

**A-Engrossed**  
**Senate Bill 369**

Ordered by the Senate April 30  
Including Senate Amendments dated April 30

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**SUMMARY**

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

*[Enacts Uniform Fiduciary Access to Digital Assets Act.]*

*[Authorizes]* **Delineates rights of certain fiduciaries to access digital assets, catalog and content of electronic communications [and digital assets of other person or] of decedent, protected person, principal under power of attorney and settlor of trust.** *[Sets forth procedures for obtaining access and control of digital assets. Sets forth responsibilities of custodians of digital assets.]* **Directs custodian to comply with fiduciary's request for catalog of electronic communications upon request within 60 days.**

**Requires custodian to offer account holders affirmative means of creating record of intention that indicates how digital assets and catalog and content of electronic communications of account holder are to be treated after set period of inactivity or upon receipt of request for disclosure.**

**Authorizes fiduciary for certain account holders to submit to custodian notarized form requesting disclosure of digital asset or content of electronic communications. Sets forth information required in form.**

**Authorizes fiduciary to petition court for right to access digital asset, catalog and content of electronic communications upon refusal or failure of custodian to disclose digital asset or catalog or content of electronic communications. Requires court to consider, make written findings and enter order within 30 days of notice of petition.**

**Provides that custodian is immune from liability for acts done in good faith in compliance with Act.**

**A BILL FOR AN ACT**

1  
2 Relating to access to digital assets.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. As used in sections 1 to 13 of this 2015 Act:**

5 (1) **"Account holder" means:**

6 (a) **A person that has entered into a terms of service agreement with a custodian; or**

7 (b) **A fiduciary for a person that has entered into a terms of service agreement.**

8 (2) **"Agent" means a person designated as an agent under a power of attorney in accordance with ORS 127.005 to 127.045.**

9  
10 (3) **"Catalog of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the electronic communication and the subject line of the electronic communication.**

11 (4) **"Conservator" has the meaning given that term in ORS 125.005.**

12 (5) **"Content of an electronic communication" means information concerning the substance or meaning of an electronic communication that:**

13 (a) **Has been sent or received by an account holder;**

14  
15  
16  
**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (b) Is held in electronic storage by a custodian that is an electronic communication ser-  
2 vice or is carried or maintained by a custodian that is a remote computing service; and

3 (c) Is not readily available to the public.

4 (6) “Court” means a circuit court in this state.

5 (7) “Custodian” means a person that carries, maintains or stores a digital asset of an  
6 account holder.

7 (8) “Digital asset” means an electronic record but does not include an underlying asset  
8 or liability unless the asset or liability is itself an electronic record.

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

11 (10) “Electronic communication” means a digital asset stored by an electronic commu-  
12 nication service or carried or maintained by a remote computing service, and includes but  
13 is not limited to a catalog of electronic communications and the content of an electronic  
14 communication.

15 (11) “Electronic communication service” means a custodian that provides to the public  
16 the ability to send or receive an electronic communication.

17 (12) “Fiduciary” means a person that is an original, additional or successor personal  
18 representative, conservator, agent or trustee.

19 (13) “Information” includes data, text, images, videos, sounds, codes, computer programs,  
20 software, databases and similar intelligence of any nature.

21 (14) “Person” means an individual, corporation, estate, business or nonprofit entity,  
22 public corporation, government or governmental subdivision, agency, or instrumentality, or  
23 other legal entity.

24 (15) “Personal representative” means an executor, administrator, successor personal  
25 representative, special administrator or a person legally authorized to perform substantially  
26 the same functions.

27 (16) “Power of attorney” means a record that grants an agent authority to act in the  
28 place of a principal.

29 (17) “Principal” means a person who grants authority to an agent in a power of attorney.

30 (18) “Protected person” means an individual for whom a conservator has been appointed  
31 or for whom an application is pending for the appointment of a conservator.

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

34 (20) “Remote computing service” means a custodian that provides to the public computer  
35 processing services or the storage of digital assets by means of an electronic communi-  
36 cations system as defined in 18 U.S.C. 2510(14).

37 (21) “Terms of service agreement” means an agreement that controls the relationship  
38 between an account holder and a custodian.

39 (22) “Trustee” means a person with legal title to an asset pursuant to an agreement or  
40 declaration that creates a beneficial interest in others.

41 (23) “Will” includes a codicil, testamentary instrument that only appoints an executor  
42 and an instrument that revokes or revives another will or testamentary instrument.

43 **SECTION 2.** Subject to section 11 (2) of this 2015 Act and unless otherwise provided by  
44 the court or the will of a decedent, a personal representative of the decedent has a right to  
45 access:

1 (1) The content of an electronic communication if the custodian is permitted to disclose  
2 the content under the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702(b);

3 (2) The catalog of electronic communications sent or received by the decedent; and

4 (3) Any other digital asset in which the decedent at death had a right or interest.

5 **SECTION 3.** Subject to section 11 (2) of this 2015 Act, the court, after notice and an op-  
6 portunity to be heard, may authorize a conservator to access:

7 (1) The content of an electronic communication if the custodian is permitted to disclose  
8 the content under the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702(b);

9 (2) The catalog of electronic communications sent or received by the protected person;  
10 and

11 (3) Any other digital asset in which the protected person has a right or interest.

12 **SECTION 4.** (1) To the extent a power of attorney expressly grants authority to an agent  
13 over the content of an electronic communication of the principal and subject to section 11  
14 (2) of this 2015 Act, the agent has a right to access the content of an electronic communi-  
15 cation if the custodian is permitted to disclose the content under the Electronic Communi-  
16 cations Privacy Act of 1986, 18 U.S.C. 2702(b).

17 (2) Unless otherwise provided by a power of attorney or the court, an agent has a right  
18 to access:

19 (a) The catalog of electronic communications sent or received by the principal; and

20 (b) Any other digital asset in which the principal has a right or interest.

21 **SECTION 5.** Subject to section 11 (2) of this 2015 Act and unless otherwise provided by  
22 the court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

23 (1) That is an original account holder, has a right to access each digital asset held in  
24 trust, including the catalog of electronic communications sent or received by the trustee and  
25 the content of an electronic communication; and

26 (2) That is not an original account holder, has a right to access:

27 (a) The content of an electronic communication if the custodian is permitted to disclose  
28 the content under the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702(b);

29 (b) The catalog of electronic communications sent or received by the original or any  
30 successor account holder; and

31 (c) Any other digital asset of the original or any successor account holder.

32 **SECTION 6.** (1) Subject to section 11 (2) of this 2015 Act and unless otherwise provided  
33 by the court, the will of a decedent, the power of attorney of a principal or the record of  
34 intention created by an account holder pursuant to section 8 of this 2015 Act, a personal  
35 representative of the decedent, a conservator and an agent under a power of attorney have  
36 a right to the catalog of electronic communications sent or received by the decedent, pro-  
37 tected person or principal.

38 (2) A custodian shall comply with a fiduciary's request for the catalog of electronic  
39 communications to the extent permitted by copyright law not later than 60 days after receipt  
40 of the request if the fiduciary complies with the following:

41 (a) If a request under this section is made by a personal representative, the request must  
42 be accompanied by a certified copy of the letter of appointment of the representative, or a  
43 small estate affidavit filed under ORS 114.515 or other court order.

44 (b) If a request under this section is made by a conservator, the request must be ac-  
45 companied by a certified copy of the letters of conservatorship issued by the court under

1 **ORS 125.405.**

2 (c) If a request under this section is made by an agent under a power of attorney, the  
3 request must be accompanied by a copy of the power of attorney that authorizes the agent  
4 to exercise authority over the catalog of electronic communications and a certification by  
5 the agent, under penalty of perjury, that the power of attorney is in effect.

6 (3) A custodian may not unduly restrict the manner in which a catalog of electronic  
7 communications is provided to a fiduciary. The custodian must reasonably provide access  
8 to the catalog of electronic communications and provide a printed copy of the catalog upon  
9 request.

10 (4) If the custodian fails to comply with the request upon the fiduciary's compliance with  
11 subsection (2) of this section, the fiduciary may apply to the court for an order directing  
12 compliance under section 10 of this 2015 Act. The application must show that the catalog of  
13 electronic communications is necessary for the administration of the estate, conservatorship  
14 or execution of the duties and powers under a power of attorney.

15 **SECTION 7.** (1) Subject to section 11 (2) of this 2015 Act and unless otherwise provided  
16 by the court, the settlor in the terms of a trust or the settlor in a record of intention created  
17 by the settlor as an account holder pursuant to section 8 of this 2015 Act, a trustee has a  
18 right to access the catalog of electronic communications sent or received by the settlor as  
19 an account holder.

20 (2) A custodian shall comply with a trustee's request for access to the catalog of elec-  
21 tronic communications if the request is accompanied by:

22 (a) A certified copy of the trust instrument; or

23 (b) A certification of trust under ORS 130.860 that authorizes the trustee to exercise  
24 authority over the catalog of electronic communications, is signed or otherwise  
25 authenticated by the trustee, states that the trust has not been revoked, modified or  
26 amended in a manner that would cause the representations contained in the certification of  
27 trust to be incorrect and contains the following information:

28 (A) That the trust exists and the date the trust instrument was executed;

29 (B) The identity of the settlor;

30 (C) The identity and address of the trustee;

31 (D) That there is nothing inconsistent in the trust with respect to the trustee's powers  
32 over the catalog of electronic communications;

33 (E) Whether the trust is revocable and the identity of any person holding a power to  
34 revoke the trust; and

35 (F) Whether a cotrustee has authority to sign or otherwise authenticate, and whether  
36 all or fewer than all cotrustees are required to exercise powers of the trustee.

37 (3) A custodian shall comply with a request made under this section not later than 60  
38 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for  
39 an order directing compliance under section 10 of this 2015 Act.

40 (4) A custodian that receives a certification of trust under ORS 130.860 may require the  
41 trustee to provide copies of excerpts from the original trust instrument and later amend-  
42 ments that designate the trustee and confer on the trustee the right to access the catalog  
43 of electronic communications sent or received by the settlor.

44 (5) A custodian that acts in reliance on a certification of trust under ORS 130.860 without  
45 knowledge that the representations contained in it are incorrect is not liable to any person

1 for so acting and may assume without inquiry the existence of facts stated in the certifica-  
2 tion.

3 **SECTION 8.** (1)(a) At the time an account holder enters into a terms of service agree-  
4 ment with a custodian, the custodian shall offer to the account holder an affirmative means  
5 of creating a record of intention that indicates how the account holder intends that the  
6 digital assets, content of electronic communications and catalog of electronic communi-  
7 cations of the account holder may be treated by the custodian after a set period of inactivity  
8 or upon receipt of a request for disclosure. The record of intention is not a part of the terms  
9 of service agreement.

10 (b) A custodian shall make an offer as described in paragraph (a) of this subsection to  
11 any existing account holder with a current terms of service agreement with the custodian  
12 within six months after the effective date of this 2015 Act.

13 (2) The offer to create a record of intention under subsection (1) of this section must be  
14 made conspicuously at the time an account holder enters into a terms of service agreement  
15 with a custodian. The account holder must affirmatively indicate whether or not the account  
16 holder desires to create a record of intention.

17 (3) The offer to create a record of intention must include a nonexclusive list of options  
18 that may be individually selected by the account holder, including but not limited to options  
19 for disclosure that specify to whom disclosure may be made, the circumstances under which  
20 disclosure may be made and what portions of the digital assets, content of electronic com-  
21 munications or catalog of electronic communications may be disclosed.

22 (4) The custodian shall comply with the record of intention pursuant to its terms and is  
23 authorized to disclose the digital assets, content of electronic communications and catalog  
24 of electronic communications of the account holder as provided in the record of intention.  
25 The custodian shall not be liable in any civil or criminal action for compliance in good faith  
26 with the provisions of a record of intention made under this section.

27 **SECTION 9.** (1) If an account holder has not created a record of intention under section  
28 8 of this 2015 Act, or if the record of intention created by an account holder is ambiguous  
29 or incomplete, a fiduciary may submit to a custodian a notarized form signed by the fiduciary  
30 requesting disclosure of a digital asset or the content of an electronic communication. The  
31 form must contain the following:

32 (a) Information that the account holder is, as applicable:

33 (A) Deceased;

34 (B) A protected person subject to a conservatorship;

35 (C) A principal under a power of attorney; or

36 (D) A settlor of a trust.

37 (b) Information that the account holder is a person or fiduciary that has entered into a  
38 terms of service agreement with the custodian.

39 (c) Information that identifies the account as belonging to the account holder with  
40 specificity.

41 (d) A statement that there are no other existing account holders of the account holder's  
42 account.

43 (e) A declaration that disclosure is not in violation of 18 U.S.C. 2701 et seq.

44 (f) A description of the digital asset or content of an electronic communication sought  
45 to be disclosed.

1 (g) A statement setting forth the purpose for the disclosure, how information obtained  
2 from the disclosure will be used and that the disclosure is for the purpose of administering  
3 a trust estate or the estate of a decedent or protected person, or to execute the duties and  
4 functions under a power of attorney.

5 (h) A statement that the request is not in conflict with, as applicable:

6 (A) The deceased account holder's will;

7 (B) The terms of the principal's power of attorney;

8 (C) The settlor's trust;

9 (D) Any order of the court pertaining to the digital asset or content of an electronic  
10 communication of the account holder; or

11 (E) A record of intention created by the account holder under section 8 of this 2015 Act.

12 (2) A request made under, and the form described in, subsection (1) of this section must  
13 be accompanied by the following:

14 (a) If made by a personal representative, the request must be accompanied by a certified  
15 copy of the letter of appointment of the representative, or a small estate affidavit filed under  
16 ORS 114.515 or other court order.

17 (b) If made by a conservator, the request must be accompanied by a certified copy of the  
18 court order that gives the conservator authority over the digital asset or content of an  
19 electronic communication.

20 (c) If made by an agent under a power of attorney, the request must be accompanied by  
21 a copy of the power of attorney that authorizes the agent to exercise authority over the  
22 digital asset or content of an electronic communication and a certification by the agent,  
23 under penalty of perjury, that the power of attorney is in effect.

24 (d) If made by a trustee, the request must be accompanied by:

25 (A) A certified copy of the trust instrument; or

26 (B) A certification of trust under ORS 130.860 that authorizes the trustee to exercise  
27 authority over the digital asset or content of an electronic communication, is signed or  
28 otherwise authenticated by a trustee, states that the trust has not been revoked, modified  
29 or amended in a manner that would cause the representations contained in the certification  
30 of trust to be incorrect and that contains the information described in section 7 (2)(b)(A) to  
31 (F) of this 2015 Act.

32 (3) If a custodian denies a fiduciary's request for disclosure under this section, the  
33 custodian shall provide an explanation, in writing, to the fiduciary of the reasons for the  
34 denial.

35 **SECTION 10.** (1) Upon the refusal or failure of a custodian to disclose a digital asset, the  
36 content of an electronic communication or a catalog of electronic communications under  
37 sections 1 to 13 of this 2015 Act, a fiduciary may petition the court for the right to access  
38 a digital asset, the content of an electronic communication or a catalog of electronic com-  
39 munications of an account holder who is a decedent, protected person, principal or settlor  
40 as provided in this section. The petition must be narrowly tailored and specify with  
41 particularity:

42 (a) The nature and extent of the digital asset, content of an electronic communication  
43 or catalog of electronic communications to be disclosed; and

44 (b) The purpose for which the digital asset, content of an electronic communication or  
45 catalog of electronic communications is sought and its relationship to the administration of

1 the estate, conservatorship or trust, or to the execution of the duties and powers under a  
2 power of attorney.

3 (2) The petitioner shall provide notice of the petition:

4 (a) With respect to an estate of a decedent, to heirs, devisees under prior wills and per-  
5 sons interested in the estate of the decedent who would be required to be identified and set  
6 forth in a petition for the appointment of a personal representative under ORS 113.035;

7 (b) With respect to a conservatorship, to persons entitled to notice under ORS 125.060;

8 (c) With respect to a power of attorney, to the principal; and

9 (d) With respect to a trust, to persons entitled to notice of a judicial proceeding under  
10 ORS 130.035 in the manner prescribed in that section.

11 (3) The court shall consider, make written findings and enter an order within 30 days of  
12 the date that notice of the petition was provided under subsection (2) of this section.

13 (4) A custodian shall comply with an order of the court entered under this section au-  
14 thorizing disclosure of a digital asset, some or all of the content of an electronic communi-  
15 cation or a catalog of electronic communications within 30 days of receipt of a copy of the  
16 order. A custodian shall not be liable in any civil or criminal action for compliance in good  
17 faith with a court order under this section.

18 **SECTION 11.** (1) A fiduciary that is an account holder or has been granted access to a  
19 digital asset, the content of an electronic communication or a catalog of electronic commu-  
20 nications by court order under section 10 of this 2015 Act:

21 (a) Subject to the terms of service agreement and copyright or other applicable law, may  
22 take any action concerning the digital asset, content of an electronic communication, or  
23 catalog of electronic communications, to the extent of the account holder's authority and the  
24 fiduciary's powers;

25 (b) Has, under applicable electronic privacy laws, the lawful consent of the account  
26 holder for the custodian to grant access to the digital asset or to disclose the content of an  
27 electronic communication or catalog of electronic communications to the fiduciary; and

28 (c) Is, under applicable computer fraud and unauthorized access laws, an authorized user.

29 (2) Unless an account holder, after the effective date of this 2015 Act, creates a record  
30 of intention under section 8 of this 2015 Act or agrees to a provision in a terms of service  
31 agreement that limits a fiduciary's access to a digital asset, the content of an electronic  
32 communication, or a catalog of electronic communications, of the account holder by an af-  
33 firmative act separate from the account holder's assent to other provisions of the terms of  
34 service agreement:

35 (a) A provision in a terms of service agreement that limits a fiduciary's right to access  
36 a digital asset, the content of an electronic communication, or a catalog of electronic com-  
37 munications, of the account holder is void as against the strong public policy of this state;  
38 and

39 (b) The fiduciary's access under sections 1 to 13 of this 2015 Act to a digital asset does  
40 not violate the terms of service agreement even if the terms of service agreement requires  
41 notice of a change in the account holder's status.

42 (3) A choice of law provision in a terms of service agreement is unenforceable against a  
43 fiduciary to the extent that the provision designates law that enforces a limitation described  
44 in subsection (2) of this section on a fiduciary's right to access a digital asset, the content  
45 of an electronic communication or a catalog of electronic communications.

1       **(4) If tangible personal property of a decedent, protected person, principal or settlor can**  
2 **receive, store, process or send a digital asset, a fiduciary with authority over the property**  
3 **has a right to access the property and any digital asset stored in it. The fiduciary is an**  
4 **authorized user for purposes of any applicable computer fraud and unauthorized access laws.**

5       **SECTION 12. A custodian and the custodian’s officers, employees and agents are immune**  
6 **from liability for any act done in good faith in compliance with sections 1 to 13 of this 2015**  
7 **Act.**

8       **SECTION 13. Sections 1 to 13 of this 2015 Act modify, limit or supersede the Electronic**  
9 **Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify,**  
10 **limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices**  
11 **described in 15 U.S.C. 7003(b).**

12       **SECTION 14. Sections 1 to 13 of this 2015 Act apply to:**

13       **(1) A fiduciary acting under a will, trust or power of attorney executed before, on or after**  
14 **the effective date of this 2015 Act;**

15       **(2) A personal representative acting for a decedent who died before, on or after the ef-**  
16 **fective date of this 2015 Act;**

17       **(3) A conservator appointed to act for a protected person before, on or after the effective**  
18 **date of this 2015 Act; and**

19       **(4) An existing account holder with a current terms of service agreement with a custo-**  
20 **dian on or after the effective date of this 2015 Act.**

21