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SENATE BILL NO. 494

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on March 8, 2010)

(Patron Prior to Substitute—Senator Hurt)

A *BILL to amend and reenact § 19.2-70.3 of the Code of Virginia, relating to the admissibility of certain business records in criminal proceedings.*

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-70.3 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-70.3. Obtaining records concerning electronic communication service or remote computing service; admissibility as business records.

A. A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service, excluding the contents of electronic communications, to an investigative or law-enforcement officer only pursuant to:

1. A subpoena issued by a grand jury of a court of this Commonwealth;
2. A search warrant issued by a magistrate, general district court or a circuit court;
3. A court order for such disclosure issued as provided in this section; or
4. The consent of the subscriber or customer to such disclosure.

B. A court shall issue an order for disclosure under this section only if the investigative or law-enforcement officer shows that there is reason to believe the records or other information sought are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with such order would otherwise cause an undue burden on such provider.

C. A provider of electronic communication service or remote computing service, including a foreign corporation that provides such services, shall disclose the contents of electronic communications to an investigative or law-enforcement officer only pursuant to a search warrant issued by a magistrate, a juvenile and domestic relations district court, a general district court, or a circuit court, based upon complaint on oath supported by an affidavit as required in § 19.2-54. In the case of a search warrant directed to a foreign corporation the affidavit shall state that the complainant believes that the records requested are actually or constructively possessed by a foreign corporation that provides electronic communication service or remote computing service within the Commonwealth of Virginia. If satisfied that probable cause has been established for such belief and as required by Chapter 5 (§ 19.2-52 et seq.), the magistrate, the juvenile and domestic relations district court, the general district court, or the circuit court shall issue a warrant identifying those records to be searched for and commanding the person seeking such warrant to properly serve the warrant upon the foreign corporation. The foreign corporation may verify the authenticity of records that it produces by providing an affidavit from the person in custody of those records certifying that they are true and complete.

D. In order to comply with the requirements of § 19.2-54, any search of the records of a foreign corporation shall be deemed to have been made in the same place wherein the search warrant was issued.

E. No cause of action shall lie in any court against a provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant or subpoena under this section.

F. *Notwithstanding any other provision of law, the written reports or records of a provider of electronic communication service or remote computing service that pertain to a subscriber to or customer of such service, excluding the contents of electronic communications, are admissible in evidence as a business records exception to the hearsay rule.*

G. For the purposes of this section:

"Foreign corporation" means any corporation or other entity, whose primary place of business is located outside of the boundaries of the Commonwealth, that makes a contract or engages in a terms of service agreement with a resident of the Commonwealth to be performed in whole or in part by either party in the Commonwealth, or a corporation that has been issued a certificate of authority pursuant to § 13.1-759 to transact business in the Commonwealth. The making of the contract or terms of service agreement or the issuance of a certificate of authority shall be considered to be the agreement of the foreign corporation or entity that a search warrant or subpoena, which has been properly served on it, has the same legal force and effect as if served personally within the Commonwealth.

"Properly served" means delivery of a search warrant or subpoena by hand, by United States mail, by commercial delivery service, by facsimile or by any other manner to any officer of a corporation or its

60 general manager in the Commonwealth, to any natural person designated by it as agent for the service
61 of process, or if such corporation has designated a corporate agent, to any person named in the latest
62 annual report filed pursuant to § 13.1-775.