

**SENATE . . . . . No. 936**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

***Barry R. Finegold***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the privacy of a decedent’s electronic communication.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Barry R. Finegold</i>	<i>Second Essex and Middlesex</i>	
<i>Bradley H. Jones, Jr.</i>	<i>20th Middlesex</i>	<i>1/29/2019</i>
<i>Eric P. Lesser</i>	<i>First Hampden and Hampshire</i>	<i>2/1/2019</i>

**SENATE . . . . . No. 936**

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By Mr. Finegold, a petition (accompanied by bill, Senate, No. 936) of Barry R. Finegold, Bradley H. Jones, Jr. and Eric P. Lesser for legislation relative to the privacy of a decedent’s electronic communication. The Judiciary.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. 885 OF 2017-2018.]

**The Commonwealth of Massachusetts**

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**In the One Hundred and Ninety-First General Court  
(2019-2020)**  
\_\_\_\_\_

An Act relative to the privacy of a decedent’s electronic communication.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. The General Laws are hereby amended by inserting after chapter 201F the  
2 following chapter:-

3           CHAPTER 201G. MASSACHUSETTS REVISED UNIFORM FIDUCIARY ACCESS  
4 TO DIGITAL ASSETS ACT

5           Section 1. Short title

6           This chapter may be cited as the Massachusetts Revised Uniform Fiduciary Access to  
7 Digital Assets Act.

8           Section 2. Definitions

9 In this chapter:

10 (1) “Account” means an arrangement under a terms-of-service agreement in which a  
11 custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides  
12 goods or services to the user.

13 (2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable  
14 power of attorney.

15 (3) “Carries” means engages in the transmission of an electronic communication.

16 (4) “Catalogue of electronic communications” means information that identifies each  
17 person with which a user has had an electronic communication, the time and date of the  
18 communication, and the electronic address of the person.

19 (5) “Conservator” means a person appointed by a court to manage the estate of a  
20 protected person and includes a limited conservator, temporary conservator, special conservator,  
21 and those individuals specifically authorized under section 5-408 of chapter 190B.

22 (6) “Content of an electronic communication” means information concerning the  
23 substance or meaning of the communication which:

24 (A) has been sent or received by a user;

25 (B) is in electronic storage by a custodian providing an electronic-communication service  
26 to the public or is carried or maintained by a custodian providing a remote-computing service to  
27 the public; and

28 (C) is not readily accessible to the public.

29 (7) “Court” means the probate and family court department of the trial court.

30 (8) “Custodian” means a person that carries, maintains, processes, receives, or stores a  
31 digital asset of a user.

32 (9) “Designated recipient” means a person chosen by a user using an online tool to  
33 administer digital assets of the user.

34 (10) “Digital asset” means an electronic record in which an individual has a right or  
35 interest. The term does not include an underlying asset or liability unless the asset or liability is  
36 itself an electronic record.

37 (11) “Electronic” means relating to technology having electrical, digital, magnetic,  
38 wireless, optical, electromagnetic, or similar capabilities.

39 (12) “Electronic communication” has the meaning set forth in 18 U.S.C. section  
40 2510(12), as amended.

41 (13) “Electronic-communication service” means a custodian that provides to a user the  
42 ability to send or receive an electronic communication.

43 (14) “Fiduciary” means an original, additional, or successor personal representative,  
44 conservator, agent, or trustee.

45 (15) “Information” means data, text, images, videos, sounds, codes, computer programs,  
46 software, databases, or the like.

47           (16) “Online tool” means an electronic service provided by a custodian that allows the  
48 user, in an agreement distinct from the terms-of-service agreement between the custodian and  
49 user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

50           (17) “Person” means an individual, estate, business or nonprofit entity, public  
51 corporation, government or governmental subdivision, agency, or instrumentality, or other legal  
52 entity.

53           (18) “Personal representative” means an executor, administrator, special administrator, or  
54 person that performs substantially the same function under law of this commonwealth other than  
55 this chapter.

56           (19) “Power of attorney” means a record that grants an agent authority to act in the place  
57 of a principal.

58           (20) “Principal” means an individual who grants authority to an agent in a power of  
59 attorney.

60           (21) “Protected person” means an individual for whom a conservator has been appointed.  
61 The term includes an individual for whom a petition for the appointment of a conservator is  
62 pending.

63           (22) “Record” means information that is inscribed on a tangible medium or that is stored  
64 in an electronic or other medium and is retrievable in perceivable form.

65           (23) “Remote-computing service” means a custodian that provides to a user computer-  
66 processing services or the storage of digital assets by means of an electronic communications  
67 system, as defined in 18 U.S.C. section 2510(14), as amended.

68 (24) “Terms-of-service agreement” means an agreement that controls the relationship  
69 between a user and a custodian.

70 (25) “Trustee” means a fiduciary with legal title to property under an agreement or  
71 declaration that creates a beneficial interest in another. The term includes an original, additional,  
72 or successor trustee, whether or not appointed or confirmed by the court.

73 (26) “User” means a person that has an account with a custodian.

74 (27) “Will” includes a codicil, testamentary instrument that only appoints a personal  
75 representative, and an instrument that revokes or revises a testamentary instrument.

### 76 Section 3. Applicability

77 (a) This chapter applies to:

78 (1) a fiduciary acting under a will or power of attorney executed before, on, or after the  
79 effective date of this chapter;

80 (2) a personal representative acting for a decedent who died before, on, or after the  
81 effective date of this chapter;

82 (3) a conservatorship proceeding commenced before, on, or after the effective date of this  
83 chapter; and

84 (4) a trustee acting under a trust created before, on, or after the effective date of this  
85 chapter.

86 (b) This chapter applies to a custodian if the user resides in this commonwealth or resided  
87 in this commonwealth at the time of the user’s death.

88 (c) This chapter does not apply to a digital asset of an employer used by an employee in  
89 the ordinary course of the employer's business.

90 Section 4. User direction for disclosure of digital assets

91 (a) A user may use an online tool to direct the custodian to disclose or not to disclose  
92 some or all of the user's digital assets, including the content of electronic communications. If the  
93 online tool allows the user to modify or delete a direction at all times, a direction regarding  
94 disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of  
95 attorney, or other record.

96 (b) If a user has not used an online tool to give direction under subsection (a) or if the  
97 custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of  
98 attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets,  
99 including the content of electronic communications sent or received by the user.

100 (c) A user's direction under subsection (a) or (b) overrides a contrary provision in a  
101 terms-of-service agreement that does not require the user to act affirmatively and distinctly from  
102 the user's assent to the terms of service.

103 Section 5. Terms-of-service agreement

104 (a) This chapter does not change or impair a right of a custodian or a user under a terms-  
105 of-service agreement to access and use digital assets of the user.

106 (b) This chapter does not give a fiduciary any new or expanded rights other than those  
107 held by the user for whom, or for whose estate, the fiduciary acts or represents.

108 (c) A fiduciary's access to digital assets may be modified or eliminated by a user, by  
109 federal law, or by a terms-of-service agreement if the user has not provided direction under  
110 section 4.

111 Section 6. Procedure for disclosing digital assets

112 (a) When disclosing digital assets of a user under this chapter, the custodian may at its  
113 sole discretion:

114 (1) grant a fiduciary or designated recipient full access to the user's account;

115 (2) grant a fiduciary or designated recipient partial access to the user's account sufficient  
116 to perform the tasks with which the fiduciary or designated recipient is charged; or

117 (3) provide a fiduciary or designated recipient a copy in a record of any digital asset that,  
118 on the date the custodian received the request for disclosure, the user could have accessed if the  
119 user were alive and had full capacity and access to the account.

120 (b) A custodian may assess a reasonable administrative charge for the cost of disclosing  
121 digital assets under this chapter.

122 (c) A custodian need not disclose under this chapter a digital asset deleted by a user.

123 (d) If a user directs or a fiduciary requests a custodian to disclose under this chapter  
124 some, but not all, of the user's digital assets, the custodian need not disclose the assets if  
125 segregation of the assets would impose an undue burden on the custodian. If the custodian  
126 believes the direction or request imposes an undue burden, the custodian or fiduciary may seek  
127 an order from the court to disclose:



- 128 (1) a subset limited by date of the user's digital assets;
- 129 (2) all of the user's digital assets to the fiduciary or designated recipient;
- 130 (3) none of the user's digital assets; or
- 131 (4) all of the user's digital assets to the court for review in camera.

132 Section 7. Disclosure of content of electronic communications of deceased user

133 If a deceased user consented or a court directs disclosure of the contents of electronic  
134 communications of the user, the custodian shall disclose to the personal representative of the  
135 estate of the user the content of an electronic communication sent or received by the user if the  
136 representative gives the custodian:

- 137 (1) a written request for disclosure in physical or electronic form;
- 138 (2) a certified copy of the death certificate of the user;
- 139 (3) an attested copy of the letter of appointment of the representative or a small-estate  
140 affidavit or court order;
- 141 (4) unless the deceased user provided direction using an online tool, a copy of the user's  
142 will, trust, or other record evidencing the user's consent to disclosure of the content of electronic  
143 communications; and
- 144 (5) if requested by the custodian:
- 145 (A) a number, username, address, or other unique subscriber or account identifier  
146 assigned by the custodian to identify the user's account;

147 (B) evidence linking the account to the user; or

148 (C) a finding by the court that:

149 (i) the user had a specific account with the custodian, identifiable by the information  
150 specified in subparagraph (A);

151 (ii) disclosure of the content of electronic communications of the user would not violate  
152 18 U.S.C. section 2701 et seq., as amended, 47 U.S.C. section 222, as amended, or other  
153 applicable law;

154 (iii) unless the user provided direction using an online tool, the user consented to  
155 disclosure of the content of electronic communications; or

156 (iv) disclosure of the content of electronic communications of the user is reasonably  
157 necessary for administration of the estate.

158 Section 8. Disclosure of other digital assets of deceased user

159 Unless the deceased user prohibited disclosure of digital assets or the court directs  
160 otherwise, a custodian shall disclose to the personal representative of the estate of a deceased  
161 user a catalogue of electronic communications sent or received by the user and digital assets,  
162 other than the content of electronic communications, of the user, if the representative gives the  
163 custodian:

164 (1) a written request for disclosure in physical or electronic form;

165 (2) a certified copy of the death certificate of the user;

166 (3) an attested copy of the letter of appointment of the representative or a small-estate  
167 affidavit or court order; and

168 (4) if requested by the custodian:

169 (A) a number, username, address, or other unique subscriber or account identifier  
170 assigned by the custodian to identify the user's account;

171 (B) evidence linking the account to the user;

172 (C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary  
173 for administration of the estate; or

174 (D) a finding by the court that:

175 (i) the user had a specific account with the custodian, identifiable by the information  
176 specified in subparagraph (A); or

177 (ii) disclosure of the user's digital assets is reasonably necessary for administration of the  
178 estate.

179 Section 9. Disclosure of content of electronic communications of principal

180 To the extent a power of attorney expressly grants an agent authority over the content of  
181 electronic communications sent or received by the principal and unless directed otherwise by the  
182 principal or the court, a custodian shall disclose to the agent the content if the agent gives the  
183 custodian:

184 (1) a written request for disclosure in physical or electronic form;

185 (2) an original or copy of the power of attorney expressly granting the agent authority  
186 over the content of electronic communications of the principal;

187 (3) a certification by the agent, under penalty of perjury, that the power of attorney is in  
188 effect; and

189 (4) if requested by the custodian:

190 (A) a number, username, address, or other unique subscriber or account identifier  
191 assigned by the custodian to identify the principal's account; or

192 (B) evidence linking the account to the principal.

193 Section 10. Disclosure of other digital assets of principal

194 Unless otherwise ordered by the court, directed by the principal, or provided by a power  
195 of attorney, a custodian shall disclose to an agent with specific authority over digital assets or  
196 general authority to act on behalf of a principal a catalogue of electronic communications sent or  
197 received by the principal and digital assets, other than the content of electronic communications,  
198 of the principal if the agent gives the custodian:

199 (1) a written request for disclosure in physical or electronic form;

200 (2) an original or a copy of the power of attorney that gives the agent specific authority  
201 over digital assets or general authority to act on behalf of the principal;

202 (3) a certification by the agent, under penalty of perjury, that the power of attorney is in  
203 effect; and

204 (4) if requested by the custodian:

205 (A) a number, username, address, or other unique subscriber or account identifier  
206 assigned by the custodian to identify the principal's account; or

207 (B) evidence linking the account to the principal.

208 Section 11. Disclosure of digital assets held in trust when trustee is original user

209 Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to  
210 a trustee that is an original user of an account any digital asset of the account held in trust,  
211 including a catalogue of electronic communications of the trustee and the content of electronic  
212 communications.

213 Section 12. Disclosure of contents of electronic communications held in trust when  
214 trustee is not original user

215 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a  
216 custodian shall disclose to a trustee that is not an original user of an account the content of an  
217 electronic communication sent or received by an original or successor user and carried,  
218 maintained, processed, received, or stored by the custodian in the account of the trust if the  
219 trustee gives the custodian:

220 (1) a written request for disclosure in physical or electronic form;

221 (2) a certified copy of the trust instrument or a certification of the trust under chapter  
222 203E that includes consent to disclosure of the content of electronic communications to the  
223 trustee;

224 (3) a certification by the trustee, under penalty of perjury, that the trust exists and the  
225 trustee is a currently acting trustee of the trust; and

226 (4) if requested by the custodian:

227 (A) a number, username, address, or other unique subscriber or account identifier

228 assigned by the custodian to identify the trust's account; or

229 (B) evidence linking the account to the trust.

230 Section 13. Disclosure of other digital assets held in trust when trustee is not original user

231 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a

232 custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of

233 electronic communications sent or received by an original or successor user and stored, carried,

234 or maintained by the custodian in an account of the trust and any digital assets, other than the

235 content of electronic communications, in which the trust has a right or interest if the trustee gives

236 the custodian:

237 (1) a written request for disclosure in physical or electronic form;

238 (2) a certified copy of the trust instrument or a certification of the trust under chapter

239 203E;

240 (3) a certification by the trustee, under penalty of perjury, that the trust exists and the

241 trustee is a currently acting trustee of the trust; and

242 (4) if requested by the custodian:

243 (A) a number, username, address, or other unique subscriber or account identifier

244 assigned by the custodian to identify the trust's account; or

245 (B) evidence linking the account to the trust.

246 Section 14. Disclosure of digital assets to conservator of protected person

247 (a) After an opportunity for a hearing under chapter 190B, the court may grant a  
248 conservator access to the digital assets of a protected person.

249 (b) Unless otherwise ordered by the court or directed by the user, a custodian shall  
250 disclose to a conservator the catalogue of electronic communications sent or received by a  
251 protected person and any digital assets, other than the content of electronic communications, in  
252 which the protected person has a right or interest if the conservator gives the custodian:

253 (1) a written request for disclosure in physical or electronic form;

254 (2) an attested copy of the court order that gives the conservator authority over the digital  
255 assets of the protected person; and

256 (3) if requested by the custodian:

257 (A) a number, username, address, or other unique subscriber or account identifier  
258 assigned by the custodian to identify the account of the protected person; or

259 (B) evidence linking the account to the protected person.

260 (c) A conservator with general authority to manage the assets of a protected person may  
261 request a custodian of the digital assets of the protected person to suspend or terminate an  
262 account of the protected person for good cause. A request made under this section must be  
263 accompanied by an attested copy of the court order giving the conservator authority over the  
264 protected person's property.

265 Section 15. Fiduciary duty and authority

266 (a) The legal duties imposed on a fiduciary charged with managing tangible property  
267 apply to the management of digital assets, including:

268 (1) the duty of care;

269 (2) the duty of loyalty; and

270 (3) the duty of confidentiality.

271 (b) A fiduciary's authority with respect to a digital asset of a user:

272 (1) except as otherwise provided in section 4, is subject to the applicable terms of service;

273 (2) is subject to other applicable law, including copyright law;

274 (3) is limited by the scope of the fiduciary's duties; and

275 (4) may not be used to impersonate the user.

276 (c) A fiduciary with authority over the property of a decedent, protected person, principal,  
277 or settlor has the right to access any digital asset in which the decedent, protected person,  
278 principal, or settlor had a right or interest and that is not held by a custodian or subject to a  
279 terms-of-service agreement.

280 (d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of  
281 the property of the decedent, protected person, principal, or settlor for the purpose of applicable  
282 computer-fraud and unauthorized-computer-access laws, including section 120F of chapter 266.

283 (e) A fiduciary with authority over the tangible, personal property of a decedent,  
284 protected person, principal, or settlor:



285 (1) has the right to access the property and any digital asset stored in it; and

286 (2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-  
287 access laws, including section 120F of chapter 266.

288 (f) A custodian may disclose information in an account to a fiduciary of the user when the  
289 information is required to terminate an account used to access digital assets licensed to the user.

290 (g) A fiduciary of a user may request a custodian to terminate the user's account. A  
291 request for termination must be in writing, in either physical or electronic form, and  
292 accompanied by:

293 (1) if the user is deceased, a certified copy of the death certificate of the user;

294 (2) an attested copy of the letter of appointment of the representative or a small-estate  
295 affidavit or court order, court order, power of attorney, or trust giving the fiduciary authority  
296 over the account; and

297 (3) if requested by the custodian:

298 (A) a number, username, address, or other unique subscriber or account identifier  
299 assigned by the custodian to identify the user's account;

300 (B) evidence linking the account to the user; or

301 (C) a finding by the court that the user had a specific account with the custodian,  
302 identifiable by the information specified in subparagraph (A).

303 Section 16. Custodian compliance and immunity

304 (a) Not later than 60 days after receipt of the information required under sections 7  
305 through 14, a custodian shall comply with a request under this chapter from a fiduciary or  
306 designated recipient to disclose digital assets or terminate an account. If the custodian fails to  
307 comply, the fiduciary or designated recipient may apply to the court for an order directing  
308 compliance.

309 (b) An order under subsection (a) directing compliance must contain a finding that  
310 compliance is not in violation of 18 U.S.C. section 2702, as amended.

311 (c) A custodian may notify the user that a request for disclosure or to terminate an  
312 account was made under this chapter.

313 (d) A custodian may deny a request under this chapter from a fiduciary or designated  
314 recipient for disclosure of digital assets or to terminate an account if the custodian is aware of  
315 any lawful access to the account following the receipt of the fiduciary's request.

316 (e) This chapter does not limit a custodian's ability to obtain or require a fiduciary or  
317 designated recipient requesting disclosure or termination under this chapter to obtain a court  
318 order which:

319 (1) specifies that an account belongs to the protected person or principal;

320 (2) specifies that there is sufficient consent from the protected person or principal to  
321 support the requested disclosure; and

322 (3) contains a finding required by law other than this chapter.

323 (f) A custodian and its officers, employees, and agents are immune from liability for an  
324 act or omission done in good faith in compliance with this chapter.

325 Section 17. Uniformity of application and construction

326 In applying and construing this uniform act, consideration must be given to the need to  
327 promote uniformity of the law with respect to its subject matter among states that enact it.

328 Section 18. Relation to Electronic Signatures in Global and National Commerce Act

329 This chapter modifies, limits and supersedes the federal Electronic Signatures in Global  
330 and National Commerce Act, 15 U.S.C. section 7001, et seq., but does not modify, limit, or  
331 supersede section 101(c) of said act, 15 U.S.C. section 7001(c), or authorize electronic delivery  
332 of any of the notices described in section 103(b) of said act, 15 U.S.C. section 7003(b).

333 Section 19. Severability

334 If any provision of this chapter or its application to any person or circumstance is held  
335 invalid, the invalidity does not affect other provisions or applications of this chapter which can  
336 be given effect without the invalid provision or application, and to this end the provisions of this  
337 chapter are severable.

338 SECTION 2. This act shall take effect on January 1, 2020.