal activity.

1:15:29 **Representative Frantsvog:** Wouldn't there be an issue of how many people could watch the movie?

**Representative Beadle:** That is an issue that could come about. It depends on the licensing agreement.

**Chairman Keiser:** Have you run this new language by Pat Ward?

**Representative Beadle:** I have not had the opportunity to do that. I assume that there would still be concerns. When I talked to him about the amendments, he said it was better but that he wasn't sure if it would truly satisfy MPAA.

1:16:50 **Chairman Keiser:** Let's look at page 3, line 20, the addition of subsection 5, the second big amendment and what you think it's really doing.

1:17:08 **Representative Beadle:** What I was trying to do was to give the employer more flexibility. This was counsel's recommendation to water it down in order to preserve our right to work status. They did not think this would be in direct violation to the right to work, but they did say that stating that they cannot fire you for not giving your password would go

against the right to work. They recommended putting this language in so that any ancillary or tangential item not specifically covered in the statute is still grounds for termination, be it an employee wasting paid time.

Representative Beadle made **motion to adopt printed amendments**, 13.0714.01002. Seconded by Representative Boschee.

**Voice vote to adopt amendments. Motion carried.** Printed amendments are now on the bill.

**Chairman Keiser:** Now we have the verbal amendments regarding the username. Does anyone want to move those? We do not have an interest in them.

Representative Beadle moves **do pass as amended**. Representative M. Nelson seconds the motion.

Chairman Keiser: I know that at one point we had a lot of angst on this. Some of the concerns have been addressed with the amendments. We may not like it, but this is not the future but is today. We should be making a policy statement relative to these.

**Roll call vote on do pass as amended. Motion carries.**

**Yes = 14**  
**No = 0**  
**Absent = 1**

**Carrier: Representative Beadle**

VR  
2/5/13

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1455

Page 1, line 9, after "website" insert ". except for any copyrighted material that may be hosted on a file sharing hosting site"

Page 2, line 9, after the underscored semicolon insert "or"

Page 2, line 13, replace ":\_or" with an underscored period

Page 2, remove lines 14 through 16

Page 3, line 17, remove "or"

Page 3, line 20, after "site" insert: ":\_or"

5. Discipline or dismiss an employee for conduct other than conduct protected under this chapter

Renumber accordingly

Date: 1-29-2013

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455

House Industry, Business, and Labor Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider  Consent Calendar

Motion Made By Kasper Seconded By Frantsvog

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman	ab	
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle		✓	Rep. Edmund Gruchalla		✓
Rep. Rick Becker		✓	Rep. Marvin Nelson	ab	
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson		✓			
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby		✓			
Rep. Don Vigasaa	✓				

Total Yes 7 No 6  
Absent 2

Floor Assignment Sukut

If the vote is on an amendment, briefly indicate intent:

Date: 1-30-2013

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455

House Industry, Business, and Labor Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider  Consent Calendar

Motion Made By Louser Seconded By Beadle Kreun

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman	ab	
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee	✓	
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla	✓	
Rep. Rick Becker	✓		Rep. Marvin Nelson	✓	
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby		ab			
Rep. Don Vigesaa		ab			

Total Yes 12 No 0

Absent 3

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2-4-2013

Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455**

**House Industry, Business, and Labor Committee**

Legislative Council Amendment Number 13.0714.01002

Action Taken:     Do Pass     Do Not Pass     Amended     Adopt Amendment  
                          Rerefer to Appropriations     Reconsider     Consent Calendar

Motion Made By Beadle                      Seconded By Boschee

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser			Rep. Bill Amerman		
Vice Chairman Gary Sukut			Rep. Joshua Boschee		
Rep. Thomas Beadle			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Marvin Nelson		
Rep. Robert Frantsvog					
Rep. Nancy Johnson					
Rep. Jim Kasper					
Rep. Curtiss Kreun					
Rep. Scott Louser					
Rep. Dan Ruby					
Rep. Don Vigesaa					

*voice vote*

Total    Yes    No

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2-4-2013

Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0714.01002

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider  Consent Calendar

Motion Made By Beadle Seconded By Bob Felsa

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		ab
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee	✓	
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla	✓	
Rep. Rick Becker	✓		Rep. Marvin Nelson	✓	
Rep. Robert Frantvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes 14 No 0

Absent 1

Floor Assignment Beadle

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1455: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 9, after "website" insert ".except for any copyrighted material that may be hosted on a file sharing hosting site"

Page 2, line 9, after the underscored semicolon insert "or"

Page 2, line 13, replace ";or" with an underscored period

Page 2, remove lines 14 through 16

Page 3, line 17, remove "or"

Page 3, line 20, after "site" insert: ";or"

5. Discipline or dismiss an employee for conduct other than conduct protected under this chapter

Renumber accordingly

**2013 SENATE HUMAN SERVICES**

**HB 1455**

# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Human Services Committee  
Red River Room, State Capitol

HB 1455  
3/13/13  
19834 & 19894

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the authority of personal representatives relating to internet accounts and workplace privacy of social media accounts.

## Minutes:

"attached testimony."

**Chairman J. Lee** opens the hearing on HB 1455

**Chairwoman J Lee** recess the hearing.

Recoding Number 19894

## Chairwoman J. Lee reopens testimony

**Rep. Ben Hanson** from Dist. 16 Fargo and West Fargo. Testifies in favor of HB 1455 See attached **testimony #1 Chairwoman J. Lee**. Asks for clarification on proposed amendments. **Chairwoman J. Lee** asks about problems in North Dakota. There is discussion about memorialized Facebook pages.

**Rep. Thomas Beadle** testifies in support of HB 1455. Explains what the history of HB 1455 in House IBL. Comments on section 1 and section 2 of HB1455. **Chairwoman J. Lee** asks about removing language on page two of HB 1455. There is discussion about what individuals put on the Facebook pages. There is a discussion about employers requesting passwords from your social network accounts. **Senator Anderson** Asks for about section1 and a personal lawyer accessing personal information. **Senator Anderson** asks if you don't like employer asks for your information why you wouldn't find a new employer to work for. There is a discussion on your personal diary and what is put on-line. **Senator Axness** comments about what you can't ask and employee and what is on a Facebook page. **Chairwoman J. Lee** asks about how you control what an individual shares on Facebook. **Senator Anderson** asks about an employer and a "friend's request". **Senator Dever** asks if HB 1455 regulate social media while on the job.

There is a discussion about a Facebook account after an individual has passed.

**Chairwoman J Lee** comments about written testimony provided to the committee. #4, #5, #7

**Connie Hofland** attorney with the law firm of **Zugar, Kirmis & Smith** in Bismarck ND, is in opposition to HB 1455. Represents the Motion Picture Association of America in opposition to Section 1 of HB 1455 See attached **testimony #2 Connie Hofland** reads testimony on behalf from **Gail Hagerty**, is opposed to section 1 of HB 1455. See attached **testimony #3. Senator Anderson** asks about copy right law. **Senator Axness** asks about transfer of accounts. **Senator Dever** asks disposition of social media accounts be determined under current law. **Senator Larsen** asks if HB 1455 will not allow to gather information from an individual's Facebook Page.

**Chairwoman J. Lee** Closes public hearing on HB 1455

# 2013 SENATE STANDING COMMITTEE MINUTES

**Senate Human Services Committee**  
Red River Room, State Capitol

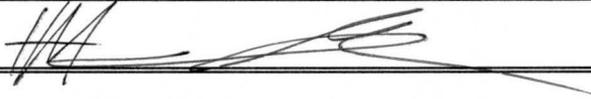
HB 1455

4/3/2013

20812

Conference Committee

Committee Clerk Signature



## **Explanation or reason for introduction of bill/resolution:**

Relating to the authority of personal representatives relating to internet accounts and workplace privacy of social media accounts

## **Minutes:**

You may make reference to "attached testimony."

Vice Chairman Larson opens the discussion on HB 1455

The committee discusses HB 1455

**Senator Axness** discusses section 2 of HB 1455, for a password.

There is a discussion about Facebook and using another person's account.

There is a discussion closed

# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Human Services Committee  
Red River Room, State Capitol

HB 1455  
4/8/2013  
20964

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the authority of personal representatives relating to internet accounts and workplace privacy of social media accounts

## Minutes:

"Attached testimony."

**Chairwoman J. Lee** opens the discussion on HB1455

There is a discussion on Gale Hagerty testimony.

**Connie Hofland** is recognized and discusses about deleting section 1 with the committee.

**Levy Andrest** is recognized and discusses section 1 with the committee, and proposed amendments.

**Senator Anderson** shares his opinion on HB 1455 with the committee.

There is a discussion if the bill failed.

**Senator Axness** discusses section 2 of HB 1455.  
There is a discussion about language in the HB 1455.

There is discussion about the anti-discrimination laws.

**Senator Larsen** shares his opposition to HB 1455, and motions for Do Not Pass.

There is discussion about amending HB 1455

**Senator Larsen** retracts his motion for Do Not Pass.

**Senator Axness** motions to adopt amendment, delete section 1 pg. 1 lines 5 through 10. Delete request from 7 & 11 on pg. 2, and include amendments recommended by Rep. Hanson relating to business purposes **attachment # 4**.

**Levy Andrest** is life of insurance is recognized clarifies proposed amendment.  
**Attachment #4 Senator Dever** asks about employers asking about personal accounts.

**Senator Larsen** Seconds

**The amendment passes 5-0-0**

**Senator Larsen** motions for a **Do Not Pass** as amended.

**Senator Dever** seconds

**Senator Dever** shares his opinion about HB 1455.

**Do Not Pass 4-1-0**

**Senator Larsen** will carry

April 8, 2013

  
4-8-13

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 1, line 1, remove "a new subsection to section 30.1-18-15 and"

Page 1, line 2, remove "to authority of personal representatives"

Page 1, line 3, remove "relating"

Page 1, remove lines 5 through 10

Page 2, line 4, after "mail" insert "or any account created, maintained, used, or accessed by an employee or applicant for business-related communications or for a business purpose of the employer"

Page 2, line 7, remove "or request"

Page 3, line 17, remove the second "or"

Page 3, line 19, replace the underscored period with "; or

6. Implement and enforce a policy pertaining to the use of an employer-issued electronic communications device or to the use of an employee-owned device that will be used for business purposes.

Page 3, after line 24, insert:

**"Construction.**

This Act may not be construed to prevent an employer from complying with the requirements of state or federal statutes, rules, or regulations; case law; or rules of self-regulatory organizations.

Renumber accordingly

Date: 4-8-13  
Roll Call Vote #: \_\_\_\_\_

2013 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455

Senate Human Services Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen Axness Seconded By Sen Larsen

Senators	Yes	No	Senator	Yes	No
Chairman Judy Lee	✓		Senator Tyler Axness	✓	
Vice Chairman Oley Larsen	✓				
Senator Dick Dever	✓				
Senator Howard Anderson, Jr.	✓				

Total (Yes) 5 No 0

Absent \_\_\_\_\_

Floor Assignment /

If the vote is on an amendment, briefly indicate intent:

Delete sections 1 (5-16)  
Delete "or Request"  
include Amendment relating to business purposes

Date: 4-8-13  
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1455

Senate Human Services Committee

Check here for Conference Committee

Legislative Council Amendment Number 13.0714.02003 Title .03000

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen Larsen Seconded By Sen Anderson

Senators	Yes	No	Senator	Yes	No
Chairman Judy Lee	✓		Senator Tyler Axness		✓
Vice Chairman Oley Larsen	✓				
Senator Dick Dever	✓				
Senator Howard Anderson, Jr.	✓				

Total (Yes) 4 No 1

Absent \_\_\_\_\_

Floor Assignment Sen - Larsen

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1455, as engrossed: Human Services Committee (Sen. J. Lee, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (4 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "a new subsection to section 30.1-18-15 and"

Page 1, line 2, remove "to authority of personal representatives"

Page 1, line 3, remove "relating"

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Renumber accordingly

**2013 TESTIMONY**

**HB 1455**

① HB 1455  
1-29-2013

## House Committee on Industry, Business and Labor

January 29, 2013 testimony in regards to HB 1455 concerns possession and use of personal social network accounts.

Mr. Chairman, fellow committee members. For the record my name is Ben Hanson and I am a representative from District 16 in Fargo and West Fargo. I stand before you today to urge a Do Pass recommendation on HB 1455 from your committee.

First, some definitions: The most popular social networking website currently in existence is Facebook. This bill encompasses all social networking websites in which one, by submitting an email address and obtaining a password, is able to tweak a set format with pictures and text within a website to meet other website members and/or promote themselves or their business. More networks will inevitably be created within the immediate future and many will die out. This bill would continue to apply to any that are created subsequent to its potential passing.

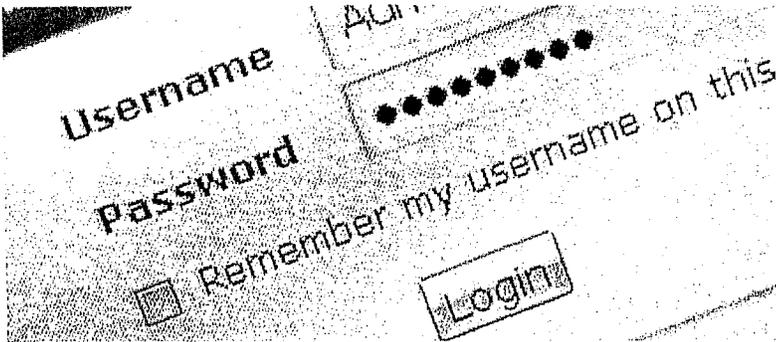
Section one of the bill would add language to current Century Code to simply ensure that when one is deceased one's personal accounts on any social network be given over, i.e. password and login information, to one's inheritor's, whomever they may be.

Section two will prohibit employers or potential employers from requesting social networking information, passwords, login or even screen names. It also prohibits employers from requesting one logs into said networks to show employers their information or even their screen page.

I suspect the first section will generate less conversation than Section 2 and would like to anticipate a few questions: "Has this happened in North Dakota that we need to do this?" Not that has been reported. This is more a tactic of Fortune 500-calibar companies to ensure, in their minds, what needs to be the company image. With technology expanding and social networks adding subscribers so quickly, should a North Dakota-based company or larges company with branches in North Dakota (Microsoft and Amazon come to mind) combined with a state legislature that meets every other year the time is now to make sure basic, common sense privacy laws are enacted to avoid any entanglements in the future.

HB 1455  
1-29-2013

# Online Invasion



If an employer asks for your Facebook password, is it the same as if they'd asked to read your diary or open your mail? Some lawmakers think so, and are sponsoring bills to make such inquiries illegal.

"If 50 years ago, as part of the interview process, an employer said they needed to look through your mail or put a bug on your phone before they would hire you, it simply would not have been tolerated," says Michigan Representative Paul Opsommer (R). He's supporting a bill to prevent employers from requesting passwords to personal Internet accounts—including email, banking and social networking sites—in order to get or keep a job. Students also would not have to grant access to their social networking accounts in university applications. Opsommer believes the bill reflects a "very traditional and conservative stance to push back against the efforts of those looking to turn peoples' lives into their own personal fish bowl just because the law has not kept pace with the digital age."

Delaware, Illinois and Maryland were the first states to address this privacy concern. Delaware now prohibits public and private higher education institutions from asking students and student applicants for passwords or other account information.

Maryland and Illinois passed bans on employers requesting passwords and account information. Maryland's law prevents employers from taking disciplinary action against employees or from not hiring applicants who refuse to disclose personal online information. Employers, however, are allowed to investigate employees who use a personal account for business purposes, to ensure they comply with legal and regulatory requirements. Illinois' new law recognizes the right of employers to obtain information in the public domain about employees or applicants. It also allows employers to monitor employees' email or electronic equipment owned by the employer, and to set workplace policies on the use of social networking sites.

Representative Jim Durkin (R) voted against the law in Illinois in part because it lacked exceptions for protecting proprietary information or trade secrets and may expose employers to legal liabilities. Calling it "a solution in search of a problem," he says the issue arose after an Associated Press article described a few incidents of improper invasion of privacy. He believes the law does not appropriately balance the rights of employers with the rights of employees.

California, Massachusetts, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina and Washington introduced legislation in 2012. The California Legislature passed two laws that prohibit requesting passwords from employees and students.

The Ohio bill would prohibit employers from asking for social media passwords, but its sponsor, Senator Carleta Tavares (D), says it's not meant to thwart employers' efforts to search the public profiles of potential employees. But, she says, "requesting access to that individual's personal profile reaches far beyond that scope."

—Pam Greenberg

## A PEA for Proof

Call it a post-election review, evaluation, inspection, analysis or audit—the label doesn't matter. But election results do. No surprise, then, that officials, candidates and citizens want to make sure voting equipment and procedures are working reliably.

Recounting every ballot is one way to check, but that's expensive and unnecessary in all but the closest of races. Instead, 25 states and the District of Columbia use "post-election audits (PEAs)." During a typical PEA, election officials examine ballots from randomly selected precincts or machines, retally the results by hand, and compare that result to what was reported on election night. Every so often, the process turns up a programming error or equipment malfunction.

State-by-state details on post-election audits vary considerably. In Michigan, which enacted its first audit requirement this year, the word "audit" refers to a procedural check: Did each polling place operate according to law? "The sanctity of the ballot is vitally important," says Representative Anthony Forlini (R), the bill's sponsor. "If there's any degree of uncertainty, people are going to say, 'Why are we voting?' This way, we know that everyone's got a fair shot."

Other states, such as California and Colorado, are piloting new "risk-limiting audits," using statistical techniques that provide greater certainty that the results are correct but require far fewer ballots to be counted.

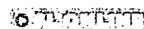
Concerns about post-election audits may include:

- ◆ **Money.** The cost of paying employees to re-count ballots can be substantial. On the other hand, if audits help avoid costly recounts, PEAs could be moneysavers.
- ◆ **Confusion.** Post-election audits, and especially the newer "risk-limiting audits," can be hard to understand. Yet, they "can still be done on a hand-held calculator," argues Joseph Lorenzo Hall with the Center for Democracy & Technology.

New Jersey, which uses electronic voting equipment, does not use post-election audits because "we have complete confidence in our voting machines," says Robert Giles, director of the state's Division of Elections. "They are tested, we have continuous training with our counties, and we have clear chain-of-custody and seal-use protocols for the equipment."

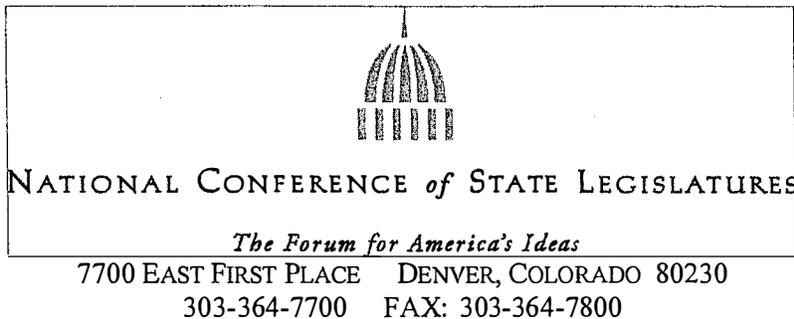
Hall is not as confident. "Post-election audits, and especially risk-limiting audits, are the single most important development in election technology in recent years," he argues. In other words, he'd like to see all states "give PEAs a chance."

—Wendy Underhill



To find out more about post-election audits and voting technology in general, go to [www.ncsl.org/magazine](http://www.ncsl.org/magazine).

③ HB 1455  
1-29-2013



**State Laws and Legislation Providing for Access to Decedents' Email and Social Networking Sites**  
*As of January 17, 2013*

**OVERVIEW**

Five states—Connecticut, Idaho, Indiana, Oklahoma and Rhode Island—have enacted laws granting an executor or personal representative the authority to access email accounts or social networking accounts, microblogging and short message service websites upon a person's incapacity or death.

Laws passed several years ago in Connecticut and Rhode Island require service providers to provide access to or copies of the contents of emails to the executor or personal representative of a deceased person's estate.

Idaho, Indiana and Oklahoma laws are similar to those in Connecticut and Rhode Island, but also allow for access to social networking, microblogging and short message service websites, in addition to email accounts. The Indiana and Rhode Island laws, however, require the executor to provide a death certificate and documentation of the executor's appointment. Rhode Island provides for indemnification of the email service provider from liability (for violating the terms of a service agreement, for example) when complying with the order.

The Idaho law also allows for provisions in a will or a formal order that may still restrict a personal representatives' access to those services or sites, since some individuals may not want others to have access to their online information after they die.

**TEXT OF STATUTES**

**Connecticut**

**Sec. 45a-334a. Access to decedent's electronic mail account.** (a) For the purposes of this section:

(1) "Electronic mail service provider" means any person who (A) is an intermediary in sending or receiving electronic mail, and (B) provides to end-users of electronic mail services the ability to send or receive electronic mail; and

(2) "Electronic mail account" means: (A) All electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and (B) any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.

(b) An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the

contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.

(c) Nothing in this section shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law.

## **Idaho**

### **Idaho Code 15-3-715** *(excerpt)*

15-3-715. Transactions authorized for personal representatives -- Exceptions. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-3-902 of this code, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

...

(28) Take control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website.

## **Indiana**

### **Indiana Code 29-1-13-1.1**

#### **Electronically stored documents of deceased**

Sec. 1.1. (a) As used in this section, "custodian" means any person who electronically stores the documents or information of another person.

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:

(1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or

(2) an order of a court having probate jurisdiction of the deceased person's estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

(d) Nothing in this section shall be construed to require a custodian to disclose any information:

(1) in violation of any applicable federal law; or

(2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.

*As added by P.L. 12-2007, SEC. 1.*

## **Oklahoma**

### **58 Okl. St. § 269**

#### **§ 269. Executor of administrator—Powers.**

The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.

HISTORY: Laws 2010, ch. 181 (HB 2800), § 1, eff. Nov. 1, 2010.

## **Rhode Island**

**§ 33-27-1 Short title.** – This chapter shall be known and may be cited as the "Access to Decedents' Electronic Mail Accounts Act".

**§ 33-27-2 Definitions.** – As used in this chapter:

(1) "Electronic mail service provider" means any person who:

- (i) Is an intermediary in sending or receiving electronic mail; and
- (ii) Provides to end-users of electronic mail services the ability to send or receive electronic mail.

(2) "Electronic mail account" means:

(i) All electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and

(ii) Any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.

**§ 33-27-3 Access to decedents' electronic mail.** – An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of:

(1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor and administrator; and

(2) An order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2701, on behalf of his/her estate, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.

**§ 33-27-4 Violation of federal law.** – Nothing in this chapter shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law.

**§ 33-27-5 Severability.** – If any provision of this chapter or the application of it to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the chapter, which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

History of Section.

(P.L. 2007, ch. 172, § 1; P.L. 2007, ch. 256, § 1.)

X 4

HB 1458 1-29-2013

### Five-Star Flags

The North American Vexillological Association polled their members and ranked American city flags, based on design. The winner? Washington, D.C. The Top 10 state capital winners, with their scores on a 10-point scale, are:



1. Denver, 8.86



2. Phoenix, 8.65



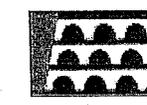
3. Indianapolis, 8.35



4. Madison, 7.92



5. Jackson, 7.83



6. Des Moines, 7.77



7. Richmond, 7.76



8. Annapolis, 5.39



9. Albany, 5.20



10. Sacramento, 4.97

# Life After Death Online

**B**efore the days of social media, when people died, funerals or wakes were the only way for family and friends to remember them. Now, however, we have digital memories of loved ones through their email and social networking accounts, but often have little say over what happens to those accounts when owners die.

Terms of service agreements and privacy policies govern who can use social media and email accounts, and most expire when a user dies. Gmail and Yahoo! email accounts, for example, are closed after a period of inactivity. If the terms of service are violated—even by a family member with the password—the account may be shut down. That's what happened recently to one mother two hours after she requested access to her

son's Facebook page after his death, according to news accounts. Yet, closing people's accounts after they die protects them from being hacked, spammed or abused.

Family members can close a Yahoo! email account by providing a death certificate, but if someone wants access to the account, it requires a court order. Google may provide access to a deceased person's Gmail account, if specific documentation, including a death certificate, is provided. Otherwise, the account will be deleted nine months after the last login.

Facebook allows family members to remove a loved one's account or memorialize it, which changes the privacy setting so only confirmed friends are allowed access to view past comments, post memories or leave condolences. Twitter allows family members to deactivate the account with documenta-

tion, but no one is allowed to login, regardless of his or her relationship to the deceased.

The Uniform Law Commission created a study committee early this year to address the growing concerns about digital assets and to make recommendations concerning the rights of a fiduciary to obtain digital information when a person is incapacitated or dies.

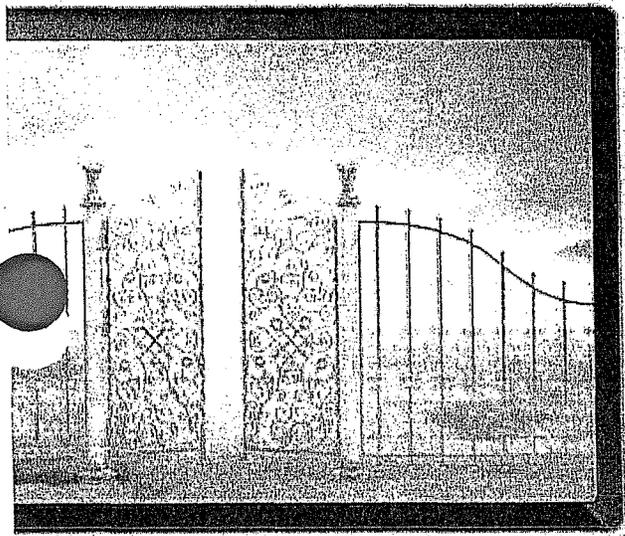
Legislators in Connecticut, Idaho, Indiana, Oklahoma and Rhode Island passed laws several years ago addressing some of these concerns. The Connecticut and Rhode Island laws address only email accounts. Idaho, Indiana and Oklahoma laws also address micro-blogging, short message services and social networking accounts.

Idaho gives a personal representative or executor the right to take control of a deceased person's accounts. Connecticut, Indiana and Rhode Island require a death certificate and documentation of the executor's appointment before the estate's representative can see the deceased person's emails or social networking accounts.

Oklahoma allows provisions in a will or a formal order to govern access. In Idaho, a will or court order can restrict access to accounts. Bills pending in Nebraska and New York are similar to Idaho's law.

Social media sites, emails and digital records are replacing the photo albums, letters and papers of the past and should be considered in estate planning. The Library of Congress, among others, provides tips on how to preserve digital memories. State laws can clarify how digital assets are treated.

—Pam Greenberg



TESTIMONY IN OPPOSITION TO HB 1455

5 HB  
1455  
1-29-2013

Good afternoon Chairman Keiser and members of the House Industry Business & Labor Committee. My name is Pat Ward. I am an attorney with the law firm of Zuger Kirmis & Smith here in Bismarck. We represent the Motion Picture Association of America in opposition to HB 1455.

The Motion Picture Association of America opposes Section 1 of HB1455 that gives unfettered control of a deceased person's digital accounts to a personal representative.

This part of the bill authorizes the personal representative to take control without regard to the terms of service, licensing agreements, contractual obligations or other legal requirements. In the case of motion pictures and television programs, and similar entertainment content, that may be stored in a digital cloud service or cyber-locker, those digital assets are also subject to federal copyright law. This bill is likely preempted by federal copyright law, which gives the copyright owner the exclusive right to set the terms and conditions for the distribution and dissemination of the work, 17 U.S.C. section 106. And, copying and redistributing by a fiduciary or executor of motion pictures stored in a digital account would violate federal copyright law.

A personal representative should be required to be bound by the law, as well as terms of service, licensing and contractual obligations that the deceased person would have been required to follow during his or her lifetime. Those legal and contractual obligations would address the ability to share, copy and distribute the files, as well as the limitations on sharing, copying and distributing.

Also, the digital files of a deceased person may have been obtained illegally, as a result of copyright infringement by unauthorized file sharing services or other means. For example, the estimated loss to copyright holders caused by Megaupload (which was indicted in 2012) is \$500,000,000. State law should not exacerbate the copyright infringement problem by authorizing executors or fiduciaries to copy and distribute files consisting of infringing copies of movies and television programs.

In addition, the Uniform Law Commission is undertaking a review of this issue and will have a recommendation on a Model State Law for the Uniform Probate Code. The legislature should defer consideration of this legislation until such time as the Uniform Law Commission issues its recommended uniform law.

For these reasons, the Motion Pictures Association of America urges a DO NOT PASS vote on HB1455 or amendment of the bill to eliminate Section 1.

① 2-4-2013  
HB 1455

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1455

Page 1, line 9, after "website" insert ", except for any copyrighted material that may be hosted on a file sharing hosting site"

Page 2, line 9, after the underscored semicolon insert "or"

Page 2, line 13, replace "; or" with an underscored period

Page 2, remove lines 14 through 16

Page 3, line 17, remove "or"

Page 3, line 20, after "site" insert: "; or

5. Discipline or dismiss an employee for conduct other than conduct protected under this chapter"

Renumber accordingly

## House Committee on Industry, Business and Labor

March 13<sup>th</sup>, 2013 testimony in regards to HB 1455 concerns possession and use of personal social network accounts.

Madam Chair, fellow committee members, For the record my name is Ben Hanson and I am a representative from District 16 in Fargo and West Fargo. I stand before you today to testify in favor HB 1455.

First, some definitions: The most popular social networking website currently in existence is Facebook. This bill encompasses all social networking websites in which one, by submitting an email address and obtaining a password, is able to tweak a set format with pictures and text within a website to meet other website members and/or promote themselves or their business. More networks will inevitably be created within the immediate future and many will die out. This bill would continue to apply to any that that are created subsequent to its potential passing.

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PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 1, line 7, replace "Take" with "In accordance with terms of use that were applicable to the  
decedent, take"

*Terms of use*

Page 1, line 8, replace the first underscored comma with "or on any"

Page 1, line 8, remove "or e-mail"

Page 1, line 9, remove "service website."

Renumber accordingly

P

By Brian J. Cohan

February 17, 2013

# Wills, Trusts & Estates Prof Blog

A Member of the Law Professor Blogs Network

## Social Media After Death

As I have previously discussed, there is a growing concern for managing social media assets after death. According to Mashable, if the deceased had a Facebook page his account profile can take one of four routes. One route is leaving the profile unaccessed and unreported letting the typical account activity continue. However, if the family discloses the death to Facebook, Facebook will change the deceased timeline to a 'memorial page.' Family members can also petition Facebook to deactivate the deceased's account. Last, access to a profile may be gained through either knowledge of the deceased's password or through a court order. Courts do not typically grant access to the profile accounts due to Facebook's privacy policy.

For some Facebook has become a way to mourn their loved ones death. Nonetheless, others feel because their loved one is gone there is no reason to keep their profile up. Some grief therapists believe that leaving the social media page up can help ease some of the pain of losing a loved one. Other families seek clues or closure after the death of a loved one and ask for access to her Facebook page. Facebook's policies and various state laws make the transfer of access to the profile after death unlikely.

Some Facebook users are planning what will happen to their online information postmortem. Different agencies such as Entrust.net and My Wonderful Life, can help people plan for what will happen to their digital assets after death. In fact, Facebook recently added an application allowing users to record a last wish then choose a 'trustee' to publish it when the person passes.

# How 1 Billion People Are Coping With Death and Facebook

By [Stephanie Buck](#)

February 13, 2013

From Mashable.com



"I think I'm going to go online," said Cheryl, logging in to Facebook from her hospital bed.

She soon reconsidered, however. "I don't know what to write: 'Hey I almost died last night. What's up with you guys?'"

Months later, Cheryl died from Hodgkin's lymphoma. Her partner Kelli Dunham still cherishes funny memories like this one. "She was kind of a smart ass," Dunham tells *Mashable*.

The two represent a phenomenon occurring the world over: [Facebook](#) after death. Couples, families, colleagues and friends are not only coping with losing loved ones, but also interacting with the Facebook profiles they leave behind.

The situation surfaces a multitude of questions and concerns. What happens to a Facebook profile after death? How do people interact with a dead user? Should loved ones be able to access a dead user's profile at all? What is acceptable online grieving etiquette? And finally, what has grief become in the age of social media?

As of 2012, 30 million people who maintained Facebook accounts have died, according to a report by *The Huffington Post*. Some studies approximate that nearly 3 million users have died in 2012 alone; 580,000 in the U.S.

### What Happens After We Die?

So what happens to all those suddenly abandoned profiles? Their fate could go one of four ways:

- The profile remains untouched, unaccessed, unreported and therefore open to everyday wall posts, photo tags, status mentions and Facebook ads. In other words, business as usual.
- A family member or close friend may choose to report a death to Facebook. Upon receipt of proof of death, such as a death certificate or local obituary, Facebook will switch the dead user's timeline to a "memorial page."
- A close family member may petition Facebook to deactivate a dead user's account.
- Users may gain access to a dead user's profile in one of two ways: either through knowledge of the dead user's password, a practice against Facebook's terms of service, or through a court subpoena. However, per Facebook's privacy policy and strict state law, courts rarely grant outside access to said social data. More on that later.

Facebook's official policy for handling user deaths is the memorial page. In 2009, the social network began switching dead users' profiles to memorial statuses, should the deceased user's friends or family request the change.

Those friends may interact with the memorial page similarly as they would an active profile. They can post condolences and share memories on his or her timeline; they can view pictures and interact with past posts.

However, Facebook removes a host of other capabilities from memorialized pages. For instance, the profile is no longer accessible via public search, available only to existing Facebook friends. The page will not appear within Facebook "Suggestions." In other words, the algorithm won't suggest that you "reconnect with" a dead user whose page has been memorialized. Users won't be able to tag a memorialized Facebook user in future posts or photos, or message that person at all. All automated app activity (e.g., Daily Horoscope) associated with a memorialized Facebook page ceases. Finally, Facebook reserves the right to delete status updates of a sensitive nature. For instance, if a user who committed suicide posted a photo of a gun to his head, Facebook would likely deem the content inappropriate and remove.

"Memorialization allows friends and family to post remembrances and honor a deceased user's memory, while protecting the account and respecting the privacy of the deceased," Facebook spokesman Andrew Noyes tells *Mashable*. "Also, we do honor requests from close family members to deactivate the account, which removes the profile and associated information from the site."

## Interfacing With the Dead



*Image via [iStockphoto](#), [itsxtian](#)*

But most users don't raise a Facebook flag at all, choosing instead to peruse and interact with a person's regular Facebook presence even after his or her demise. And they have all kinds of reasons to keep it that way.

Scott Millin lost his 45-year-old sister Nanci to breast cancer in December 2011. As her caregiver and estate trustee, Millin made practical arrangements before, during and after her death.

"My job was now to dismantle and disperse what was remaining from Nanci's life," says Millin. "Canceling her phone service, credit cards, trash service and email account were logical conclusions and decisions... The one thing I struggled what to do with [was] her Facebook page."

He not only saw Nanci's timeline as a testament to her accomplishments and memories, but as a curated tome of experiences she had chosen to share from her otherwise private life.

"I think Nanci's Facebook page is a virtual cemetery of sorts for me, as well as for her friends and family," he says. "Only we don't have to navigate winding roads and marble headstones to get there. Instead, we just click from any device and see her, remember her, leave messages, and smile or cry at what was and what has become."

For many, Facebook has become a highly accessible (even mobile) vehicle for grieving and, ultimately, catharsis.

For many, Facebook has become a highly accessible (even mobile) vehicle for grieving and, ultimately, catharsis.

Kristen Brown met well-respected musician Damien "Khamelien" Rahim through mutual friend Chris Kirkpatrick. Over the years, Brown and Rahim became close; the latter even wrote and produced the theme song for her nine-year-old son's YouTube storyboard (below).

In September 2012, however, Rahim was robbed and murdered in an Orlando, Fla. parking lot. Since his Facebook was not memorialized, Rahim's friends still received notifications from his Facebook events many days after his death.

After two months had passed, Brown showed a friend the storyboard, bursting into tears upon hearing Rahim's voice. She had to leave the room to compose herself. "That night I messaged Damien's still active profile on Facebook," she says. "It gave me comfort to be able to say what I needed to, even though he would never know."

"Facebook very much helped in my time of grieving by making it so easy to connect with Damien's family and other friends," says Brown. "We bonded and shared our grief... It helped my kids grieve, as well."

For others, reminders on social media of a loved one's death can be more painful than helpful. If a dead user's timeline sits un-memorialized, that profile can appear in Facebook Suggestions, such as the "People You May Know" sidebar on the homepage. Their birthdays reappear year after year in the news feed sidebar, prompting well-wishes from individuals unaware of the death. Many profiles continue to surface in Sponsored Stories, which promote users' activity and likes from months and years past (e.g., "Kevin likes Wal-Mart").

On the birthday following Cheryl's death, Dunham noticed a flood of wishes on her partner's timeline. But rather than scrolling through a stream of condolences, Dunham encountered what she initially interpreted as insensitivity.

"[People] wrote birthday wishes that made it clear that they had no idea she was dead. Stupid stuff like 'Have a good time on your birthday, Cheryl. You only live once.' *Really*," she says. "I started responding to all these posts with just, 'She's dead,' but since Cheryl had over a thousand Facebook friends, this was not really a very good use of time. I also probably hurt some people's feelings."

### **Learning to Grieve on Social Media**

Whether publicly or via intimate messages, people's Facebook interactions with the dead mimic the grieving rituals we've held throughout time.

In Mexico, families honor their departed ancestors by leaving marigolds, baked goods and favorite possessions of the dead on altars. Similar to this *Día de los Muertos*, Facebook users share cherished memories and stories, post favorite photos, inside jokes and "gifts" on their late loved ones' Facebook timelines.

"People have built cemeteries and monuments in remembrance for as long as we've existed. Now those memories are digital," says Margaret Carpo.

"People have built cemeteries and monuments in remembrance for as long as we've existed. Now those memories are digital," says Margaret Carpo. Her friend died in a car accident in the Philippines in 2009, but her family continues to keep her Facebook Timeline active.

Western society especially presumes that individuals can overcome grief by emotionally detaching themselves from the deceased, says cyberanthropology expert Michaelanne Dye. "However, in the past 20 years, researchers have begun to explore the healthy benefits of maintaining a tie to the deceased... Considering this, Facebook appears to be a natural way for people to work through grief over the loss of a loved one."

Dye also points to an evolving practice of identity construction, which makes dealing with grief in the Facebook era all that more nuanced. Today, identities are co-constructed through social media interactions. "Therefore, the deceased's online identity not only continues in the virtual space; it can also evolve and adapt as others continue to interact with the dead person's profile," says Dye.

Some of those interactions, however, infuriated Dunham as she returned to interact with her dead partner's Facebook profile. She diagnosed some of Cheryl's Facebook friends with what she calls "social necrophilia," the eager scramble to prove one maintained a close connection with the deceased.

"Everyone always wants to pretend they knew the dead person better than they do," says Dunham. "For example, one person wrote, 'You're drinking champagne in heaven with my grandfather right now.' This was ludicrous: Cheryl was a staunch atheist *and* she had 10 years sober, which was something she wrote about a lot."



*Image courtesy of Flickr, CaptPiper*

Andrew Ross lost his wife Debra to cancer two years and eight months ago. He feels that Debra's Facebook friends seem detached from sincere grief.

"Most Facebook friends are pretty shallow," he says. "There is not the depth of true emotions such as one would get in a real relationship. A lot of people respond in an overly emotional manner that seems to play on showing others how deeply they feel, whether it is true or not. It mostly strikes me as false and unpleasant. I got no comfort from the experience."

Ross has mixed feelings about maintaining Debra's Facebook profile and permanently deleting her presence there altogether. "At some point I feel her page should be deleted permanently. She is gone and it should be too," he says.

Social media etiquette surrounding death is a delicate and highly subjective construct. What one person views as good judgment could translate as incredibly poor taste or downright offensive to others.

Social media etiquette surrounding death is a delicate and highly subjective construct. What one person views as good judgment could translate as incredibly poor taste or downright offensive to others.

Julie Spira authored *The Rules of Netiquette: How to Mind Your Digital Manners*, wherein she talks about how to approach the "social media obituary." In an email interview with *Mashable*, she praises people who honor the dead by celebrating that person's memories and accomplishments on Facebook. However, she has also encountered instances she believes exemplify shockingly poor taste: "When a woman posted a photo of her newly deceased husband just prior to the ambulance arriving to take him to the morgue. It was grotesque and made many people uncomfortable."

By this point, many people have learned that their friends and family have very different ideas of what constitutes "normal" grieving — especially when someone takes his or her grief public on social networks.

For many, grieving through social media is more comfortable than real-life interactions, which is why some people encounter what they translate as odd or callous behavior from fellow users. Dye adds, "Facebook provides a way for people to grieve publicly and receive feedback and support from others, while not forcing them to endure these painful interactions face-to-face, which, for some, might be an easier and healthier way for them to work through their grief.

"In the physical world, methods of mourning vary across cultures, as well as among individuals within the same culture. This also holds true in the online world."

"In the physical world, methods of mourning vary across cultures, as well as among individuals within the same culture. This also holds true in the online world."

Grief therapist Lisa Leonard adds that grief varies wildly for each individual, and that it usually doesn't progress orderly, like steps in a staircase. That being said, she can clearly identify the stages of grief (denial, anger, bargaining, depression and acceptance) in her friends' Facebook behavior.

But Leonard believes that social media can actually ease the process for some. "Being able to access the lost one's profile after death is beneficial," she says. "It allows a connection to others who loved him or

her, a source of memories and humor to share and an opportunity to say 'goodbye' or 'I'm missing you' in a way that can soften the blow and move the healing along."

### The Law's the Limit

But what if the bereaved feel entitled to a deeper closure, specifically, by seeking answers from or access to a dead family member's Facebook profile? The short answer: Their chances aren't good.

Families like the Stassens have entered legal battles with major companies like Facebook and Google in an attempt to gain access to the digital assets of dead loved ones. As heirs of their son's estate, the parents of Benjamin Stassen feel they have a right to access his Facebook account, to search for clues as to why their son suddenly chose to commit suicide.

In the U.S., property rights vary wildly across the country's 50 states and territories, and are largely dependent on a person's location of residency. These laws cover the scope of many types of property: real property (e.g., real estate and housing), personal property (e.g. automobiles, tools, clothing) and intangible property — in other words, "things that have value and can be transferred from one person to another, but has no physical substance, like IP rights," says David Ervin, intellectual property attorney and partner at the law firm Kelley Drye.

To complicate matters further, state-determined property rights can quickly enter a gray area when a resident has entered into a contract with another person or company. In this case, Facebook's terms of service can impact an individual's legal right to transfer web property, even after death.

Facebook defines user property in two ways: account access and content posted from one's account.

"Users own the content they post on Facebook, and users cannot assign their Facebook account without Facebook's approval," says Ervin, referencing Facebook's TOS (addressed sections below). "Basically, Facebook owns their **service** and determines who gets to establish accounts and have access to the service, while users are allowed to control and own the **content** and information they post."

#### Section 4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

...

9. You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.

What, if any, of this access and content is permissible to outside individuals after the original user's death?

Facebook maintains the right to transfer account ownership; it's plausible this could apply to a dead user's account. But the TOS is silent on this issue, says Ervin, instead substituting access to such accounts with options like memorialization or deactivation, reserved for next of kin.

"Memorialization exists primarily to support Facebook's authenticity policies," says Facebook spokesman Noyes. "Profiles are restricted to real, live human beings and the profiles are memorialized when someone dies because continued operation of the account would be inauthentic."

## Section 2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

If access falls under scrupulous Facebook privacy restrictions, what about content, which is highly personal and oftentimes of a creative nature?

It's difficult to subsume all the different types of user-submitted content on Facebook. The range of what users post is highly subjective, and oftentimes, wasn't even ours in the first place — remember that web comic from your favorite blog you posted last week?

This is where copyright factors in, hugely. Only protectable, tangible property can be considered a part of a user's estate and, therefore, accessible by his or her descendants, says Ervin.

"Not everything that someone posts to their Facebook account is protectable," he adds. "Copyright law protects original expressions that are fixed in a tangible medium. This covers things like photographs, music, art, written articles and drawings. Short comments or status updates on Facebook would not likely meet the requirements of copyright protection and would, therefore, not likely be subject to protection as intangible property."

The combination of unprotected content, account and access ownership, and inconsistent state's rights makes the transfer of Facebook property after death a near-unapproachable beast.

"I'm not convinced that social media networking service accounts (and the access rights that are granted to the accounts under a written contract) are intangible property, or that the service provider's terms of service can be undone by state property law alone," says Ervin.

That's why organizations like the Uniform Law Commission, comprised of licensed lawyers, draft legislation like the Fiduciary Access to Digital Assets Act, with the hopes of determining whether such

digital assets should fall into the hands of executors, given privacy concerns and the potential access to sensitive data and information.

It's a complicated question on many people's minds — not just lawyers'.

### Planning Our Digital Legacies



*Image courtesy of Flickr, [Schristia](#)*

As social media after death continues to become more commonplace, people are beginning to plan for their own demises in an effort to protect and preserve the online information they've cultivated for years.

In an emerging industry called digital legacy management, agencies like [Entrust.net](#) and [My Wonderful Life](#) help social media users make death arrangements. The latter lets users create "books" that log funeral preferences and major decisions before they die. Users can draft emails that will be delivered to designated recipients after death, create digital epitaphs for their real-life headstones and elect "Angels," or loved ones they trust to carry out their wishes.

Similarly, with a Facebook app called [if i die](#), a user records a video message or last wish, then chooses Facebook friend "trustees" to publish the declaration post-mortem. The company suggests posting a "bid farewell, a favorite joke, a long-kept secret," or, essentially, a massive "fuck you."

Others are more concerned with improving the tools on Facebook.com itself.

Spira has petitioned for Facebook to add a "deceased" relationship status option that friends and family members could control. She believes it would help alert visitors to a dead user's profile: "If a family's loved one can list that as their relationship status, perhaps it would prevent people from receiving an email saying it's their friend's birthday and rushing over to write 'Happy Birthday' on their timeline, or having their page filled with requests to play *FarmVille*."

Dunham imagines a similar relationship status option. "I wish Facebook would offer the option of 'widowed from \_\_\_\_\_,' because I would really have liked to have kept the connection [to Cheryl], but it was too painful for me when people assumed she was alive."

Dunham says it has been easier to cope with losing Cheryl since nearly two years have passed since her death. She doesn't encounter as many Facebook prompts, suggesting she invite Cheryl to an event or include her in a group. Activity on her page has dwindled, and Dunham hopes people will remember not to post ignorant "Happy Birthday" messages on Cheryl's wall this year.

Overall, she's grateful for her continued access to Cheryl's presence, even if it's mainly digital these days.

"I've definitely spent some evenings looking at our comments back and forth in my Facebook friendship with Cheryl," she says. "I had completely forgotten that Cheryl had posted, 'I wanted cake for dinner, I got cake for dinner, I have the best girlfriend ever' on her wall, but when I re-read that it reminded me of that evening and what a treasure it was."

*Homepage, Mashable composite. Image via [iStockphoto](#), [AlexSava](#)*

**TESTIMONY IN OPPOSITION TO HB 1455**

Good afternoon Chair Lee and members of the Senate Human Services Committee. My name is Connie Hofland. I am an attorney with the law firm of Zuger Kirmis & Smith here in Bismarck. We represent the Motion Picture Association of America in opposition to Section 1 of HB 1455.

The Motion Picture Association of America, Inc. opposes pending legislation to give unfettered control of a deceased person's digital accounts to a personal representative or other fiduciary. Members of the MPAA are the leading producers and distributors of motion pictures and television programs.\*

The legislation, at Section 1, authorizes the personal representative to take control of any account on a social networking website, and similar site, except for any copyrighted material, without regard to the terms of service, licensing agreements, contractual obligations or other legal requirements.

As drafted, Section 1 is likely preempted by the exclusive authority of Congress to legislate on copyright matters, 17. U.S.C. section 106. Federal law gives the copyright owner the exclusive right to set the terms and conditions for the distribution and dissemination of the work. As a practical matter, a personal representative would have

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\* MPAA member companies are: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

an impossible task of separating out material on these sites that is under a copyright and material not subject to copyright.

Moreover, there are additional legal obligations, such as terms of service and licensing agreements that govern these accounts and would be overridden by this bill. A personal representative should be required to be bound by the law, as well as terms of service, licensing and contractual obligations that the deceased person would have been required to follow during his or her lifetime. Those legal and contractual obligations would address the ability to share, copy and distribute the files, as well as the limitations on sharing, copying and distributing.

And, the digital files of a deceased person may have been obtained illegally, as a result of copyright infringement by unauthorized file sharing services or other means. For example, the estimated loss to copyright holders caused by Megaupload (which was indicted in 2012) is \$500,000,000. State law should not exacerbate the copyright infringement problem by authorizing executors or fiduciaries to copy and distribute files consisting of infringing copies of movies and television programs.

The issue of control over a decedent's website accounts is being addressed by the Uniform Law Commission. The ULC is reviewing proposed language, which takes into account federal copyright issues, as well as federal law addressing electronic privacy. The ULC will propose a Model State Law for the Uniform Probate Code which will address the disposition and handling of digital account and the issue should be



addressed on a uniform basis by the states. Any legislation in this area should await the completion of work by the Uniform Law Commission.

For these reasons, MPAA urges a DO NOT PASS vote or an amendment to eliminate Section 1 of HB 1455.



② ③

PROPOSED AMENDMENT TO HOUSE BILL NO. 1455

Page 1, line 9, replace "except for any copyrighted material that may be hosted on a file sharing hosting site" with "subject to the same license, restrictions, or legal obligations of the decedent."

3

**Testimony on HB1455  
before the Senate Human Resources Committee  
by District Judge Gail Hagerty  
March 13, 2013**

Chair Lee, Members of the Committee:

I'm Gail Hagerty -- a district judge in Bismarck and a Uniform Law Commissioner. I am currently serving on a Uniform Law Commission committee which is drafting an act to deal with access to digital assets at the time of death or disability. It is a very complex issue, because of the nature of the assets and because of provisions of federal law which prohibit providers of social media from disclosing the contents of digital communications. The drafting committee is studying what should be required for personal representatives, guardians, and persons with a power of attorney should do with regard to collecting and preserving digital assets. And, we've spent a great deal of time just trying to define digital assets.

The uniform law drafting process is a very thorough and thoughtful process. Commissioners are named to the drafting committee, and observers (businesses and entities which may be impacted by the act) are invited and encouraged to attend and participate in the drafting process. The American Bar Association has representatives participating in the process. Each proposed uniform act is read, line by line, at two annual conferences of the Uniform Law Commission. All commissioners have an opportunity to comment on the act and ask questions. There are amendments from the floor, and the drafting committees continue to work on the draft even during the annual conference.

Our goal is not only to get the legal issues decided properly, but also to draft an act which will be enactable and helpful in the states.

**I understand that Section 1 of HB1455 is a well-intentioned effort to deal with a difficult issue. However, I am urging you to delete that section and wait for the uniform act dealing with this issue.** In its current form, HB1455 will create several problems,

including:

- Making online services chose between violating federal statutes which require they not disclose contents of communications and state law.
- Creating a false expectation that a personal representative will have access to communications which are protected by federal law.
- Failing to provide answers for policy questions including whether the wishes of a decedent who did not wish to have communications provided to a personal representative would be honored; whether online services would be required to retain records and for how long; what procedures would be necessary to obtain a court order; and with whom may a personal representative share information which a person may have believed was private.

I will continue to work with the drafting committee and it is anticipated we will have a completed act by July of 2014. Be assured I plan to be back here talking about the act in 2015!

3



**State Laws and Legislation Providing for Access to Decedents' Email and Social Networking Sites**  
*As of January 17, 2013*

**OVERVIEW**

Five states—Connecticut, Idaho, Indiana, Oklahoma and Rhode Island—have enacted laws granting an executor or personal representative the authority to access email accounts or social networking accounts, microblogging and short message service websites upon a person's incapacity or death.

Laws passed several years ago in Connecticut and Rhode Island require service providers to provide access to or copies of the contents of emails to the executor or personal representative of a deceased person's estate.

Idaho, Indiana and Oklahoma laws are similar to those in Connecticut and Rhode Island, but also allow for access to social networking, microblogging and short message service websites, in addition to email accounts. The Indiana and Rhode Island laws, however, require the executor to provide a death certificate and documentation of the executor's appointment. Rhode Island provides for indemnification of the email service provider from liability (for violating the terms of a service agreement, for example) when complying with the order.

The Idaho law also allows for provisions in a will or a formal order that may still restrict a personal representatives' access to those services or sites, since some individuals may not want others to have access to their online information after they die.

**TEXT OF STATUTES**

**Connecticut**

**Sec. 45a-334a. Access to decedent's electronic mail account.** (a) For the purposes of this section:

(1) "Electronic mail service provider" means any person who (A) is an intermediary in sending or receiving electronic mail, and (B) provides to end-users of electronic mail services the ability to send or receive electronic mail; and

(2) "Electronic mail account" means: (A) All electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and (B) any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.

(b) An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the

contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.

(c) Nothing in this section shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law.

## **Idaho**

### **Idaho Code 15-3-715** *(excerpt)*

15-3-715. Transactions authorized for personal representatives -- Exceptions. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 15-3-902 of this code, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

...

(28) Take control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website.

## **Indiana**

### **Indiana Code 29-1-13-1.1**

#### **Electronically stored documents of deceased**

Sec. 1.1. (a) As used in this section, "custodian" means any person who electronically stores the documents or information of another person.

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:

(1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or

(2) an order of a court having probate jurisdiction of the deceased person's estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

(d) Nothing in this section shall be construed to require a custodian to disclose any information:

(1) in violation of any applicable federal law; or

(2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.

*As added by P.L.12-2007, SEC.1.*

## **Oklahoma**

### **58 Okl. St. § 269**

#### **§ 269. Executor of administrator—Powers.**

The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.

HISTORY: Laws 2010, ch. 181 (HB 2800), § 1, eff. Nov. 1, 2010.

## **Rhode Island**

**§ 33-27-1 Short title.** – This chapter shall be known and may be cited as the "Access to Decedents' Electronic Mail Accounts Act".

**§ 33-27-2 Definitions.** – As used in this chapter:

(1) "Electronic mail service provider" means any person who:

(i) Is an intermediary in sending or receiving electronic mail; and

(ii) Provides to end-users of electronic mail services the ability to send or receive electronic mail.

(2) "Electronic mail account" means:

(i) All electronic mail sent or received by an end-user of electronic mail services provided by an electronic mail service provider that is stored or recorded by such electronic mail service provider in the regular course of providing such services; and

(ii) Any other electronic information stored or recorded by such electronic mail service provider that is directly related to the electronic mail services provided to such end-user by such electronic mail service provider, including, but not limited to, billing and payment information.

**§ 33-27-3 Access to decedents' electronic mail.** – An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt by the electronic mail service provider of:

(1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor and administrator; and

(2) An order of the court of probate that by law has jurisdiction of the estate of such deceased person, designating such executor or administrator as an agent for the subscriber, as defined in the Electronic Communications Privacy Act, 18 U.S.C. § 2701, on behalf of his/her estate, and ordering that the estate shall first indemnify the electronic mail service provider from all liability in complying with such order.

**§ 33-27-4 Violation of federal law.** – Nothing in this chapter shall be construed to require an electronic mail service provider to disclose any information in violation of any applicable federal law.

**§ 33-27-5 Severability.** – If any provision of this chapter or the application of it to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the chapter, which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

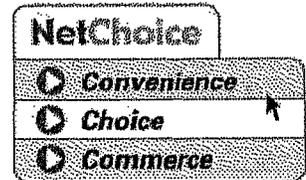
History of Section.

(P.L. 2007, ch. 172, § 1; P.L. 2007, ch. 256, § 1.)

4

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

Steve DelBianco, Executive Director  
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202-420-7482  
www.netchoice.org



March 13, 2013

Senator Judy Lee, Chair  
Senate Human Services Committee  
North Dakota Legislature  
Bismarck, North Dakota

**RE: Opposition to HB 1455, Relating to authority of personal representatives relating to Internet accounts and workplace privacy of social media accounts**

Madame Chair Lee and Members of the Committee:

On behalf of our member companies and their millions of online users, we urge that you not support HB 1455 in its current form and at the present time. HB 1455 creates problems for North Dakota residents and employers.

Authority of personal representatives relating to Internet accounts

Every day, some North Dakota residents die without having given enough thought to what happens to their email accounts and online documents after they're gone. Often, their families and estate managers face a wide variety of company policies and conflicting state and federal laws. And the growing use of social media provides even more challenges and opportunities for grieving families.

However, the approach taken in HB 1455 could cause more harm than good -- partly by giving estate representatives the power to disregard the express privacy choices of North Dakota residents.

There are several reasons to consider more carefully the question of how families and estate managers may access the online communications of deceased persons.

There's the question of how online services can reconcile state disclosure mandates against existing federal privacy protections. As the committee knows, the Electronic Communications Privacy Act (ECPA) prevents online services from sharing the contents of communications unless they first obtain consent from the subscriber or sender.

There is an argument that executors stand in the shoes of the deceased and are thus entitled to access their accounts if consistent with the intent of the deceased and if necessary to fulfill the executors' duties. However, this argument is untested and mandating access by executors would raise new questions.

Beyond ECPA, there are many other key questions about how to manage and legislate in the area of access to the digital legacy of deceased Americans. For example:

- Some users choose their online services based on the strong privacy protections and data deletion policies in the *Terms of Service*. Shouldn't that be enough to indicate a user's wishes, or must the user also make affirmative choices about privacy and deletion options?
- Under what circumstances can the state authorize an executor to override privacy and deletion choices made by the user?

- Should online services be required to retain emails and documents for a minimum period -- despite the subscriber's express wishes to delete their account upon death?
- 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 are what prompted the Uniform Law Commission (ULC) to begin drafting model state legislation for "Fiduciary Access to Digital Assets." This ULC project already has 18 pages of draft legislative language and will continue its work through the year.

This ULC project is focusing government and industry to address concerns of a growing number of your constituents, fed in part by media coverage like the recent Wall Street Journal article, "*Life and Death Online: Who Controls a Digital Legacy?*"

The Journal focused on the tragic example of a family managing the online legacy of their teenage daughter. While the article concerned a teenager, the majority of users are adults who expect their online privacy preferences to be respected—even after death. Today, social networks offer innovative options – like Facebook's "Memorialize" – that respect a user's privacy wishes while also letting their friends and family post messages and memories.

But creating a patchwork of conflicting state and federal laws will obstruct that kind of innovation by online services. Worse, these laws would empower an estate attorney to disregard the privacy wishes of the departed, which would impact the interests of all North Dakota residents using any form of Internet communications or document storage.

#### Workplace privacy of social media accounts

We agree with the underlying goal to protect the privacy of employees and job applicants' personal online accounts. However, HB 1455 exposes employers to civil liability and limits employers' ability to investigate intra-office crimes.

For example, companies routinely investigate allegations of employees harassing co-workers and causing unsafe work environments. But HB 1455 severely limits the capacity of employers to perform such review.

While the measure is well meaning, it must be amended to preserve the flexibility of employers to perform basic, positive functions like protecting their own workers.

Because of the problems present in the bill, we therefore urge that you not support HB 1455 in its current form and at the present time. 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 businesses who share the goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at [www.netchoice.org](http://www.netchoice.org)

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1455

Page 2, line 4, after “mail” insert “or any account created, maintained, used or accessed by an employee or applicant for business-related communications or for a business purpose of the employer”

Page 3, line 17, remove “or”

Page 3, line 19, replace the period with “; or”

Page 3, after line 19, insert:

“6. Implement and enforce a policy pertaining to the use of an employer-issued electronic communications device or to the use of an employee-owned device that will be used for business purposes.”

Page 3, after line 24, insert:

**“Construction**

Nothing in this act shall be construed to prevent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law or rules of self-regulatory organizations.”

Renumber accordingly

Tammy Cota, Executive Director  
1615 L Street NW, Suite 1100  
Washington, DC 20036-5624  
Cell: 802-279-3534  
Email: tammy@internetalliance.org  
Web: www.internetalliance.org



March 12, 2013

Honorable Judy Lee, Chair  
Senate Human Services Committee  
State Capitol  
600 East Boulevard  
Bismarck, ND 58505-0360

Dear Senator Lee:

The Internet Alliance (IA), comprised of the leading Internet, communications and technology companies are writing to urge you to reject HB 1455, which would grant a broad right of access to the contents of a deceased users email, social networking and other online accounts as well as prohibit employers from requesting an existing or potential employee to disclose a user name or password or any other related account information in order to gain access personal social networking accounts.

#### **Deceased Accounts**

While well intentioned, the first section of the legislation related to deceased accounts raises several complex issues regarding user privacy rights, data production and retention, access, authentication, fraud, and conflicting state and federal legal requirements. Instead of advancing this prematurely, we ask that you not advance this bill.

We applaud your committee's interest in shining the light on these issues by scheduling a hearing March 13 to discuss the provisions contained in HB 1455. People need to be reminded that they have a choice about their digital legacy after their death. Hopefully, as more people become aware of this issue, they will take steps to insure that their wishes regarding the treatment of their digital assets upon death are clear. Currently however, states have started to address this issue without a full appreciation of the various conflicting stakeholder interests.

We understand that families often find solace in maintaining the online accounts of their loved one, and that executors and fiduciaries often seek access to the contents of a decedents digital account in order to fulfill their duties. But these interests may often be in opposite to the interests or express wishes of the decedent, and unfortunately, proposals such as HB 1455 would allow an executor to trump the decedents own wishes and access information the person requested be kept private.

Furthermore, state laws that grant a fiduciary access to the contents of such electronic communications directly conflict with federal law and leave providers of electronic communications with the unenviable choice of having to pick which law to violate.

Specifically, Section 2702 of the 1986 Electronic Communications Privacy Act restricts an electronic computing service or remote computing service from providing the contents of an electronic communication without the lawful consent of the originator or recipient of the email, or the subscriber of the service. There is also case law that confirms that civil subpoenas cannot compel production of records from online provider, as it violates the Stored Communications Act (8 U.S.C. Sec. 701).

Indeed, it is due to these conflicting interests that the Uniform Law Commission (ULC) has established a committee to attempt to find a solution that adequately balances the concerns of access to a decedents account, with restrictions on the disclosure of the content of electronic communications imposed under federal law by the Electronic Communications Privacy Act. As the goal of the ULC is to craft a manageable and understandable set of rules by 2014 that will be broad and technologically flexible enough to be used in any state, it is premature for states to act at this time.

It is also important to recognize that companies are attempting to address this issue through internal authentication processes and their own terms of service. For example, Facebook will not issue login and password information to family members of a person who has died. However, a family member may contact Facebook directly and request the dead person's profile be taken down or turned into a memorial page. If a memorial page is chosen, then that account could never again be logged into and the account is taken off public search results. This is a very effective way to avoid fraudulent activities that could arise if a person, including a family member, decides to use the dead person's account illegally. But this does not event take potential fraudulent activity into account. In addition, the private sector is responding to this situation, by creating services that allow users to store their digital assets and communications in one place, for subsequent delivery to a party such as next of kin, relative or executor/fiduciary.

### Employee Privacy

The second part of this bill would prohibit an employer from requesting a user name and password from a potential or existing employee, which we support. There are some well-needed exemptions contained in this section that would give employers the ability to request evidence from an employee for investigations of illegal activity or work-related misconduct. Examples of misconduct that may need investigating to keep the workplace safe includes possible: sexual harassment of other employees, bribery, identity or trade secret theft, insider trading, downloading of confidential company-specific information, or other work-related misconduct that may have been conducted from an employee's personal social networking account.

However, under the Prohibited Acts of an Employer section, Line 7, # 1 it would make it a crime for an employer to ask for an employee's "user name." As you know, many personal online accounts contain a person's name or email address so if an employer simply asks an employee or job candidate for their name and email address, it could be considered a violation. This section should be clarified that employers cannot ask for a user name AND password to access a personal online account or service.

Lastly, if employers are prohibited from requesting potential or existing employees' log-in credentials, employers should then be immune from liability for any claim of negligent hiring due to compliance of this bill. Therefore, we ask that you include such an immunity provision prior to moving this bill forward.

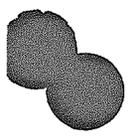
For all of these reasons, we urge that you reject this bill or consider studying the issue further. Please feel free to contact us if you have any questions or would like to discuss our concerns in more detail.

Sincerely,

*Tammy Cota*

Tammy Cota

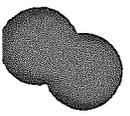
cc: Senate Human Services Committee



March 13, 2013

Senator Judy Lee,  
Chair of Senate Human Services Committee

Dear Madam Chair:



The Internet Alliance (IA), NetChoice and the State Privacy and Security Coalition represent all of the leading Internet, communications and technology companies. Together, are writing to urge you to reject HB 1455, which would grant a broad right of access to the contents of a deceased users email, social networking and other online accounts as well as prohibit employers from requesting an existing or potential employee to disclose a user name or password or any other related account information in order to gain access personal social networking accounts.

As the IA's written testimony submitted to the House Business and Labor Committee explained in January, while well intentioned, we believe it is premature to advance legislation related to online deceased accounts. We also asked the committee to make small narrow exemptions to the employee privacy section so that businesses may request evidence from an employee for investigations of illegal activity or work-related misconduct.

**Access to Decedents' Accounts**



This section mandates that social networking sites, microblogging, short message service websites, and email service websites allow personal representatives to take control of, conduct, continue, or terminate an account of a decedent. Here are just some of the problems with this section:

- The ability for someone to continue a website or email account after someone's death invites fraudulent activity. It raises complex issues regarding user privacy rights, data production and retention, access, authentication, fraud, and conflicting state and federal legal requirements.
- Giving a person total access to these accounts is an invasion of privacy, not just for the account holder, but everyone else the person has ever interacted with via email.
- This bill does not take into consideration situations in which the account holder specifically asks that this information be kept private
- This bill does not make allowed for memorialize accounts. A common industry practice in which discontinue service upon proof that a person has passed away. Only certain social networking accounts offer to memorialize a site but they do not allow a person to take control over the site.
- It raises serious concerns under federal law. Specifically, the unresolved friction with this proposed statute and Section 2702 of the 1986 Electronic Communications Privacy Act which restricts internet service providers from providing email without the lawful consent of the email sender. There is case law that confirms that even civil subpoenas cannot compel Internet companies from handing over such records, as it violates the Stored Communications Act (8 U.S.C. Sec. 701).

Currently, the Uniform Law Commission (ULC) is looking at these conflicts and are meeting next week in DC to discuss a national solution that adequately balances the concerns of access to a decedents account, with Federal restrictions on such

disclosures. The goal of the ULC is to craft a manageable and understandable set of rules that will be broad and technologically flexible enough to be used in any state. We suggest that North Dakota refrain from passing this legislation until these complicated questions are answered.

### **Employee Privacy**

The second part of this bill would prohibit an employer from requesting a user name and password from a potential or existing employee, which we support.

However, there are some well-needed, legitimate exemptions we asked for in this section to give employers the ability to request evidence from an employee for investigations of illegal activity or work-related misconduct – not passwords. Examples of misconduct that may need investigating to keep the workplace safe includes possible: sexual harassment of other employees, bribery, identity or trade secret theft, insider trading, downloading of confidential company-specific information, or other work-related misconduct that may have been conducted from an employee's personal social networking account.

Moreover, the strict prohibition of “requesting” access to a social media account could make it a crime to access a potential employees LinkedIn account, follow them on Twitter or even ask for their email address. We realize that these issue may be resolved believe that there is not enough time this session.

For all of these reasons, we urge that you reject this bill or consider studying the issue further. Please feel free to contact us if you have any questions or would like to discuss our concerns in more detail.

Sincerely,



Tammy Cota  
Steve DelBianco  
Jim Halpert

The Internet Alliance  
NetChoice  
State Privacy and Security Coalition

