

SENATE No. 973

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia Stone Creem

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 access to a decedent's electronic mail accounts.

PETITION OF:

NAME:

Cynthia Stone Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

SENATE No. 973

By Ms. Creem, a petition (accompanied by bill, Senate, No. 973) of Cynthia Stone Creem for legislation relative to access to a decedent's electronic mail accounts. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 883 OF 2019-2020.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

An Act relative to access to a decedent's electronic mail accounts.

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. Subsection (a) of section 3-715 of chapter 190B of the General Laws, as
2 appearing in the 2010 Official Edition, is hereby amended by adding the following paragraph:

3 (28) obtain information from an entity that was a provider of an electronic
4 communications service or remote computing service to the decedent in accordance with the
5 procedures set forth in section 3-715A of chapter 190B of the General Laws, subject to the duties
6 and responsibilities set forth in the Massachusetts uniform probate code and all other applicable
7 state law pertaining to personal representatives, and subject to copyright law, the Electronic
8 Communications Privacy Act, 18 U.S.C. § 2701 et seq., and all other applicable federal law.

9 SECTION 2. Said section 3-715 of said chapter 190B, as appearing, is hereby further
10 amended by striking out subsection (b) and inserting in place thereof the following subsection:

11 (b) Except as restricted or otherwise provided by the will or by an order in a formal
12 proceeding and subject to the priorities stated in section 3-902, a special personal representative
13 acting reasonably for the benefit of the interested persons, may properly exercise only those
14 powers set forth in subsections (1), (2), (3), (5), (7), (12), (15), (18), (19), (20), (21), (22), (24),
15 (26) and (28) of paragraph (a).

16 SECTION 3. Chapter 190B of the General Laws, as appearing in the 2010 Official
17 Edition, is hereby amended by adding after section 3-715 the following new section:

18 Section 3-715A

19 SECTION 1. DEFINITIONS.

20 (1) "Account" means an arrangement under a terms-of-service agreement in which a
21 custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides
22 goods or services to the user.

23 (2) "Carries" means engages in the transmission of an electronic communication.

24 (3) "Catalogue of electronic communications" means information that identifies each
25 person with which a user has had an electronic communication, the time and date of the
26 communication, and the electronic address of the person.

27 (4) "Content of an electronic communication" means information concerning the
28 substance or meaning of the communication which:

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

30 (B) is in electronic storage by a custodian providing an electronic communication service
31 to the public or is carried or maintained by a custodian providing a remote computing service to
32 the public; and

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

34 (5) “Court” means the Massachusetts Probate and Family Court and any other
35 Massachusetts court having appellate jurisdiction over any ruling by the Massachusetts Probate
36 and Family Court.

37 (6) “Custodian” means a person that carries, maintains, processes, receives, or stores a
38 digital asset of a user.

39 (7) “Designated recipient” means a person chosen by a user using an online tool to
40 administer digital assets of the user.

41 (8) “Digital asset” means an electronic record in which an individual has a right or
42 interest. The term does not include an underlying asset or liability unless the asset or liability is
43 itself an electronic record.

44 (9) “Electronic” means relating to technology having electrical, digital, magnetic,
45 wireless, optical, electromagnetic, or similar capabilities.

46 (10) “Electronic communication” has the meaning set forth in 18 U.S.C. Section
47 2510(12).

48 (11) “Electronic communication service” means a custodian that provides to a user the
49 ability to send or receive an electronic communication.

50 (12) “Fiduciary” means an original, additional, or successor personal representative.

51 (13) “Information” means data, text, images, videos, sounds, codes, computer programs,
52 software, databases, or the like.

53 (14) “Online tool” means an electronic service provided by a custodian that allows the
54 user, in an agreement distinct from the terms-of-service agreement between the custodian and
55 user, to provide directions for disclosure or nondisclosure of digital assets to a third person upon
56 the circumstances addressed in this act.

57 (15) “Person” means an individual, estate, business or nonprofit entity, public
58 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
59 entity.

60 (16) “Personal representative” means an executor, administrator, special administrator, or
61 person that performs substantially the same function under law of this state other than this act.

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

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

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

69 (20) “User” means a person that has an account with a custodian.

70 (21) “Will” includes a codicil, testamentary instrument that only appoints an executor,
71 and instrument that revokes or revises a testamentary instrument.

72 SECTION 2. APPLICABILITY.

73 (a) This act applies to:

74 (1) a fiduciary acting under a will executed before, on, or after the effective date of this
75 act; and

76 (2) a personal representative acting for a decedent who died before, on, or after the
77 effective date of this act.

78 (b) This act applies to a custodian if the user resided in this state at the time of the user’s
79 death.

80 (c) This act does not apply to a digital asset of an employer used by an employee in the
81 ordinary course of the employer’s business.

82 SECTION 3. DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS.

83 (a) A user may use an online tool to direct the custodian to disclose to a designated
84 recipient or not to disclose some or all of the user’s digital assets, including the content of
85 electronic communications. If the online tool allows the user to modify or delete a direction at
86 all times, a direction regarding disclosure using an online tool overrides a contrary direction by
87 the user in a will or other record made prior to the date of the direction made by the user using an
88 online tool.

89 (b) The user may allow or prohibit in a will or other record, disclosure to a fiduciary of
90 some or all of the user’s digital assets, including the content of electronic communications sent
91 or received by the user, and the provisions of such will or other record shall override a contrary
92 direction by the user using an online tool that was made prior to the date of such will or other
93 record.

94 (c) A user’s direction under subsection (a) or (b) overrides (i) a contrary provision in a
95 terms-of-service agreement that does not require the user to act affirmatively and distinctly from
96 the user’s assent to the terms of service and (ii) a contrary affirmative action from the user (as
97 described in the preceding clause (i)) that predates the user’s direction under subsection (a) or
98 (b).

99 (d) If the online tool has not been utilized by the user or if the custodian has not
100 provided an online tool and, in either case, if no direction regarding some or all of the digital
101 assets is provided to the fiduciary in a will or other record, the fiduciary may petition a court for
102 access to some or all of the user’s digital assets. The court shall grant such access unless it finds
103 that the fiduciary is not acting in good faith or that such access is prohibited by applicable federal
104 law.

105 SECTION 4. TERMS-OF-SERVICE AGREEMENT.

106 (a) Except as otherwise provided in Section 3, this act does not change or impair a right
107 of a custodian or a user under a terms-of-service agreement to access and use digital assets of the
108 user.

109 (b) Except as otherwise provided in Section 3, this act does not give a fiduciary or
110 designated recipient any new or expanded rights other than those held by the user for whom, or
111 for whose estate, the fiduciary or designated recipient acts or represents.

112 (c) A fiduciary's or designated recipient's access to digital assets may be modified or
113 eliminated by a user, or by federal law, or, subject to Section 3(c), by a terms-of-service
114 agreement if the user has not provided a subsequent direction under Section 3(a) or Section 3(b)
115 or by a court order issued under Section 3(d).

116 SECTION 5. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

117 (a) When disclosing digital assets of a user under this act, the custodian shall, in
118 accordance with the direction provided under Section 3(a) or Section 3(b) or a court order issued
119 under Section 3(d):

120 (1) if requested by the fiduciary or designated recipient, grant a fiduciary or designated
121 recipient full access to the user's account;

122 (2) subject to Section 5(a)(3)(d), grant a fiduciary or designated recipient partial access to
123 the user's account to the extent that such partial access is requested by a fiduciary or designated
124 recipient; or

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

128 (b) A custodian may assess a reasonable administrative charge for the cost of disclosing
129 digital assets under this act.

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

131 (d) If a user directs or a fiduciary requests a custodian to disclose under this act some, but
132 not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the
133 assets would impose an undue burden on the custodian. If the custodian believes the direction or
134 request imposes an undue burden, the custodian or fiduciary may seek an order from the court to
135 disclose:

136 (1) a subset limited by date of the user's digital assets;

137 (2) all of the user's digital assets to the fiduciary or designated recipient;

138 (3) none of the user's digital assets; or

139 (4) all of the user's digital assets to the court for review in camera.

140 SECTION 6. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS
141 OF DECEASED USER.

142 If a deceased user consented or a court directs disclosure of the contents of electronic
143 communications of the user, the custodian shall disclose to the personal representative of the
144 estate of the user the content of an electronic communication sent or received by the user if the
145 personal representative gives the custodian:

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

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

148 (3) a certified copy of the letter of appointment of the personal representative or a small
149 estate affidavit or court order;

150 (4) unless the user provided direction using an online tool, (i) a copy of the user's will,
151 trust, power of attorney, or other record evidencing the user's consent to disclosure of the content
152 of electronic communications, (ii) a court order acknowledging that user consented to the
153 disclosure of the content of electronic communications to the personal representative under the
154 user's will, trust, power of attorney or other record or (iii) a court order issued under Section
155 3(d); and

156 (5) if requested by the custodian:

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

159 (B) evidence linking the account to the user.

160 SECTION 7. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER.

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

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

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

167 (3) a certified copy of the letter of appointment of the representative or a small estate
168 affidavit or court order; and

169 (4) if requested by the custodian:

- 170 (A) a number, username, address, or other unique subscriber or account identifier
171 assigned by the custodian to identify the user's account;
- 172 (B) evidence linking the account to the user;
- 173 (C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary
174 for administration of the estate; or
- 175 (D) a finding by the court that:
- 176 (i) the user had a specific account with the custodian, identifiable by the
177 information specified in subparagraph (A); or
- 178 (ii) disclosure of the user's digital assets is reasonably necessary for
179 administration of the estate.

180 SECTION 8. FIDUCIARY DUTY AND AUTHORITY.

181 (a) The user's rights in digital assets, including the content of electronic communications,
182 constitute property of the estate of the user to be managed consistent with the legal duties
183 imposed on a fiduciary charged with managing tangible property, including:

- 184 (1) the duty of care;
- 185 (2) the duty of loyalty; and
- 186 (3) the duty of confidentiality.

187 (b) A fiduciary's or designated recipient's authority with respect to a digital asset of a
188 user:

189 (1) except as otherwise provided in Section 3, is subject to the applicable terms of
190 service;

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

192 (3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

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

194 (c) A fiduciary with authority over the property of a decedent has the right to access any
195 digital asset in which the decedent had a right or interest and that is not held by a custodian or
196 subject to a terms-of-service agreement.

197 (d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of
198 the property of the decedent for the purpose of applicable computer fraud and unauthorized
199 computer access laws, including section 120F of chapter 266 of the General Laws.

200 (e) A fiduciary with authority over the tangible, personal property of a decedent:

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

202 (2) is an authorized user for the purpose of computer fraud and unauthorized
203 computer access laws, including section 120F of chapter 266 of the General Laws.

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

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

- 209 (1) a certified copy of the death certificate of the user;
- 210 (2) a certified copy of the letter of appointment of the representative or a small
211 estate affidavit or court order, giving the fiduciary authority over the account; and
- 212 (3) if requested by the custodian:
- 213 (A) a number, username, address, or other unique subscriber or account identifier
214 assigned by the custodian to identify the user's account;
- 215 (B) evidence linking the account to the user; or
- 216 (C) a finding by the court that the user had a specific account with the
217 custodian, identifiable by the information specified in subparagraph (A).

218 SECTION 9. CUSTODIAN COMPLIANCE AND IMMUNITY.

219 (a) Not later than 60 days after receipt of the information required under Sections 6
220 through 8, a custodian shall comply with a request under this act from a fiduciary or designated
221 recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the
222 fiduciary or designated recipient may apply to the court for an order directing compliance.

223 (b) A custodian may notify the user that a request for disclosure or to terminate an
224 account was made under this act.

225 (c) A custodian may deny a request under this act from a fiduciary or designated recipient
226 for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful
227 access to the account following the receipt of the fiduciary's request.

228 (d) A custodian and its officers, employees, and agents are immune from liability for an
229 act or omission done in good faith in compliance with this act.