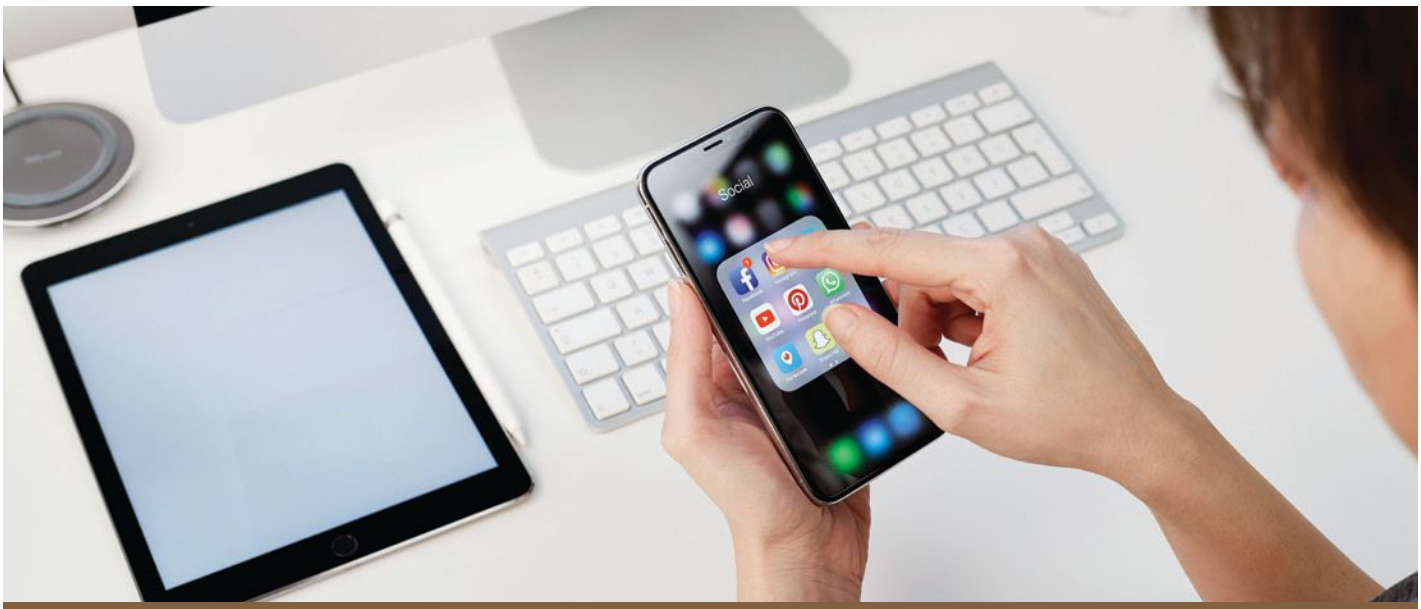


Access to Digital Assets and Content of Electronic Communications Under Michigan's Fiduciary Access to Digital Assets Act

By Chiara Mattieson

With the COVID-19 pandemic's arrival in early 2020, the already in-process shift to primarily, if not exclusively, digital or electronic recordkeeping, communication, and even administration and management of anything and everything possible accelerated. Entire estate plans were drafted and executed remotely using electronic signatures. Delays in delivery timelines and actual or perceived decreases in reliability of service by the U.S. Postal Service and other delivery services led even people who were previously reticent to turn to electronic or digital management and delivery of information and documents regarding their assets and affairs to do exactly that. One foreseeable result of this acceleration of the "shift to digital" is that digital assets[1] are an issue in an increasing number of estate planning, estate and trust administration, and probate and trust litigation engagements. Therefore, estate planning and probate lawyers should become familiar with Michigan's Fiduciary Access to Digital Assets Act (FADAA).

BACKGROUND

Before FADAA became effective in June 2016, terms-of-service agreements and privacy policies of the various companies that make, store, or provide the digital assets (email service providers, banks, brokerage firms, cloud storage providers, etc.) determined whether, and how, family members of decedents and family members of and fiduciaries for incapacitated persons could gain access to those assets. More often than not, no provisions for heirs or fiduciaries to gain access existed. Unless the deceased or incapacitated user provided usernames and passwords, fiduciaries and heirs could not access them. The digital assets could be deleted by the companies that controlled them or linger in perpetuity on the internet long after a person's death or loss of capacity, with no ability for fiduciaries or the family to control their maintenance or use. Delays, frustrations, and sometimes the loss of valuable items or information were the norm. It was a widely known issue, and in response, "at least 48 states and the U.S. Virgin Islands have enacted laws addressing access to email, social media accounts, microblogging or other website accounts, or other electronically stored assets, upon a person's incapacity or death."[2]

The Uniform Law Commission[3] (ULC) completed the original Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014. That law provided for what many might consider the obvious solution: Generally speaking, this original uniform act provided that after a fiduciary is appointed for an incapacitated person or a deceased person's estate, the fiduciary will have the same right to access and manage a digital asset that the deceased or incapacitated person would. If the fiduciary did not have the username and password for access to any assets, the company would have to provide access to the duly appointed fiduciary upon their request. Tech companies and privacy groups opposed this iteration of the act, and only Delaware passed a law based upon it.

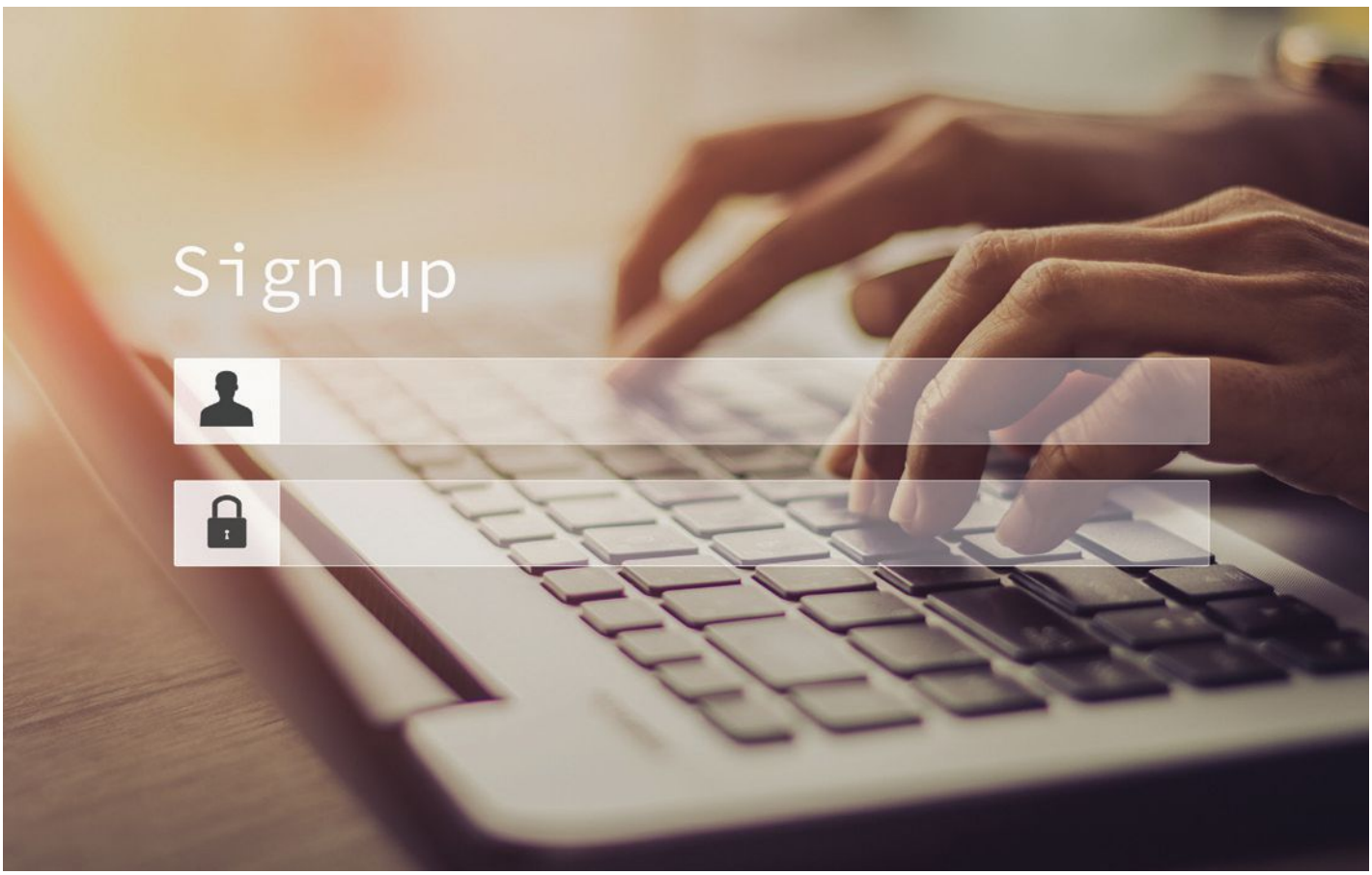
The ULC then developed a revised version of the act: the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). The RUFADAA restricts the right of a fiduciary or family members to access and control a decedent's or incapacitated person's digital assets, and they do not, in effect, "step into the shoes of the decedent or incapacitated person" with regard to digital assets. Michigan's FADAA is a version of the RUFADAA, and knowing up front that it restricts fiduciary authority related to digital assets is essential to understanding its terms and application, and adopting strategies in your planning, administration, and probate litigation practices to protect and advance your clients' interests where digital assets are involved.

MICHIGAN'S FADAA

Scope of the Act

Michigan's FADAA is codified at MCL 700.1001 through MCL 700.1018. It applies to:

- fiduciaries acting under a will or power of attorney regardless of the document's date of execution;[4]
- personal representatives acting for decedents regardless of date of death;[5]
- conservatorships regardless of date on which the conservatorship commenced;[6]



- trustees acting under trusts regardless of the date of the trust's creation;[7] and
- digital custodians[8] of any digital assets so long as the user[9] of the asset resides in Michigan or resided in Michigan at the time of their death.[10]

FADAA explicitly limits itself from impairing "an accrued right or an action taken in a proceeding before the effective date of [the] act"[11] and, importantly, "does not apply to a digital asset of an employer used by an employee in the ordinary course of business."[12]

User-Provided Direction Before Death or Incapacity

Under FADAA, a user can direct a digital custodian to use or disclose some or all of their digital assets to designated recipients via online tools or by permitting or prohibiting such disclosure to a fiduciary in the user's will, trust, power of attorney, or other record.[13] Online tools are services provided by digital custodians. They are distinct from terms-of-service agreements (TOSAs), and they are how a user provides the custodian directions for disclosure or nondisclosure of digital assets to third persons.[14] TOSAs, which are the agreements that control the relationship between users and digital custodians;[15] online tools; and permissions granted in wills, trusts, powers of attorney, or other records have varying priority of control under FADAA.

If there is an online tool applicable to a digital asset, and that tool "allows the user to modify or delete a direction at all times," the user's direction using the online tool takes priority over, or overrides, a contrary direction given in a will, trust, power of attorney, or other record.[16] If no direction has been given via an online tool, then direction given in a will, trust, power of attorney, or other record controls.[17] Both direction given via an online tool and direction given in a will, trust, power of attorney, or other record override any contrary provisions in TOSAs so long as those TOSA provisions do "not require the user to act affirmatively and distinctly from the user's assent to the terms-of-service agreement."[18] Notably, FADAA gives no direction as to what priority of control a user's actions under TOSA provisions that require affirmative and distinct action from the user would be given.

As a practical matter, while utilizing online tools provides direction with the highest priority of control, it is likely more difficult for users, their conservators, the personal representatives of their estates, and the trustees of their trusts to keep track of such direction. These are considerations that should be weighed by users when deciding whether or not to utilize online tools, and estate planning attorneys may wish to inquire about and discover any direction given by their clients via online tools as part of the estate planning process. Also, and important to note, if the user does not provide direction via an online tool or in their will, trust, power of attorney, or other record, "[a] fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement."[19]

Digital Custodians' Obligations and Discretion in Disclosing Digital Assets

Digital custodians are not required to simply grant a fiduciary or designated recipient full access to a user's account. While digital custodians have that option, they may also grant only partial access "sufficient to perform the tasks with which the fiduciary or designated recipient is charged," or provide a copy of an asset that the user could have accessed themselves on the date the digital custodian received the request for disclosure.[20] Digital custodians may "assess a reasonable administrative charge" for the cost of disclosure, and they are not required to disclose assets the user deleted.[21] Finally, where a user or a fiduciary directs or requests disclosure of some, but not all, assets held by a digital custodian, the digital custodian does not have to disclose the requested assets if doing so would impose an "undue burden" on the custodian. If the digital custodian believes there is an undue burden, the custodian or the fiduciary can seek an appropriate court order.[22] A designated recipient is not provided a right to seek a court order for disclosure once a digital custodian declares an undue burden prevents disclosure.

Disclosure of Electronic Communications: A Greater Burden

While emails and messages (such as through a social media messaging system) are not necessarily an exhaustive list of "electronic communications" under FADAA, they're the most commonly used. MCL 700.1007 controls disclosure of the content of these communications. It provides that if a deceased user consented, or a court directs disclosure of the content of these electronic communications, a digital custodian (emphasis added):

> ... shall disclose to the personal representative of the user the content of an electronic communication sent or received by the user *if the personal representative gives the digital custodian all of the following:*
>
> (a) A written request for disclosure in physical or electronic form.
> (b) A copy of the death certificate of the user.
> (c) A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or other court order.
> (d) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the contents of electronic communications.
> (e) *If requested by the digital custodian, any of the following:*
>
> (i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
> (ii) Evidence linking the account to the user.
> (iii) *A finding by the court that:*
>
> (A) The user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (i).
> (B) Disclosure of the content of electronic communications of the user would not violate 18 USC 2701 to 2707, 47 USC 222, or other applicable law.
> (C) Unless the user provided direction using an online tool, the user consented to disclosure of the contents of electronic communications.
> (D) Disclosure of the contents of electronic communications of the user is reasonably necessary for administration of the estate.

This provision places several potential hurdles to obtaining access to and copies of a decedent's or incapacitated person's electronic communications.

First, there's no provision for an incapacitated — but not deceased — person to consent to disclosure of content of electronic communications (such consent to have been given before the loss of capacity). Second, the provision does not provide for disclosure to anyone other than a personal representative. It appears, therefore, that designated

recipients have no right to directly pursue disclosure of the content of electronic communications. Further, under subsection (e), the digital custodian can demand information be provided that anyone other than the user themselves may not have access to or records of. Moreover, an interested person to a probate proceeding regarding a decedent's estate can petition the court for an order to limit, eliminate, or modify the personal representative's powers with respect to the decedent's digital assets.[23] The means by which an agent acting under a power of attorney that grants that agent authority over the content of electronic communications obtains access and disclosure is less burdensome, but subscriber and account identifiers and evidence linking the account to the principal may be required.[24]

These burdens imposed on efforts to obtain disclosure of the content of electronic communications may be relevant to the concerns of estate planning clients and to probate litigation clients who believe evidence found in a decedent's or incapacitated person's electronic communications is important to their case.

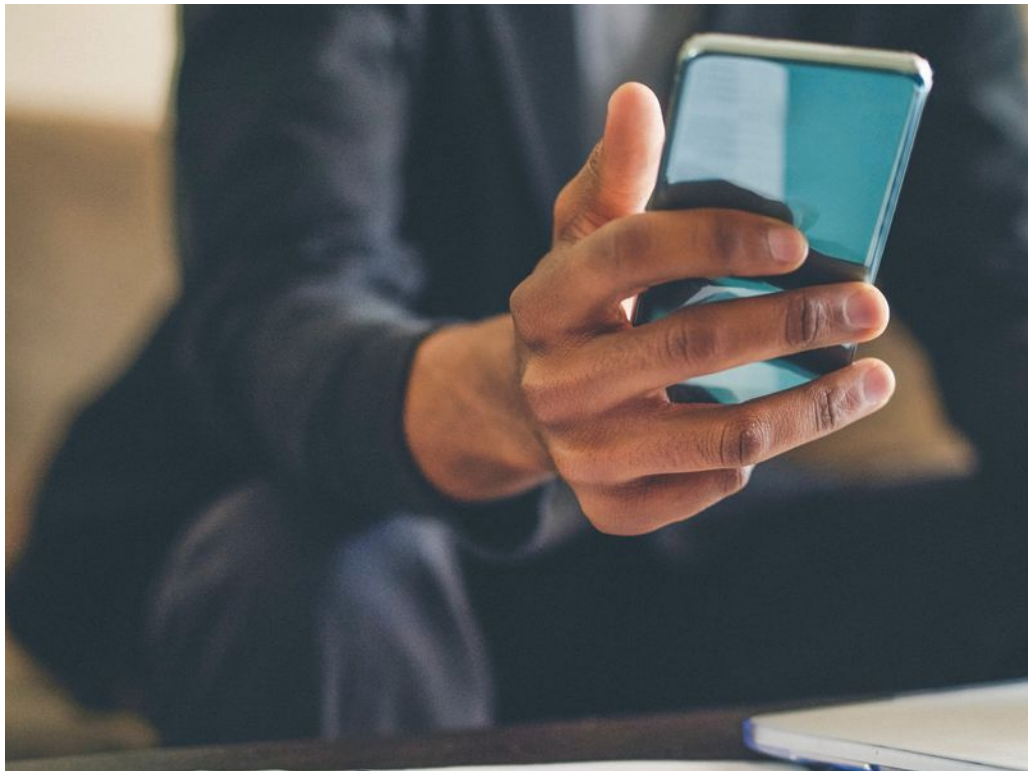
Disclosure to Trustees

If a trustee is an "original user" of an account, a digital custodian shall disclose any digital assets of the account held in trust to that trustee.[25] If a trustee is *not* an original user of an account, "[u]nless otherwise ordered by the court, directed by the user, or provided in a trust," a digital custodian shall disclose the content of electronic communications if the trustee provides *all* of the following:

> (a) A written request for disclosure in physical or electronic form.
> (b) A certificate of the trust under [MCL 700.7913] ... that includes consent to disclosure of the contents of electronic communications to the trustee.
> (c) A certification of the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.
> (d) If requested by the digital custodian, any of the following:
> (i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.
> (ii) Evidence linking the account to the trust.[26]

"A digital custodian that receives a certificate of trust ... may require the trustee to provide copies of excerpts from the original trust instrument and later amendments that designate the trustee and, if the trustee is requesting content of electronic communications, that includes consent to disclosure of the contents of electronic communications to the trustee."[27] However, if a custodian demands the trust instrument, except as detailed here pursuant to MCL 700.1016(3), the custodian is liable for damages under MCL 700.7913.[28]

In light of this provision, estate planning attorneys may consider including direction in their trusts to digital custodians in trusts to make disclosure to trustees as if they are an "original user" of an account regardless of whether or not they are, in actuality, original users.



Conservator Access to Digital Assets

MCL 700.1014 requires that the court provide an opportunity for a hearing and issue an order granting a conservator access to the digital assets of a protected person before such access can be provided by a digital custodian. Once such an order is entered, unless the user directed otherwise or a court orders otherwise, a digital custodian shall disclose to a conservator the catalogue of electronic communications[29] sent and received by the protected person and any other digital assets of the protected person *other than* the content of electronic communications upon provision by the conservator of a written request, a certified copy of the court order granting the conservator authority over the protected person's digital assets, and certain identifying information and evidence if the digital custodian requests it.[30] Note that no means is provided by which a conservator gets access to the content of a protected person's electronic communications. A conservator may also request that a protected person's account be suspended or terminated for good cause.[31]

Fiduciaries' Duties Regarding Digital Assets and Good Faith Immunity from Liability

Fiduciaries' duties of care, loyalty, and confidentiality apply to digital assets just as they do to management of tangible personal property.[32] Fiduciaries' and designated recipients' authority over digital assets is subject to the applicable TOSAs and other applicable laws, such as copyright laws; is limited to the scope of the fiduciaries' duties; and may not be used to impersonate the user.[33] Fiduciaries with authority over the property of a decedent, protected person, principal, or settlor have the right to access digital assets in which the decedent, protected person, etc., had a right or interest *and that is not held by a digital custodian or subject to a TOSA*.[34] A fiduciary acting within the scope of their duties, and fiduciaries with authority over tangible personal property, are authorized

users of the property of the decedent, protected person, etc., for purposes of applicable computer fraud and unauthorized computer access laws.[35] Fiduciaries have the ability to get information needed to terminate a user's account.[36] Finally, fiduciaries are immune from liability for actions done in good faith in compliance with the act.[37]

Digital Custodian Compliance

Once a digital custodian receives all information required to support a request to disclose digital assets or close an account under MCL 700.1007-1014, the custodian must comply within 56 days. If the digital custodian fails to comply, the fiduciary or designated recipient may petition the court for an order directing compliance.[38] However, "[a] digital custodian may deny a request ... for disclosure or to terminate an account if the digital custodian is aware of any lawful access to the account following the receipt of the request."[39] Moreover, a digital custodian may obtain or require someone requesting disclosure or termination of the account to obtain certain court orders regarding the disclosure or termination.[40] Finally, as with fiduciaries requesting or obtaining disclosure or termination of accounts, "[a] digital custodian and its officers, employees, and agents are immune from liability for an action done in good faith in compliance with this act."[41]

CONCLUSION

Michigan's FADAA, based on the Revised Uniform Fiduciary Access to Digital Assets Act, does not provide unlimited access to a decedent's or protected person's digital assets, even for fiduciaries. Rather, significant protections for privacy of decedents and protected persons, and provisions to protect digital custodians from certain burdens of providing access, are part and parcel of the law. Estate planning lawyers should be aware of digital assets disclosure and access parameters and limitations under FADAA, and may take steps to see that any clients whose interests could be impacted based on ability to access digital assets after a death or loss of capacity are informed and their interests protected to the extent that proactive drafting of estate planning documents can accomplish that goal. For lawyers representing fiduciaries in administering estates and trusts, care should be taken to consider FADAA compliance in that administration. Finally, for probate litigators, lawyers need to understand how to obtain access and information under FADAA, as well as the limitations as to what can be accessed under the law, to work efficiently in litigation, evaluate case viability, and manage client expectations.

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Footnotes:

1. "Digital asset" means an electronic record in which a user has a right or interest. Digital asset does not include an underlying asset or liability unless the asset or liability is itself an electronic record. MCL 700.1002(j).
2. "Access to Digital Assets of Decedents," National Conference of State Legislatures, *ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx* (March 26, 2021).
3. The Uniform Law Commission is a body of "practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical." *uniformlaws.org/aboutulc/overview* (accessed October 14, 2021).
4. MCL 700.1003(1).
5. *Id.*
6. *Id.*
7. *Id.*
8. "Digital custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user. MCL 700.1002(k). These are the companies, or other entities, that make, store, or provide digital assets, like social media companies, email providers, banks, investment firms, cryptocurrency wallet providers, etc.
9. "User" means a person that has an account with a digital custodian. MCL 700.1002(mm). In other words, a user is the incapacitated or deceased person whose digital assets a fiduciary seeks to access and manage under FADAA.
10. MCL 700.1003(2).
11. MCL 700.1003(3).
12. MCL 700.1003(4).
13. MCL 700.1004(1) and (2).
14. MCL 700.1002(x).
15. MCL 700.1002(jj).
16. MCL 700.1004(1).
17. MCL 700.1004(2).
18. MCL 700.1004(3).
19. MCL 700.1005(3).
20. MCL 700.1006(1).
21. MCL 700.1006(2) and (3).
22. MCL 700.1006(4).
23. MCL 700.1017.
24. MCL 700.1009.
25. MCL 700.1011.
26. MCL 700.1012.
27. MCL 700.1016(3).
28. MCL 700.1016(4).
29. "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person. MCL 700.1002(d).
30. MCL 700.1014(1) and (2).
31. MCL 700.1014(3).
32. MCL 700.1015(1).
33. MCL 700.1015(2).
34. MCL 700.1015(3).
35. MCL 700.1015(4) and (5).
36. MCL 700.1015(6) and (7).
37. MCL 700.1015(8).
38. MCL 700.1016(1).
39. MCL 700.1016(7).
40. MCL 700.1016(8).
41. MCL 700.1016(9).