State Privacy and Security Coalition, Inc.

March 4, 2015

Senator Eric Coleman
Co-chair, Joint Committee on Judiciary
Legislative Office Building
Room 2500
Hartford, CT 06106-1591

Representative William Tong
Co-chair, Joint Committee on Judiciary
Legislative Office Building
Room 2405
Hartford, CT 06106-1591

Re: Opposition to Connecticut S.B. 979 – Uniform Fiduciary Access to Digital Assets Act

Dear Chair Coleman and Chair Tong:

The State Privacy & Security Coalition, which is comprised of 26 leading communications, technology, retail and media companies and 6 trade associations, writes to urge that you not move forward with S.B. 979 as drafted.

While we support the idea of clearly defining the rules governing access to a decedent's digital assets, we have serious concerns with this bill's complete disregard for the privacy of other persons who communicated with the decedent, as well as the privacy of the decedent, and its potential conflicts with federal law and the laws of other states that grant greater privacy protection to online accounts.

We note that a recent Zogby Interactive Poll found that more than 70% of Americans want their online communications to remain private after they pass, and 65% say it would violate their privacy for private communications and photos to be shared without their consent.[1] This poll also found that a mere 15% of Americans think that their estate attorneys should have control over their private communications without their prior consent.

This bill would effectively mandate disclosure of all of a decedent's online communications to his/her personal representative by default, ignoring both what Americans want and important privacy and confidentiality interests, such as those raised by confidential communications of third

[1] NetChoice, "Americans Overwhelmingly Want To Control Personal Privacy Even After Death", http://netchoice.org/library/decedent-information/.

500 8th Street, NW
Washington, DC 20004
202.799.4000 Tel
202.799.5000 Fax

parties with a decedent who is a marriage counselor, alcohol or drug counselor, doctor, psychiatrist, therapist, or lawyer. By assuming that digital communications are the same as physical assets, such as a letter, S.B. 979 overlooks the fact that digital communications are fundamentally different than letters and should be protected differently. *See Riley v. California*, 134 S. Ct. 2473, 2489-2492 (2014) (pointing out the increased scope of privacy interests in digital materials on smart phones in holding that police generally may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested).

We are also concerned about the potential conflicts that this bill would create with federal law. There is a serious and totally unsettled question of law about whether the personal representative access under this bill would be permitted under the federal Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2702, et seq., which imposes criminal penalties and $1,000 per violation class action exposure against providers of electronic communications services that disclose contents of communication that the provider holds in storage. People who have sent emails to the deceased may be able to file class action lawsuits in federal court against service providers ordered to disclose account contents under this bill. While there are some exceptions under ECPA, the pertinent exceptions do not apply on their face to disclosures to personal representative or trust and estate lawyers, and it is very unclear whether they would even apply under S.B. 979.

S.B. 979 contains an exception for disclosures prohibited by ECPA, but it would create a powerful disincentive against any service provider who receives a request for decedent communications raising this exception: The bill one-sidedly would require service providers to pay the attorneys' fees of the personal representative or executor if a court disagreed with their raising an ECPA objection. This puts a very heavy thumb on the scale against a service provider contesting a request under the bill and would incentivize service providers to give in to the request, instead of testing whether the disclosure is in fact prohibited by ECPA.

What is more, S.B. 979 creates conflicts with other state laws that grant protection to the privacy of decedents' online accounts by trying to trump those states laws. Where people who have communicated with the deceased live in those states, those people may bring a lawsuit against a service provider who would be required under S.B. 979 to provide unfettered access to the decedent's account, including access to all the decedent's communications.

For the above reasons, we respectfully request that you not move forward with S.B. 979. In the alternative, our Coalition – along with privacy advocates such as the American Civil Liberties Union (ACLU) – has been involved in the drafting of the a model bill that honors the privacy of decedents: the Privacy Expectation Afterlife and Choices (PEAC) Act. We would support

500 8th Street, NW
Washington, DC 20004
202.799.4000 Tel
202.799.5000 Fax

introduction of the PEAC Act as a substitute and are happy to discuss the PEAC Act with you further.

Please feel free to contact us at the information below if you have any questions or would like to discuss our concerns in greater detail. Thank you for your time and consideration.

Sincerely,

James J. Halpert
General Counsel

cc: Members of the Joint Committee on Judiciary

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202.799.5000 Fax