

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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

[H 819]

Approved

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 persons communicating anonymously over the Internet.

A. In civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious, any subpoena seeking information held by a nongovernmental person or entity that would identify the tortfeasor shall be governed by the following procedure unless more expedited scheduling directions have been ordered by the court 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 the 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 subdivision 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. Except where the anonymous communicator has consented to disclosure in advance, within five business days after receipt of a subpoena and supporting materials 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 seven 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 filing upon the party seeking the subpoena and the anonymous communicator whose identifying information is sought. Service is effective when it has been mailed, dispatched by commercial delivery service, transmitted by facsimile, or delivered to counsel of record and to parties having no counsel.

5. Any written objection, motion to quash, or motion for protective order shall set forth all grounds relied upon for denying the disclosure sought in the subpoena and shall also address to the extent feasible (i) whether the identity of the anonymous communicator has been disclosed in any way beyond

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its recordation in the account records of the party to whom the subpoena is addressed, (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.

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

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

NOTICE TO INTERNET SERVICE PROVIDER

WITHIN FIVE BUSINESS DAYS AFTER RECEIPT OF THIS SUBPOENA CALLING FOR IDENTIFYING INFORMATION CONCERNING YOUR CLIENT, SUBSCRIBER OR CUSTOMER, YOU ARE REQUIRED BY § 8.01-407.1 OF THE CODE OF VIRGINIA TO MAIL ONE COPY THEREOF, BY REGISTERED MAIL OR COMMERCIAL DELIVERY SERVICE, RETURN RECEIPT REQUESTED, TO THE CLIENT, SUBSCRIBER OR CUSTOMER WHOSE IDENTIFYING INFORMATION IS THE SUBJECT OF THE SUBPOENA. AT LEAST SEVEN BUSINESS DAYS PRIOR TO THE DATE ON WHICH DISCLOSURE IS SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A DETAILED WRITTEN OBJECTION, MOTION TO QUASH OR MOTION FOR PROTECTIVE ORDER. ANY SUCH OBJECTION OR MOTION SHALL BE SERVED UPON THE PARTY INITIATING THE SUBPOENA AND UPON THE CLIENT, SUBSCRIBER OR CUSTOMER WHOSE IDENTIFYING INFORMATION IS SOUGHT.

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

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

NOTICE TO INTERNET USER

**THE ATTACHED PAPERS MEAN THAT -----
(INSERT NAME OF PARTY REQUESTING OR CAUSING ISSUANCE OF THE SUBPOENA)
HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN
ISSUED, TO YOUR INTERNET SERVICE PROVIDER -----
(INSERT NAME OF INTERNET SERVICE PROVIDER) REQUIRING PRODUCTION OF
INFORMATION REGARDING YOUR IDENTITY. UNLESS A DETAILED WRITTEN
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 SEVEN BUSINESS DAYS BEFORE THE DATE**

115 ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA). IF YOU ELECT
 116 TO FILE A WRITTEN OBJECTION OR MOTION AGAINST THIS SUBPOENA, YOU MUST
 117 AT THE SAME TIME SEND A COPY OF THAT OBJECTION OR MOTION TO BOTH YOUR
 118 INTERNET SERVICE PROVIDER AND THE PARTY WHO REQUESTED THE SUBPOENA.
 119 IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN WHOLE OR IN PART, YOU
 120 OR YOUR ATTORNEY MAY FILE A WRITTEN OBJECTION, A MOTION TO QUASH THE
 121 SUBPOENA, OR A MOTION FOR A PROTECTIVE ORDER OR YOU MAY USE THE FORM
 122 BELOW, WHICH MUST BE FILED WITH THE COURT AND SERVED UPON THE PARTY
 123 REQUESTING THE SUBPOENA AND THE INTERNET SERVICE PROVIDER BY MAILING
 124 AT LEAST SEVEN BUSINESS DAYS PRIOR TO THE DATE SET IN THE SUBPOENA FOR
 125 DISCLOSURE:

126 -----

127 Name of Court Listed on Subpoena

128 -----

129 Name of Party Seeking Information

130 Case No. -----

131 OBJECTION TO SUBPOENA DUCES TECUM

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

134
 135 for the following reasons:

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 137 [Name of Internet Service

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 139 Provider to Whom the Subpoena is Addressed]

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 141 (Please PRINT. Set forth, in detail, all reasons why the subpoena
 142 should not be complied with, and in addition, state (i) whether the
 143 identity of the anonymous communicator has been disclosed in any
 144 fashion, (ii) whether the subpoena fails to allow a reasonable
 145 time for compliance, (iii) whether it requires disclosure of
 146 privileged or other protected matter and no exception or waiver
 147 applies, or (iv) whether it subjects a person to undue burden.)
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171 (attach additional sheets if needed)
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 175 *Respectfully Submitted,*
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 179 *John Doe*
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 181
 182
 183 *Enter e-mail nickname or other*
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 185 *alias used in communicating via*
 186
 187 *the Internet service provider to*
 188
 189 *whom the subpoena is addressed.*
 190
 191 *CERTIFICATE*
 192
 193 *I hereby certify that a true copy of the above Objection to Subpoena*
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 195 *Duces Tecum was mailed this ---- day of -----, (month, year),*
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 197 *to*
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 201 *(Name and address of party seeking information)and*
 202
 203
 204
 205 *(Name and address of Internet Service Provider)*
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 207 *John Doe*
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 209 *Enter e-mail nickname or other*
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 211 *alias used in communicating via*
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 213 *the Internet service provider to*
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