

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

CHAPTER 392

An Act to amend and reenact § 19.2-70.3 of the Code of Virginia, relating to court-ordered disclosure of electronic communication service records; sealing of order.

[H 1593]

Approved March 23, 2011

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.

A. A provider of electronic communication service or remote computing service, which, for purposes of subdivisions A 2 through A 4, includes a foreign corporation that provides such services, 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, or the investigation of any missing child as defined in § 52-32, missing senior adult as defined in § 52-34.4, or an incapacitated person as defined in § 37.2-1000 who meets the definition of a missing senior adult except for the age requirement. *Upon issuance of an order for disclosure under this section, the order and any written application or statement of facts may be sealed by the court for 90 days for good cause shown upon application of the attorney for the Commonwealth in an ex parte proceeding. The order and any written application or statement of facts may be sealed for additional 90-day periods for good cause shown upon subsequent application of the attorney for the Commonwealth in an ex parte proceeding.* 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, or judicial officer or court of any of the several states of the United States or its territories, or the District of Columbia when the warrant issued by such officer or such court complies with the provisions of subsection E. 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.

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. A Virginia corporation or other entity that provides electronic communication services or remote computing services to the general public, when properly served with a search warrant and affidavit in support of the warrant, issued by a judicial officer or court of any of the several states of the United States or its territories, or the District of Columbia with jurisdiction over the matter, to produce a record or other information pertaining to a subscriber to or customer of such service or the contents of electronic communications, or both, shall produce the record or other information or the contents of electronic communications as if that warrant had been issued by a Virginia court. The provisions of this subsection shall only apply to a record or other information or contents of electronic communications relating to the commission of a criminal offense that is substantially similar to (i) a violent felony as defined in § 17.1-805, (ii) an act of violence as defined in § 19.2-297.1, (iii) any offense for which

registration is required pursuant to § 9.1-902, (iv) computer fraud pursuant to § 18.2-152.3, or (v) identity theft pursuant to § 18.2-186.3. The search warrant shall be enforced and executed in the Commonwealth as if it were a search warrant described in subsection C.

F. The provider of electronic communication service or remote computing service may verify the authenticity of the written reports or records that it discloses pursuant to this section, excluding the contents of electronic communications, by providing an affidavit from the custodian of those written reports or records or from a person to whom said custodian reports certifying that they are true and complete and that they are prepared in the regular course of business. When so authenticated, the written reports and records are admissible in evidence as a business records exception to the hearsay rule.

G. 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.

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