

AMENDED IN ASSEMBLY MAY 13, 2003

AMENDED IN ASSEMBLY APRIL 30, 2003

AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 1143

Introduced by Assembly Member Simitian

February 21, 2003

An act to amend Section 1985.3 of the Code of Civil Procedure, relating to Internet communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1143, as amended, Simitian. Civil procedure: Internet communications.

Existing law establishes the procedures by which a party may seek to produce personal records maintained by certain professionals and business entities in a civil action, as specified.

This bill would establish new procedures for the production by an Internet service provider or online community host of identifying information regarding a consumer, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1985.3 of the Code of Civil Procedure
2 is amended to read:



1 1985.3. (a) For purposes of this section, the following
2 definitions apply:

3 (1) “Personal records” means the original, any copy of books,
4 documents, other writings, or electronic data pertaining to a
5 consumer or, in the case of an online subpoena, identifying
6 information, and which are maintained by any “witness” who is
7 a physician, dentist, ophthalmologist, optometrist, chiropractor,
8 physical therapist, acupuncturist, podiatrist, veterinarian,
9 veterinary hospital, veterinary clinic, pharmacist, pharmacy,
10 hospital, medical center, clinic, radiology or MRI center, clinical
11 or diagnostic laboratory, state or national bank, state or federal
12 association (as defined in Section 5102 of the Financial Code),
13 state or federal credit union, trust company, anyone authorized by
14 this state to make or arrange loans that are secured by real property,
15 security brokerage firm, insurance company, title insurance
16 company, underwritten title company, escrow agent licensed
17 pursuant to Division 6 (commencing with Section 17000) of the
18 Financial Code or exempt from licensure pursuant to Section
19 17006 of the Financial Code, attorney, accountant, institution of
20 the Farm Credit System, as specified in Section 2002 of Title 12
21 of the United States Code, telephone corporation which is a public
22 utility, as defined in Section 216 of the Public Utilities Code,
23 psychotherapist, as defined in Section 1010 of the Evidence Code,
24 a private or public preschool, elementary school, secondary
25 school, or postsecondary school as described in Section 76244 of
26 the Education Code, or an Internet service provider or ~~an~~ online
27 community host.

28 (2) “Consumer” means any individual, partnership of five or
29 fewer persons, association, or trust which has transacted business
30 with, or has used the services of, the witness or for whom the
31 witness has acted as agent or fiduciary.

32 (3) “Subpoenaing party” means the person or persons causing
33 a subpoena duces tecum to be issued or served in connection with
34 any civil action or proceeding pursuant to this code, but shall not
35 include the state or local agencies described in Section 7465 of the
36 Government Code, or any entity provided for under Article VI of
37 the California Constitution in any proceeding maintained before
38 an adjudicative body of that entity pursuant to Chapter 4
39 (commencing with Section 6000) of Division 3 of the Business and
40 Professions Code.



1 (4) “Deposition officer” means a person who meets the
2 qualifications specified in paragraph (3) of subdivision (d) of
3 Section 2020.

4 (5) “Online subpoena” means a subpoena issued by the
5 subpoenaing party to compel an Internet service provider or online
6 community host to release identifying information of the
7 consumer, when it is alleged that the consumer has engaged in
8 Internet communications the content of which is alleged to violate
9 the law. ~~If the subpoena relates to an action pending in another
10 jurisdiction, the subpoena shall be issued by the appropriate
11 California state or federal court and shall contain a copy of the
12 pleadings in that action, along with the mandate, writ, or
13 commission of the court, when the action is pending that
14 authorizes the discovery of the information sought in California.~~

15 (6) “Identifying information” includes the following
16 information regarding an Internet user:

- 17 (A) A first or last name.
- 18 (B) A pseudonym.
- 19 (C) A home or other physical address, including street name or
20 name of a city or town.
- 21 (D) An e-mail address.
- 22 (E) A telephone number.
- 23 (F) A social security number.
- 24 (G) A birthdate.
- 25 (H) An Internet protocol (IP) address.
- 26 (I) Any other identifier or combination of information that
27 permits the physical or online contacting of a specific individual.

28 (7) “Internet service provider” means an entity offering the
29 transmission, routing, or providing of connections for digital
30 online communications.

31 (8) “Online community host” means the owner, moderator, or
32 operator of an online discussion forum.

33 (9) “Online discussion forum” means an online bulletin board,
34 online newsgroup, chat room, Internet Relay Channel, message
35 board, listserv, discussion board, or other online discussion form.

36 (10) “Public posting” is a message or comment sent, posted,
37 or contributed to an online discussion forum and made available
38 through the online discussion forum to the general public or a
39 segment of the general public.



1 (b) Prior to the date called for in the subpoena duces tecum for
2 the production of personal records, the subpoenaing party shall
3 serve or cause to be served on the consumer whose records are
4 being sought a copy of the subpoena duces tecum, of the affidavit
5 supporting the issuance of the subpoena, if any, and of the notice
6 described in subdivision (e), or in the case of an online subpoena,
7 served as provided in paragraphs (c) and (d), and proof of service
8 as indicated in paragraph (1) of subdivision (c). This service shall
9 be made as follows:

10 (1) To the consumer personally, or at his or her last known
11 address, or in accordance with Chapter 5 (commencing with
12 Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his
13 or her attorney of record. If the consumer is a minor, service shall
14 be made on the minor's parent, guardian, conservator, or similar
15 fiduciary, or if one of them cannot be located with reasonable
16 diligence, then service shall be made on any person having the care
17 or control of the minor or with whom the minor resides or by whom
18 the minor is employed, and on the minor if the minor is at least 12
19 years of age.

20 (2) Not less than 10 days prior to the date for production
21 specified in the subpoena duces tecum, plus the additional time
22 provided by Section 1013 if service is by mail.

23 (3) At least five days prior to service upon the custodian of the
24 records, plus the additional time provided by Section 1013 if
25 service is by mail.

26 (c) In the case of an online subpoena, service shall be made as
27 follows:

28 (1) Upon the Internet service provider or online community
29 host from whom records are sought.

30 (2) At least 44 days prior to the date for production.

31 (3) With payment sufficient to cover postage for the Internet
32 service provider or online community host to mail one copy of the
33 served materials to the consumer, via first-class mail, return
34 receipt requested.

35 (4) With a fee, agreed upon by the subpoenaing party and the
36 Internet service provider or online community host, to cover the
37 reasonably necessary and directly-incurred costs associated with
38 searching for, assembling, reproducing, or otherwise providing
39 the records *or notice*. These reimbursable costs shall include any
40 costs due to necessary disruption of normal operations while



1 complying with the subpoena. In the absence of an agreement, the
2 fee shall be as determined by the court. The Internet service
3 provider or online community host may, at its discretion, combine
4 its claim for costs with the hearing on a motion filed under Section
5 1987.1 by any affected party.

6 (5) Two copies of declaration containing the following
7 information:

8 (A) The communications that are the subject of the action, the
9 subpoena, or both.

10 (B) A statement of the cause of action.

11 (C) How or in what manner the identity of the Internet user is
12 directly relevant to a core claim or defense.

13 (D) A statement that other reasonable efforts to identify the
14 anonymous communicator have proven fruitless, that the
15 subpoena is issued in good faith and not for *an* improper purpose,
16 and that the Internet service provider or online community host to
17 whom the subpoena is addressed is likely to have responsive
18 information.

19 (E) The name of all courts in which complaints or motions
20 relating to this subpoena have been filed and all corresponding
21 case numbers.

22 (F) The following notices:

23

24 NOTICE TO INTERNET SERVICE PROVIDER OR ONLINE
25 COMMUNITY HOST

26

27

28 WITHIN 14 DAYS AFTER RECEIPT OF THIS SUBPOENA
29 CALLING FOR IDENTIFYING INFORMATION OF AN
30 INTERNET USER, YOU ARE REQUIRED BY SECTION
31 1985.3 OF THE CODE OF CIVIL PROCEDURE TO MAIL ONE
32 COPY OF THE SUBPOENA AND ATTACHED
33 SUPPLEMENTAL MATERIALS, BY REGISTERED MAIL,
34 RETURN RECEIPT REQUESTED, TO THE INTERNET USER
35 WHOSE IDENTIFYING INFORMATION IS THE SUBJECT
36 OF THE SUBPOENA, IF YOU HAVE THE INTERNET
37 USER'S MAILING ADDRESS ON FILE. A COPY OF THE
38 SUBPOENA AND SUPPLEMENTAL MATERIALS IS
39 PROVIDED, ALONG WITH PAYMENT FOR POSTAGE. YOU
40 MUST ALSO NOTIFY THE INTERNET USER VIA E-MAIL,



1 IF YOU HAVE THE INTERNET USER’S E-MAIL ADDRESS
 2 ON FILE. IF NEITHER MAILING NOR E-MAIL ADDRESS IS
 3 ON FILE FOR THE INTERNET USER, YOU OR THE
 4 SUBPOENAING PARTY MAY, AT YOUR DISCRETION,
 5 POST A NOTICE ON THE ONLINE BULLETIN BOARD
 6 WHERE THE PUBLIC POSTING OCCURRED. AT ANY TIME
 7 PRIOR TO THE DATE ON WHICH DISCLOSURE IS
 8 SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A
 9 WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION
 10 FOR A PROTECTIVE ORDER TO PREVENT OR REGULATE
 11 THE DISCLOSURE. COPIES OF ANY OBJECTION OR
 12 MOTION SHALL BE SERVED UPON THE PARTY
 13 INITIATING THE SUBPOENA, IF YOU HAVE THE
 14 ADDRESS, AND UPON THE INTERNET USER WHOSE
 15 IDENTIFYING INFORMATION IS SOUGHT.

16 IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA,
 17 YOU MUST ALLOW TIME FOR THE INTERNET USER TO
 18 FILE HIS OR HER OWN OBJECTION. THEREFORE, YOU
 19 MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER
 20 THAN THE DATE ON WHICH DISCLOSURE IS DUE, AND
 21 IN NO EVENT SOONER THAN 40 DAYS AFTER THE
 22 SUBPOENA WAS PROPERLY SERVED UPON YOU ABSENT
 23 A COURT ORDER DIRECTING YOU OTHERWISE.

24 IF YOU RECEIVE NOTICE THAT THE INTERNET USER OR
 25 ANOTHER AFFECTED PARTY HAS FILED A WRITTEN
 26 OBJECTION, MOTION TO QUASH, OR MOTION FOR A
 27 PROTECTIVE ORDER REGARDING THE SUBPOENA, OR
 28 IF YOU FILE A WRITTEN OBJECTION, MOTION TO
 29 QUASH, OR MOTION FOR A PROTECTIVE ORDER,
 30 DISCLOSURE PURSUANT TO THE SUBPOENA MAY NOT
 31 BE MADE EXCEPT PURSUANT TO AN ORDER OF THE
 32 COURT.

33

NOTICE TO INTERNET USER

34

35

36

37 THE ATTACHED PAPERS MEAN THAT (INSERT NAME OF
 38 SUBPOENAING PARTY) HAS ISSUED A SUBPOENA ON
 39 (INSERT NAME OF INTERNET SERVICE PROVIDER OR
 40 ONLINE COMMUNITY HOST) REQUIRING PRODUCTION



1 OF INFORMATION REGARDING YOUR IDENTITY. YOU
2 HAVE THE RIGHT TO FILE A DETAILED WRITTEN
3 OBJECTION, MOTION TO QUASH THE SUBPOENA, OR
4 MOTION FOR A PROTECTIVE ORDER. YOU MAY ELECT
5 TO CONTACT AN ATTORNEY TO REPRESENT YOUR
6 INTERESTS. UNLESS A WRITTEN OBJECTION, MOTION
7 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER IS
8 FILED IN ACCORDANCE WITH SECTION 1987.1 OF THE
9 CODE OF CIVIL PROCEDURE, THE INTERNET SERVICE
10 PROVIDER OR ONLINE COMMUNITY HOST WILL BE
11 REQUIRED BY LAW TO RESPOND BY PROVIDING THE
12 REQUIRED INFORMATION. IF YOU CHOOSE TO FILE A
13 MOTION UNDER SECTION 1987.1, YOU SHOULD FILE IT
14 AT LEAST FIVE BUSINESS DAYS BEFORE THE DATE ON
15 WHICH DISCLOSURE IS DUE (LISTED IN THE
16 SUBPOENA) AND AT THE SAME TIME SERVE A COPY OF
17 THAT OBJECTION OR MOTION UPON BOTH YOUR
18 INTERNET SERVICE PROVIDER OR ONLINE
19 COMMUNITY HOST AND SUBPOENAING PARTY.
20 IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN
21 WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY
22 FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR
23 MOTION FOR A PROTECTIVE ORDER. YOU MAY USE THE
24 FORM BELOW:

25 (Name of Court Listed on Subpoena)
26 (Name of Party Seeking Information)
27 (Case No. ____)

28
29
30

SAMPLE OBJECTION TO SUBPOENA DUCES TECUM

31 I object to the Subpoena Duces Tecum addressed to ____ for the
32 following reasons:

33 (Set forth, in detail, all reasons why the subpoena should not be
34 complied with, including, but not limited to, the following: (1)
35 Whether the subpoena fails to allow a reasonable time for
36 compliance, and (2) whether the subpoena fails to comply with the
37 requirements of subdivision (c) or (d) of SECTION 1985.3.).

38 (Name and address of Internet service provider or online
39 community host).



1 (Enter e-mail nickname, pseudonym, or other alias used to
2 whom the subpoena is addressed).

3
4 (d) ~~Within~~ *In the case of an online subpoena, within 14 days*
5 *after receipt of the subpoena and materials required in subdivision*
6 *(c), the Internet service provider or online community host shall*
7 *provide notice to the consumer as follows:*

8 (1) If a mailing address is on file with the Internet service
9 provider or online community host, one copy *of the subpoena and*
10 *materials required in subdivision (c)* shall be dispatched by
11 registered mail or commercial delivery service, return receipt
12 requested, to the consumer.

13 (2) If an e-mail address is on file with the Internet service
14 provider or online community host, an e-mail shall be dispatched
15 to the consumer stating that the subpoena has been received and
16 enclosing or attaching the subpoena and materials required in
17 subdivision (c).

18 (3) If the basis for seeking the identifying information relates
19 to a public posting on an online discussion forum identified by the
20 subpoenaing party under paragraph (5) of subdivision (c), and if
21 neither the e-mail address nor mailing address is on file nor the
22 Internet service provider or online community host receives notice
23 that both the onfile e-mail and onfile mailing address are incorrect
24 or out-of-date, such as via a returned mailing or bounced e-mail,
25 then the Internet service provider shall do either of the following:

26 (A) Post on the online bulletin board where the posting was
27 made the subpoena and materials in subdivision (c).

28 (B) Notify the subpoenaing party that the conditions contained
29 in paragraph (3) have been met and that the subpoenaing party
30 must now post the subpoena and materials in subdivision (c) on the
31 online bulletin board where the posting was made. If the Internet
32 service provider or online community host chooses to use this
33 provision, it shall provide the subpoenaing party with access to
34 make the posting, as needed.

35 (e) Prior to the production of the records, the subpoenaing party
36 shall do either of the following, or in the case of an online
37 subpoena, follow the procedure under ~~paragraphs~~ *subdivisions (c)*
38 *and (d):*



1 (1) Serve or cause to be served upon the witness a proof of
2 personal service or of service by mail attesting to compliance with
3 subdivision (b).

4 (2) Furnish the witness a written authorization to release the
5 records signed by the consumer or by his or her attorney of record.
6 The witness may presume that any attorney purporting to sign the
7 authorization on behalf of the consumer acted with the consent of
8 the consumer, and that any objection to release of records is
9 waived.

10 (f) A subpoena duces tecum for the production of personal
11 records shall be served in sufficient time to allow the witness a
12 reasonable time, as provided in paragraph (1) of subdivision (d) of
13 Section 2020, to locate and produce the records or copies thereof.

14 (g) Every copy of the subpoena duces tecum and affidavit, if
15 any, served on a consumer or his or her attorney in accordance with
16 subdivision (b) shall be accompanied by a notice, in a typeface
17 designed to call attention to the notice, indicating that (1) records
18 about the consumer are being sought from the witness named on
19 the subpoena; (2) if the consumer objects to the witness furnishing
20 the records to the party seeking the records, the consumer must file
21 papers with the court or serve a written objection as provided in
22 subdivision (i) prior to the date specified for production on the
23 subpoena; and (3) if the party who is seeking the records will not
24 agree in writing to cancel or limit the subpoena, an attorney should
25 be consulted about the consumer's interest in protecting his or her
26 rights of privacy. If a notice of taking of deposition is also served,
27 that other notice may be set forth in a single document with the
28 notice required by this subdivision.

29 (h) A subpoena duces tecum for personal records maintained
30 by a telephone corporation which is a public utility, as defined in
31 Section 216 of the Public Utilities Code, shall not be valid or
32 effective unless it includes a consent to release, signed by the
33 consumer whose records are requested, as required by Section
34 2891 of the Public Utilities Code.

35 (i) Any consumer whose personal records or identifying
36 information are sought by a subpoena duces tecum and who is a
37 party to the civil action in which this subpoena duces tecum is
38 served may, prior to the date for production, bring a motion under
39 Section 1987.1 to quash or modify the subpoena duces tecum.
40 Notice of the bringing of that motion shall be given to the witness



1 and deposition officer at least five days prior to production. The
2 failure to provide notice to the deposition officer shall not
3 invalidate the motion to quash or modify the subpoena duces
4 tecum but may be raised by the deposition officer as an affirmative
5 defense in any action for liability for improper release of records.

6 Any other consumer or nonparty whose personal records or
7 identifying information are sought by a subpoena duces tecum
8 may, prior to the date of production, serve on the subpoenaing
9 party, the witness, and the deposition officer, a written objection
10 that cites the specific grounds on which production of the personal
11 records should be prohibited.

12 No witness or deposition officer shall be required to produce
13 personal records after receipt of notice that the motion has been
14 brought by consumer, or after receipt of a written objection from
15 a nonparty consumer, except upon order of the court in which the
16 action is pending or by agreement of the parties, witnesses, and
17 consumers affected.

18 The party requesting a consumer's personal records or
19 identifying information may bring a motion under Section 1987.1
20 to enforce the subpoena within 20 days of service of the written
21 objection. The motion shall be accompanied by a declaration
22 showing a reasonable and good faith attempt at informal resolution
23 of the dispute between the party requesting the personal records
24 and the consumer or the consumer's attorney.

25 (j) When considering a written objection, motion to quash, or
26 motion for a protective order to prohibit the disclosure of
27 identifying information in the case of an online subpoena, the court
28 shall examine whether the subpoenaing party and the Internet
29 service provider or online community host have substantially
30 complied with the requirements set forth in this chapter and all of
31 the following factors as reflected in the pleadings as well as the
32 evidence submitted by any party to the proceeding:

33 (1) The First Amendment rights of the anonymous speaker.

34 (2) The probability that the plaintiff will prevail on the claim.

35 (3) The necessity for disclosure of the consumer's identity. If
36 the court determines that these elements weigh in favor of the
37 consumer, the court shall quash the subpoena. A prevailing
38 Internet user, Internet service provider, online community host, or
39 other affected party on a written objection, motion to quash, or



1 motion for a protective order pursuant to this chapter shall be
2 entitled to recover attorney's fees and costs.

3 (k) Upon good cause shown and provided that the rights of
4 witnesses and consumers are preserved, a subpoenaing party shall
5 be entitled to obtain an order shortening the time for service of a
6 subpoena duces tecum or waiving the requirements of subdivision
7 (b), (c), or (d) where due diligence by the subpoenaing party has
8 been shown.

9 (l) Nothing contained in this section shall be construed to apply
10 to any subpoena duces tecum which does not request the records
11 of any particular consumer or consumers and which requires a
12 custodian of records to delete all information which would in any
13 way identify any consumer whose records are to be produced.

14 (m) This section shall not apply to proceedings conducted
15 under Division 1 (commencing with Section 50), Division 4
16 (commencing with Section 3200), Division 4.5 (commencing with
17 Section 6100), or Division 4.7 (commencing with Section 6200)
18 of the Labor Code, or ~~under federal copyright statutes to a~~
19 *subpoena issued by or on behalf of a licensee or owner of*
20 *copyrighted work seeking the identity of an individual pursuant to*
21 *the Digital Millennium Copyright Act (P.L. 105-304).*

22 (n) Failure to comply with this section shall be sufficient basis
23 for the witness to refuse to produce the personal records sought by
24 a subpoena duces tecum.

25 (o) In the case of an online subpoena, a consumer may bring a
26 civil action against the subpoenaing party in a court for damages
27 caused by the release of identifying information that, as a result of
28 the willful and intentional action of the subpoenaing party, fails to
29 comply with ~~this chapter~~ *subdivisions (c) and (d)*. The court may
30 award the following to the Internet user:

31 (1) Actual ~~attorney~~ *attorney's* fees and other litigation costs
32 incurred.

33 (2) Actual damages, including economic loss.

34 (3) Statutory damages. Minimum statutory damages of five
35 thousand dollars (\$5,000) shall be imposed upon the subpoenaing
36 party for failure to comply with subdivisions (c) and (d).

37 (p) An Internet user may bring a civil action against an Internet
38 service ~~provide~~ *provider* or online community host for actual
39 damages and actual attorneys' fees and other litigation costs



1 incurred caused by a willful and intentional release of identifying
2 information *in violation of subdivision (d)*.
3 (q) *The rights and remedies provided in this section are*
4 *nonexclusive and are in addition to all those rights and remedies*
5 *that are otherwise available under any provision of law.*

