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POLICY



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Allowing Executors To Act for Deceased Individuals Under State Data Privacy Laws

EXECUTIVE SUMMARY

State data-privacy regulations should be updated to explicitly allow an authorized agent to make data requests on behalf of a deceased user. These laws, differently implemented across states, allow residents to request access to data, delete that data, and gain information about how it has been collected, used, or sold. To take two examples, California and Minnesota both have regulations that allow an authorized agent to act on behalf of an individual, but do not consider cases where a deceased individual did not authorize an agent before their death. Updating these regulations to allow an agent to act on behalf of a deceased individual would clarify the law and benefit survivors managing a loved one's digital estate.

BACKGROUND

Managing someone's "digital estate," the data and online accounts they leave behind following death, is becoming more critical as banking, social activities, and other services move online. Currently, executors are given authority to manage data on an ad hoc basis, largely based on digital platform rules and the preparedness level of the deceased. In California, the [California Consumer Privacy Act \(CCPA\)](#) allows individuals to ask companies about what data companies have about them, and to request that data be deleted. The CCPA also allows people with power of attorney to manage data on behalf of another individual. In Minnesota, the [Government Data Practices Act \(GDPA\)](#) regulates collection, storage, and access to government data, including the rights of individual data subjects. In particular, it determines when and how the government must disclose private data to the individual "data subject," and allows an "authorized representative" to act on behalf of the subject.

Neither bill, however, explicitly allows a fiduciary or court-appointed



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ed executor to access or delete data on behalf of the deceased. [Most persons in the United States do not have wills](#), according to a 2016 Gallup poll, meaning that estates are frequently administered by an executor appointed by a probate court. This executor is not considered in existing data privacy regulations, but should be allowed to manage data just as can a person with power of attorney.

SOLUTION

Data privacy laws like the CCPA and GDPR can address these concerns by explicitly defining a category of authorized agents that includes executors, trustees, and conservators of an estate. Expressly including these actors as authorized agents would protect the privacy of decedents who did not choose an agent before their death.

This would not grant an executor unprecedented access to a decedent's data. Most states have already enacted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)¹, which allows a user to give an authorized fiduciary agent access to their accounts after their death. However, even in states where this is an option, many individuals do not make such designations.

Moreover, gaining legitimate access to online information remains a challenge even where such a designation is made because many platforms do not have features that allow an executor to inherit an account. States can reduce the friction of managing a deceased user's estate by allowing posthumous access in their data privacy laws. Appendix A provides specific suggestions for improving the laws in California and Minnesota.

CONCLUSION

Small changes to state data privacy regulations will help executors access and manage the data of deceased individuals. Existing regulations in California and Minnesota already encompass the need for posthumous data management. They should also allow executors who are appointed by the court to manage the data of deceased individuals.

¹ See the list of states that have enacted RUFADAA and a summary of the legislation at "Fiduciary Access to Digital Assets Act, Revised," Uniform Law Commission (last accessed May 4, 2020), <https://bit.ly/2AQqws1>

California and Minnesota, along with other states that have data privacy laws, can make small regulatory changes to allow court-appointed executors to manage data posthumously.

CALIFORNIA

The updated CCPA regulations released in February 2020 include extensions to section 999.326 of Chapter 20, Article 1, of the California Code of Regulations, which governs how authorized agents may act on behalf of individuals. See Appendix B for the text of the updated regulations.

Subsections (b) and (c): Include Executors as Authorized Agents

To include conservators as authorized agents within the CCPA, we suggest the following changes to §999.326 (b) and (c):

(b) Subsection (a) does not apply when a consumer has provided the authorized agent with power of attorney pursuant to Probate Code sections 4000 to 4465 **or is acting as the conservator of an estate pursuant to Probate Code sections 2400–2595.**

(c) A business may deny a request from an authorized agent that does not submit proof that they have been authorized by the consumer **or through a court order** to act on their behalf.

The change to subsection (b) is necessary because most people do not appoint an agent with power of attorney to manage their assets. The existing text of the CCPA rightfully considers the case where an authorized agent may be acting on behalf of a deceased or incapacitated individual, as stated in § 999.326 (b). Because most Americans do not have wills, estate executors are often court-appointed under intestate succession laws. In these instances, a power of attorney document may not have been created. An executor of an estate nevertheless should be able to file requests under CCPA in order to effectively manage the decedent's online data.

Similarly, the existing text of subsection (c) only considers agents that have been directly authorized by the decedent. To account for those individuals who do not leave wills and thus do not designate an authorized agent, subsection (c) should be expanded to include court-appointed executors.

Subsection (e): Exemptions for Authorized Agents Managing Estates

Section (e) should be expanded to allow authorized agents to request information as required to manage a user's estate upon their death. The phrase "*to fulfill the consumer's requests*" implies there is an understood need for agents to act on behalf of a consumer who is no longer able to act on a request directly, but in the event of an intestate death, the consumer's request may be implicit, rather than explicitly requested. Alternatively, a consumer may have granted power of attorney to an authorized agent, but not explicitly stated how their data should be managed or destroyed following their death.

As currently written, section (e) would prohibit the conservator of an estate from using the deceased's online data to resolve an estate after a consumer has passed away unless they have power of attorney, but online providers increasingly hold valuable data related to a consumer's property. Section (e) should grant permission to an authorized agent to request data about a consumer in order to manage their estate. For example, an executor might need access to non-banking financial information like the contents of cryptocurrency accounts. Accordingly, we propose the following changes to section (e):

(e) An authorized agent shall not use a consumer's personal information, or any information collected from or about the consumer, for any purpose other than to fulfill the consumer's requests, *to resolve the estate of a deceased user*, for verification, or for fraud prevention.

MINNESOTA

The [Minnesota Government Data Practices Act \(GDPA\)](#) regulates collection, storage, and access to government data, including the rights of individual data subjects. In particular, Chapter 13, [Section 13.04](#) of the Minnesota statutes determines when and how the government must disclose private data to the individual "subject of data." Regulations further clarifying this statute were promulgated in [Section 1205.04](#) of the Minnesota Department of Administration rules. Crucially, this section of the rules notes that an "authorized representative" may make a data request on behalf of a data subject.

In those procedures, the responsible authority shall provide for reasonable measures to assure, in those instances where an individual who seeks to gain access to private data asserts that he or she is the subject of that data or the authorized representative of the data subject, that the individual making the assertion is in fact the subject of the data or the authorized representative of the data subject.

The “authorized representative,” however, is not defined in the GDPR rule. Elsewhere in Minnesota regulations, in subdivision 2(g) of the [Consumer Support Program](#), “authorized representative” is defined as:

an individual designated by the person or their legal representative to act on their behalf. This individual may be a family member, guardian, representative payee, or other individual designated by the person or their legal representative, if any, to assist in purchasing and arranging for supports. For the purposes of this section, an authorized representative is at least 18 years of age.

This definition should be mentioned specifically in the GDPR rules and extended to include court-appointed executors for deceased individuals.

We suggest that regulators add a definition for “authorized representative” in Chapter 1205 of the Minnesota Administrative Rules, Data Practices, as follows:

1205.0200 DEFINITIONS.

“Subp. 17. **Authorized representative.** “Authorized representative” means an individual designated by the person, their legal representative, or a court order to act on their behalf. For the purposes of this section, an authorized representative is at least 18 years of age.”

Original language defining agents in the California Consumer Privacy Act regulations, as of the February 7, 2020 version.

§ 999.326. Authorized Agent

(a) When a consumer uses an authorized agent to submit a request to know or a request to delete, a business may require that the consumer do the following:

- (1) Provide the authorized agent written and signed permission to do so;
- (2) Verify their own identity directly with the business;
- (3) Directly confirm with the business that they provided the authorized agent permission to submit the request.

(b) Subsection (a) does not apply when a consumer has provided the authorized agent with power of attorney pursuant to Probate Code sections 4000 to 4465.

(c) A business may deny a request from an authorized agent that does not submit proof that they have been authorized by the consumer to act on their behalf.

(d) An authorized agent shall implement and maintain reasonable security procedures and practices to protect the consumer's information.

(e) An authorized agent shall not use a consumer's personal information, or any information collected from or about the consumer, for any purpose other than to fulfill the consumer's requests, for verification, or for fraud prevention.

§ 999.301(c)–The definition for 'Authorized agent' should be expanded to include legal representatives acting on behalf of a deceased user in both intestate cases and when taken as part of a fiduciary duty through resolution of an estate, trust, or will of a decedent.

§ 999.315(g)–Authorizations should not require a signed document from the consumer if the authorized agent is authorized through a court order on behalf of a deceased consumer