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**HOUSE BILL NO. 819**

Offered January 9, 2002

Prefiled January 9, 2002

A *BILL* to amend the Code of Virginia by adding a section numbered 8.01-407.1, creating a presumption of confidentiality of identity of anonymous communicators; exceptions.

Patron—Almand

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That the Code of Virginia is amended by adding a section numbered 8.01-407.1 as follows:**

§ 8.01-407.1. Identity of anonymous communicator presumed confidential; exceptions.

A. Information identifying an anonymous participant in communications is presumed confidential and shall not be disclosed by its custodians pursuant to a civil subpoena issued by a court of the Commonwealth except in accord with this section or with the consent of the anonymous communicator.

B. It is the intention of this section that the confidentiality provisions and exceptions to confidentiality set forth in this section be applicable in all civil litigations, state or federal, involving information held by an individual or nongovernmental entity domiciled in the Commonwealth. In cases where disclosure of identifying information is sought pursuant to a civil subpoena issued by a court of the Commonwealth, the following procedure shall apply unless a more expedited procedure has been ordered by a court of the Commonwealth upon consideration of the interests of each person affected thereby:

1. At least thirty days prior to the date on which disclosure is sought, a party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, along with supporting material showing:

a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where suit was filed. A copy of the communications that are the subject of the action or subpoena shall be submitted.

b. That other reasonable efforts to identify the anonymous communicator have proven fruitless.

c. That the identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense.

d. That no motion to dismiss, motion for judgment on the pleadings, or judgment as a matter of law, demurrer or summary judgment-type motion challenging the viability of the lawsuit of the underlying plaintiff is pending. The pendency of such a motion may be considered by the court in determining whether to enforce, suspend or strike the proposed disclosure obligation under the subpoena.

e. That the individuals or entities to whom the subpoena is addressed are likely to have responsive information.

f. If the subpoena sought relates to an action pending in another jurisdiction, the application shall contain a copy of the pleadings in such action, along with the mandate, writ or commission of the court where the action is pending that authorizes the discovery of the information sought in the Commonwealth.

2. Two copies of the subpoena and supporting materials set forth in subsection B. 1. a. through f. shall be served upon the person to whom it is addressed along with payment sufficient to cover postage for mailing one copy of the application within the United States by registered mail, return receipt requested.

3. Within five business days after receipt of a subpoena application calling for disclosure of identifying information concerning an anonymous communicator, the individual or entity to whom the subpoena is addressed shall (i) send an electronic mail notification to the anonymous communicator reporting that the subpoena has been received if an e-mail address is available, and (ii) dispatch one copy thereof, by registered mail or commercial delivery service, return receipt requested, to the anonymous communicator at his last known address, if any is on file with the person to whom the subpoena is addressed.

4. At least five business days prior to the date on which disclosure is sought under the subpoena, any interested person may file a detailed written objection, motion to quash, or motion for protective order. Any such papers filed by the anonymous communicator shall be served on or before the date of filing upon the party seeking the subpoena and the party to whom the subpoena is addressed. Any such papers filed by the party to whom the subpoena is addressed shall be served on or before the date of

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59 filing upon the party seeking the subpoena and the anonymous communicator whose identifying  
60 information is sought. Service is effective when it has been mailed, dispatched by commercial delivery  
61 service, transmitted by facsimile, or delivered to counsel of record and to parties having no counsel.

62 5. Any written objection, motion to quash, or motion for protective order shall set forth all grounds  
63 relied upon for denying the disclosure sought in the subpoena and shall also address to the extent  
64 feasible (i) whether the identity of the anonymous communicator has been disclosed in any way beyond  
65 its recordation in the account records of the party to whom the subpoena is addressed, (ii) whether the  
66 subpoena fails to allow a reasonable time for compliance, (iii) whether it requires disclosure of  
67 privileged or other protected matter and no exception or waiver applies, or (iv) whether it subjects a  
68 person to undue burden.

69 6. The party to whom the subpoena is addressed shall not comply with the subpoena earlier than  
70 three business days before the date on which disclosure is due, to allow the anonymous communicator  
71 the opportunity to object. If any person files a written objection, motion to quash, or motion for  
72 protective order, compliance with the subpoena shall be deferred until the appropriate court rules on  
73 the obligation to comply. If an objection or motion is made, the party serving the subpoena shall not be  
74 entitled to inspect or copy the materials except pursuant to an order of the court on behalf of which the  
75 subpoena was issued. If an objection or motion has been made, the party serving the subpoena may,  
76 upon notice to the person commanded to produce, move at any time for an order to compel the  
77 production. Two copies of any such motion to compel shall be served upon the subpoenaed party, who  
78 shall mail one copy thereof, by registered mail or commercial delivery service, return receipt requested,  
79 to the anonymous communicator whose identifying information is the subject of the subpoena at that  
80 person's last known address.

81 C. The party requesting or issuing a subpoena for information identifying an anonymous Internet  
82 communicator shall serve along with each copy of such subpoena notices in boldface capital letters in  
83 substantially this form:

84  
85 **NOTICE TO INTERNET SERVICE PROVIDER**

86 **WITHIN FIVEBUSINESS DAYS AFTER RECEIPT OF THIS SUBPOENACALLING**  
87 **FOR IDENTIFYING INFORMATION CONCERNING YOUR CLIENT, SUBSCRIBER OR**  
88 **CUSTOMER, YOU ARE REQUIRED BY § 8.01-407.1 OF THE CODE OF VIRGINIA**  
89 **TO MAIL ONE COPY THEREOF, BY REGISTERED MAIL OR COMMERCIAL DELIVERY**  
90 **SERVICE, RETURN RECEIPT REQUESTED, TO THE CLIENT, SUBSCRIBER OR**  
91 **CUSTOMER WHOSE IDENTIFYING INFORMATION IS THE SUBJECT OF THE SUBPOENA.**  
92 **AT LEAST FIVEBUSINESS DAYS PRIOR TO THE DATE ON WHICH DISCLOSURE IS**  
93 **SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE ADETAILED WRITTEN**  
94 **OBJECTION, MOTION TO QUASH OR MOTION FOR PROTECTIVE ORDER. ANY SUCH**  
95 **OBJECTION OR MOTION SHALL BE SERVED UPON THE PARTY INITIATING THE**  
96 **SUBPOENA AND UPON THE CLIENT, SUBSCRIBER OR CUSTOMER WHOSE IDENTIFYING**  
97 **INFORMATION IS SOUGHT.**

98  
99 **IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA, YOU MUST ALLOW TIME FOR**  
100 **YOUR CLIENT, SUBSCRIBER OR CUSTOMER TO FILE HIS OWN OBJECTION,**  
101 **THEREFORE YOU MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER THAN THREE**  
102 **BUSINESS DAYS BEFORE THE DISCLOSURE IS DUE.**

103 **IF YOU RECEIVE NOTICE THAT YOUR CLIENT, SUBSCRIBER OR CUSTOMER HAS**  
104 **FILED A WRITTEN OBJECTION, MOTION TO QUASH OR MOTION FOR PROTECTIVE**  
105 **ORDER REGARDING THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS**  
106 **SUBPOENA, NO DISCLOSURE PURSUANT TO THE SUBPOENA SHALL BE MADE EXCEPT**  
107 **PURSUANT TO AN ORDER OF THE COURT ON BEHALF OF WHICH THE SUBPOENA WAS**  
108 **ISSUED.**

109  
110 **NOTICE TO INTERNET USER**

111 **THE ATTACHED PAPERS MEAN THAT -----**  
112 **(INSERT NAME OF PARTY REQUESTING OR CAUSING ISSUANCE OF THE SUBPOENA)**  
113 **HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN**  
114 **ISSUED, TO YOUR INTERNET SERVICE PROVIDER -----**  
115 **(INSERTNAME OF INTERNET SERVICE PROVIDER) REQUIRING PRODUCTION OF**  
116 **INFORMATION REGARDING YOUR IDENTITY. UNLESS A DETAILED WRITTEN**  
117 **OBJECTION IS FILED WITH THE COURT, THE SERVICE PROVIDER WILL BE**

REQUIRED BY LAW TO RESPOND BY PROVIDING THE REQUIRED INFORMATION. IF YOU BELIEVE YOUR IDENTIFYING INFORMATION SHOULD NOT BE DISCLOSED AND OBJECT TO SUCH DISCLOSURE, YOU HAVE THE RIGHT TO FILE WITH THE CLERK OF COURT A DETAILED WRITTEN OBJECTION, MOTION TO QUASH THE SUBPOENA OR MOTION TO OBTAIN A PROTECTIVE ORDER. YOU MAY ELECT TO CONTACT AN ATTORNEY TO REPRESENT YOUR INTERESTS. IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR PROTECTIVE ORDER, IT SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST IN ALL INSTANCES BE FILED NO LESS THAN FIVE BUSINESS DAYS BEFORE THE DATE ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA). IF YOU ELECT TO FILE A WRITTEN OBJECTION OR MOTION AGAINST THIS SUBPOENA, YOU MUST AT THE SAME TIME SEND A COPY OF THAT OBJECTION OR MOTION TO BOTH YOUR INTERNET SERVICE PROVIDER AND THE PARTY WHO REQUESTED THE SUBPOENA. IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY FILE WRITTEN OBJECTIONS, A MOTION TO QUASH THE SUBPOENA, OR A MOTION FOR A PROTECTIVE ORDER OR YOU MAY USE THE FORM BELOW, WHICH MUST BE FILED WITH THE COURT AND SERVED UPON THE PARTY REQUESTING THE SUBPOENA AND THE INTERNET SERVICE PROVIDER BY MAILING AT LEAST FIVE BUSINESS DAYS PRIOR TO THE DATE SET IN THE SUBPOENA FOR DISCLOSURE:

-----  
Name of Court Listed on Subpoena

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Name of Party Seeking Information

Case No. -----

#### OBJECTION TO SUBPOENA DUCES TECUM

I object to the Subpoena Duces Tecum addressed to.....

for the following reasons:

[Name of Internet Service

Provider to Whom the Subpoena is Addressed]

(Please PRINT. Set forth, in detail, all reasons why the subpoena should not be complied with, and in addition, state (i) whether the identity of the anonymous communicator has been disclosed in any fashion, (ii) whether the subpoena fails to allow a reasonable time for compliance, (iii) whether it requires disclosure of privileged or other protected matter and no exception or waiver applies, or (iv) whether it subjects a person to undue burden.)

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178 .....  
179 .....  
180 .....  
181 .....  
182 .....  
183 .....  
184 .....  
185 .....  
186 *(attach additional sheets if needed)*  
187 .....  
188 .....  
189 .....  
190 *Respectfully Submitted,*  
191 .....  
192 .....  
193 .....  
194 *John Doe* .....  
195 .....  
196 .....  
197 .....  
198 *Enter e-mail nickname or other* .....  
199 .....  
200 *alias used in communicating via* .....  
201 .....  
202 *the Internet service provider to* .....  
203 .....  
204 *whom the subpoena is addressed.* .....  
205 .....  
206 .....  
207 *CERTIFICATE*  
208 .....  
209 *I hereby certify that a true copy of the above Objection to Subpoena*  
210 .....  
211 *Duces Tecum was mailed this ---- day of -----, (month, year),*  
212 .....  
213 *to*  
214 .....  
215 -----  
216 .....  
217 *(Name and address of party seeking information)and*  
218 .....  
219 -----  
220 .....  
221 *(Name and address of Internet Service Provider)*  
222 .....  
223 *John Doe* .....  
224 .....  
225 *Enter e-mail nickname or other* .....  
226 .....  
227 *alias used in communicating via* .....  
228 .....  
229 *the Internet service provider to* .....  
230 .....

231 *whom the subpoena is addressed. ....*  
232