Testimony of Kimberly McCullough, Legislative Director
In Opposition to SB 369
Senate Committee on Judiciary
March 24, 2015

Chair Prozanski and Members of the Committee:

Thank you for the opportunity to submit comments regarding SB 369. As a civil liberties organization dedicated to protecting individuals' privacy and autonomy, the ACLU of Oregon is concerned about SB 369, which grants a personal representative or other fiduciary access to a wide range of digital content associated with an individual's estate or assets after death.

The content that online service providers would be required to disclose to fiduciaries under this bill far exceeds the amount of information necessary to efficiently administer an estate. Such content may include photo albums, email accounts, text messages, voicemail, social media profiles, and health and fitness data. It may also include intimate or otherwise sensitive and highly personal communications (e.g., emails to and from loved ones, a religious leader, or an addiction program sponsor). In addition, it may include personal communications with and information about third parties who are still alive at the time of disclosure.

Fundamentally, we believe that users should have the autonomy to control who can access their digital content after death — be that through account controls, or in a formal will or estate plan. A digital estate regime should not provide default access to all digital content. To protect privacy, it should instead incentivize individual users to knowingly opt-in to the sharing of their electronic communications, especially when those communications involve the privacy rights of other parties.

The ACLU of Oregon opposes SB 369 for the following reasons:

- Digital assets are not analogous to physical records and should be treated differently under the law. In the digital world, content such as correspondence and photographs are generally indefinitely preserved by default. The physical world works differently, as individuals make ongoing and active choices about what to keep and what to throw away. In addition, due to the digital world's practically unlimited storage space, the sum total of digital information an individual leaves behind is far more comprehensive and personal than it would have been if she were required to store these materials physically. SB 369 does not account for these differences, instead treating a vast array of digital content the same way as an individual's physical belongings.

- As the Supreme Court has noted, the Internet is "as diverse as human thought" and can reveal an incredible amount of information about a person's life. Consumers do not consider all of their stored content to be equally sensitive. Instead, they deliberately share some information with the public and other information with curated lists of friends or only one other person. Beyond that, some information is kept completely private on password-protected accounts, so that no one except the individual can see it. Because of these variations of privacy concerns, consumers should be able to exercise choices that are tailored to their individual preferences. SB 369 does not provide such a choice.

- Consumers do not expect other people or entities to gain access to their accounts. Our law should honor that expectation after a person passes away, allowing them choice and control.

- SB 369 allows disclosure of content, when metadata would be sufficient. SB 369 would more adequately protect the privacy expectations of individuals who have passed away and the third parties they communicated with if it only disclosed records of accounts (metadata or "envelope data"), rather than content. This is particularly important because third parties also have a privacy interest in their prior communications with a deceased individual. In addition, content referring to third parties may reveal highly sensitive information about those third parties.

- Protected persons have privacy rights too. SB 369 does not respect the privacy of protected persons, as it grants conservators broad access to the content of the protected person's online accounts. Conservators are typically appointed to assist a protected person with financial and healthcare decisions. While this may warrant access to the protected person's financial or medical accounts, it does not automatically follow that the conservator should have access to all of the individual's other online accounts.

- Privacy should be the default. Individuals should not have to affirmatively take action in order to limit third party access to those things they consider deeply personal. Our privacy is far too important to be given away by default.

We are not indifferent to the difficult situations that arise when loved ones cannot access records of deceased individuals. However, this legislation will negatively impact many individuals' ability to control their digitally stored content in a material way, potentially for generations to come. It is impossible to predict what the future of technology will bring to digital content, and whatever we do today must stand on the principle that individuals have power over their own data and all of the personal experiences recorded within it. We must create a system that allows and encourages individuals to control what happens to their records.

For all of these reasons, we urge you not to pass SB 369. Please feel free to contact me with any questions or concerns.