Facts About HB 2647

NetChoice

What is HB 2647 – The Privacy Expectations and Afterlife Choices Act?

For those users who have not yet considered their digital afterlife, HB 2647 – the Privacy Expectations Afterlife and Choices Act (PEAC) – offers a pathway for estates to be properly closed by a fiduciary or executor (often times a next of kin), while:

- Maintaining the privacy of the deceased and living people who communicated with the deceased; and
- Staying within the bounds of federal law that governs the disclosure of digital communication content.

What are the principles behind HB 2647?

1. **People's choices - explicit and implied – about their privacy are honored after they die.** If a person designated someone to take over their electronic accounts in their will or user settings, those choices will be respected. But in the case of someone dying intestate, PEAC creates the default rule that the content of private communications will not be disclosed, unless the decedent has given permission for the content to be disclosed. Such a default rule not only is consistent with federal law, but helps to insure the privacy of the living who may have corresponded with the decedent.

2. **Fiduciaries and executors (who are often the next of kin) can get access to electronic records needed to inventory the deceased's estate**. HB 2647 provides a way for a fiduciary or executor (who is often times the next of kin) to get access to records of the communication (e.g. John Smith received emails from Wells Fargo, CapitalOne, Fidelity, his accountant). This will provide fiduciaries and executors with a roadmap as to where the decedents financial assets reside, and allow them to contact those entities in order to inventory the assets—again, without violating federal law or the privacy of living third parties.

3. **Measures are taken so that ONLY the records of the <u>correct</u> account are given.** HB 2647 requires the fiduciary or executor to show to the court that the account is really that of the deceased. For example, there are numerous John Smith's in the world. Steps must be taken so that the wrong John Smith's communication records are not disclosed. Additionally, there are cases where an account is shared with a colleague or spouse and one or more of the parities are still living who do not want the fiduciary or executor to have access to the account. Their wishes, as account holders, should be maintained.

   Estate attorneys will argue that is an undue burden on them and the court to have to prove the email they want is that of the deceased, however we believe it is absolutely critical to establish without a doubt that we are not granting access to the wrong John Smith's records.

4. **The state law must comply with existing federal law – Electronic Communications Protection Act (ECPA).** The bill operates within the parameters established by federal law so that litigation can be avoided. Federal law says that the content of an exchange cannot be turned over without the consent of the originator, addressee or intended recipient.

How does HB 2647 work?

With the -1 and -3 amendments, a court can issue an order that an electronic service provider shall disclose the records of communication if the court can determine:

1. The user is deceased. This can be shown through a death certificate, which financial institutions also require of an executor.
2. The deceased had an account.
3. The account they are requesting access to belong to the deceased – they must provide the unique identifier so there isn't a risk of exposing the records of the wrong email.
4. There is not another owner of the decedents account, such as a joint account with a still living spouse or colleague.
5. That disclosure doesn't violate federal law. Courts should not execute an order that violates federal law.

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Finally, executors have told us it may be important to get contents of communications – perhaps the next great American novel is in their email. The -1 amendments would allow for the executor to obtain access to contents if the court indemnifies the service provider for improper disclosure. It is responsible that the court makes the executor liable under federal law not to improperly disclose the contents of the email. This is the same standard put on online communication companies.

Do online service providers have to turn over the records if the court orders them to do so?

Yes. The bill allows the online service provider to refuse disclosure only under very specific circumstances

1. If the person has deleted a record – put it in the trash bin – but it still exists;
2. If it the user specified differently within the product or service how they wanted their information to be treated after a period of inactivity or death;
3. If the service provider is aware of activity on the account since after the date of death.

What does it mean that service providers can refuse to turn over records if it is an "undue burden"?

Federal law – ECPA – states that service providers "may" turn over records, but they are not obligated to do so. Under this law, service providers will undertake the obligation – they "shall" turn over records with a court order. If a service provider decided it would be an undue burden – for example, they were expected to turn over a terabyte of contents (which is equivalent of 50,000 trees made into paper and printed) would likely require a service provider to restore back tapes, that service provider may request the court to limit the scope of the order.

Why is this bill only limited to closing estates of the deceased?

Guardians, conservators, trustees and power of attorneys are very separate issues. In those cases, the person is still alive and has varying degrees of agency. A deceased person does not. One policy cannot address these different circumstances in a responsible manner.

Does HB 2647 put undue burden on the court?

HB 2647 ensures that the deceased privacy choices are maintained and that other people's privacy is not wrongly exposed, while giving fiduciaries the information they need to administer the decedents estate. The bill requires the court to determine the person is actually deceased, that the email address/electronic communication account that should be turned over is indeed the email account of the decedent, and that the person's will or user settings is not in conflict with the request.

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