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HOUSE BILL NO. 819

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 8, 2002)

(Patron Prior to Substitute— Delegate Almand)

A BILL 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.

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 its recordation in the account records of the party to whom the subpoena is addressed, (ii) whether the

60 subpoena fails to allow a reasonable time for compliance, (iii) whether it requires disclosure of
61 privileged or other protected matter and no exception or waiver applies, or (iv) whether it subjects a
62 person to undue burden.

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

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

77 **NOTICE TO INTERNET SERVICE PROVIDER**

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

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

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

100 **NOTICE TO INTERNET USER**

101 **THE ATTACHED PAPERS MEAN THAT -----**
102 **(INSERT NAME OF PARTY REQUESTING OR CAUSING ISSUANCE OF THE SUBPOENA)**
103 **HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN**
104 **ISSUED, TO YOUR INTERNET SERVICE PROVIDER -----**
105 **(INSERT NAME OF INTERNET SERVICE PROVIDER) REQUIRING PRODUCTION OF**
106 **INFORMATION REGARDING YOUR IDENTITY. UNLESS A DETAILED WRITTEN**
107 **OBJECTION IS FILED WITH THE COURT, THE SERVICE PROVIDER WILL BE**
108 **REQUIRED BY LAW TO RESPOND BY PROVIDING THE REQUIRED INFORMATION.**
109 **IF YOU BELIEVE YOUR IDENTIFYING INFORMATION SHOULD NOT BE DISCLOSED**
110 **AND OBJECT TO SUCH DISCLOSURE, YOU HAVE THE RIGHT TO FILE WITH THE**
111 **CLERK OF COURT A DETAILED WRITTEN OBJECTION, MOTION TO QUASH THE**
112 **SUBPOENA OR MOTION TO OBTAIN A PROTECTIVE ORDER. YOU MAY ELECT TO**
113 **CONTACT AN ATTORNEY TO REPRESENT YOUR INTERESTS. IF YOU ELECT TO**
114 **FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR PROTECTIVE**
115 **ORDER, IT SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST IN ALL**
116 **INSTANCES BE FILED NO LESS THAN SEVEN BUSINESS DAYS BEFORE THE DATE**
117 **ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA). IF YOU ELECT**

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

128 -----

129 Name of Court Listed on Subpoena

130 -----

131 Name of Party Seeking Information

132 Case No. -----

133 OBJECTION TO SUBPOENA DUCES TECUM

134
 135 I object to the Subpoena Duces Tecum addressed to.....

136
 137 for the following reasons:

138
 139 [Name of Internet Service

140
 141 Provider to Whom the Subpoena is Addressed]

142
 143 (Please PRINT. Set forth, in detail, all reasons why the subpoena
 144 should not be complied with, and in addition, state (i) whether the
 145 identity of the anonymous communicator has been disclosed in any
 146 fashion, (ii) whether the subpoena fails to allow a reasonable
 147 time for compliance, (iii) whether it requires disclosure of
 148 privileged or other protected matter and no exception or waiver
 149 applies, or (iv) whether it subjects a person to undue burden.)
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172
 173 (attach additional sheets if needed)

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175
176
177 *Respectfully Submitted,*
178
179
180
181 *John Doe*
182
183
184
185 *Enter e-mail nickname or other*
186
187 *alias used in communicating via*
188
189 *the Internet service provider to*
190
191 *whom the subpoena is addressed.*
192
193 *CERTIFICATE*
194
195 *I hereby certify that a true copy of the above Objection to Subpoena*
196
197 *Duces Tecum was mailed this ---- day of -----, (month, year),*
198
199 *to*
200
201 -----
202
203 *(Name and address of party seeking information)and*
204
205 -----
206
207 *(Name and address of Internet Service Provider)*
208
209 *John Doe*
210
211 *Enter e-mail nickname or other*
212
213 *alias used in communicating via*
214
215 *the Internet service provider to*
216
217 *whom the subpoena is addressed.*
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