

AMENDED IN ASSEMBLY MAY 20, 2003

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:

3 1985.3. (a) For purposes of this section, the following
4 definitions apply:

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

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

34 (3) "Subpoenaing party" means the person or persons causing
35 a subpoena duces tecum to be issued or served in connection with
36 any civil action or proceeding pursuant to this code, but shall not
37 include the state or local agencies described in Section 7465 of the
38 Government Code, or any entity provided for under Article VI of



1 the California Constitution in any proceeding maintained before
2 an adjudicative body of that entity pursuant to Chapter 4
3 (commencing with Section 6000) of Division 3 of the Business and
4 Professions Code.

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

8 (5) “Online subpoena” means a subpoena issued by the
9 subpoenaing party to compel an Internet service provider or online
10 community host to release identifying information of the
11 consumer; ~~when it is alleged that the consumer has engaged in~~
12 ~~Internet communications the content of which is alleged to violate~~
13 ~~the law.~~

14 (6) “Identifying information” includes the following
15 information regarding ~~an Internet user~~ *a consumer*:

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

27 (7) “Internet service provider” means an entity offering the
28 transmission, routing, or providing of connections for digital
29 online communications, *including, but not limited to, providers of*
30 *online services and network access, or the operator of those*
31 *facilities.*

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

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

37 (10) “Public posting” is a message or comment sent, posted,
38 or contributed to an online discussion forum and made available
39 through the online discussion forum to the general public or a
40 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 *identifying information* is 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 (4) *In electronic and paper form.*

7 (5) ~~Two copies of~~ *One electronic declaration and two paper*
8 *copies of the declaration containing the following information, of*
9 *which the Internet service provider or online community host has*
10 *no duty to review the sufficiency thereof:*

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

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

14 (C) How or in what manner the identity of the ~~Internet user~~
15 *consumer* is directly relevant to a core claim or defense.

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

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

25 (F) The following notices:

26
27 NOTICE TO INTERNET SERVICE PROVIDER OR ONLINE
28 COMMUNITY HOST
29

30
31 WITHIN 14 DAYS AFTER RECEIPT OF THIS SUBPOENA
32 CALLING FOR IDENTIFYING INFORMATION OF ~~AN~~
33 ~~INTERNET USER~~ A CONSUMER, YOU ARE REQUIRED BY
34 SECTION 1985.3 OF THE CODE OF CIVIL PROCEDURE TO
35 MAIL ONE COPY OF THE SUBPOENA AND ATTACHED
36 SUPPLEMENTAL MATERIALS, BY, REGISTERED MAIL,
37 RETURN RECEIPT REQUESTED, TO THE ~~INTERNET~~
38 ~~USER~~ CONSUMER WHOSE IDENTIFYING INFORMATION
39 IS THE SUBJECT OF THE SUBPOENA, IF YOU HAVE THE
40 ~~INTERNET USER'S~~ CONSUMER'S MAILING ADDRESS ON



1 FILE. A COPY OF THE SUBPOENA AND SUPPLEMENTAL
2 MATERIALS IS PROVIDED, ALONG WITH PAYMENT FOR
3 POSTAGE. YOU MUST ALSO NOTIFY THE ~~INTERNET~~
4 ~~USER~~ *CONSUMER* VIA E-MAIL, IF YOU HAVE THE
5 ~~INTERNET-USER'S~~ *CONSUMER'S* E-MAIL ADDRESS ON
6 FILE. IF NEITHER MAILING NOR E-MAIL ADDRESS IS ON
7 FILE FOR THE ~~INTERNET-USER~~ *CONSUMER*, YOU OR
8 THE SUBPOENAING PARTY MAY, AT YOUR DISCRETION,
9 POST A NOTICE ON THE ONLINE BULLETIN BOARD
10 WHERE THE PUBLIC POSTING OCCURRED. AT ANY TIME
11 PRIOR TO THE DATE ON WHICH DISCLOSURE IS
12 SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A
13 WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION
14 FOR A PROTECTIVE ORDER TO PREVENT OR REGULATE
15 THE DISCLOSURE. COPIES OF ANY OBJECTION OR
16 MOTION SHALL BE SERVED UPON THE PARTY
17 INITIATING THE SUBPOENA, IF YOU HAVE THE
18 ADDRESS, AND UPON THE ~~INTERNET-USER~~ *CONSUMER*
19 WHOSE IDENTIFYING INFORMATION IS SOUGHT.
20 IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA,
21 YOU MUST ALLOW TIME FOR THE ~~INTERNET-USER~~
22 *CONSUMER* TO FILE HIS OR HER OWN OBJECTION.
23 THEREFORE, YOU MUST NOT RESPOND TO THE
24 SUBPOENA ANY EARLIER THAN THE DATE ON WHICH
25 DISCLOSURE IS DUE, AND IN NO EVENT SOONER THAN
26 40 DAYS AFTER THE SUBPOENA WAS PROPERLY
27 SERVED UPON YOU ABSENT A COURT ORDER
28 DIRECTING YOU OTHERWISE.
29 IF YOU RECEIVE NOTICE THAT THE ~~INTERNET-USER~~
30 *CONSUMER* OR ANOTHER AFFECTED PARTY HAS FILED
31 A WRITTEN OBJECTION, MOTION TO QUASH, OR
32 MOTION FOR A PROTECTIVE ORDER REGARDING THE
33 SUBPOENA, OR IF YOU FILE A WRITTEN OBJECTION,
34 MOTION TO QUASH, OR MOTION FOR A PROTECTIVE
35 ORDER, DISCLOSURE PURSUANT TO THE SUBPOENA
36 MAY NOT BE MADE EXCEPT PURSUANT TO AN ORDER
37 OF THE COURT.
38



1 NOTICE TO ~~INTERNET USER~~ CONSUMER

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THE ATTACHED PAPERS MEAN THAT (INSERT NAME OF SUBPOENAING PARTY) HAS ISSUED A SUBPOENA ON (INSERT NAME OF INTERNET SERVICE PROVIDER OR ONLINE COMMUNITY HOST) REQUIRING PRODUCTION OF INFORMATION REGARDING YOUR IDENTITY. YOU HAVE THE RIGHT TO FILE A DETAILED WRITTEN OBJECTION, MOTION TO QUASH THE SUBPOENA, OR MOTION FOR A PROTECTIVE ORDER. YOU MAY ELECT TO CONTACT AN ATTORNEY TO REPRESENT YOUR INTERESTS. UNLESS A WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR A PROTECTIVE ORDER IS FILED IN ACCORDANCE WITH SECTION 1987.1 OF THE CODE OF CIVIL PROCEDURE, THE INTERNET SERVICE PROVIDER OR ONLINE COMMUNITY HOST WILL BE REQUIRED BY LAW TO RESPOND BY PROVIDING THE REQUIRED INFORMATION. IF YOU CHOOSE TO FILE A MOTION UNDER SECTION 1987.1, YOU SHOULD FILE IT AT LEAST FIVE BUSINESS DAYS BEFORE THE DATE ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA) AND AT THE SAME TIME SERVE A COPY OF THAT OBJECTION OR MOTION UPON BOTH YOUR INTERNET SERVICE PROVIDER OR ONLINE COMMUNITY HOST AND SUBPOENAING PARTY.

IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR A PROTECTIVE ORDER. YOU MAY USE THE FORM BELOW:

- (Name of Court Listed on Subpoena)
- (Name of Party Seeking Information)
- (Case No. ____)

SAMPLE OBJECTION TO SUBPOENA DUCES TECUM

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



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

6 (Name and address of Internet service provider or online
7 community host).

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

10

11 (d) In the case of an online subpoena, within 14 days after
12 receipt of the subpoena and materials required in subdivision (c),
13 the Internet service provider or online community host shall
14 provide notice to the consumer as follows:

15 ~~(1) If a mailing address is on file with the Internet service
16 provider or online community host, one copy of the subpoena and
17 materials required in subdivision (c) shall be dispatched by
18 registered mail or commercial delivery service, return receipt
19 requested, to the consumer.~~

20

21 ~~(2)~~
22 (1) If an e-mail address is on file with the Internet service
23 provider or online community host, an e-mail shall be dispatched
24 enclosing or attaching the subpoena and materials required in
25 subdivision (c).

26 (2) *If the e-mail address bounces and a mailing address is on
27 file with the Internet service provider and that provider bills the
28 consumer for services, one copy of the subpoena and materials
29 required by subdivision (c) shall be dispatched by certified or
30 registered mail or commercial delivery service, return receipt
31 requested, to the consumer.*

32 (3) If the basis for seeking the identifying information relates
33 to a public posting on an online discussion forum identified by the
34 subpoenaing party under paragraph (5) of subdivision (c), and if
35 neither the e-mail address nor mailing address is on file ~~nor~~, the
36 Internet service provider ~~or online community host~~ *described in*
37 *paragraph (2)* receives notice that both the onfile e-mail and onfile
38 mailing address are incorrect or out-of-date, such as via a returned
39 mailing or bounced e-mail, *or the Internet service provider or*
40 *online community host described in paragraph (1) receives notice*



1 *that the onfile e-mail address is incorrect or out-of-date, such as*
2 *via a bounced e-mail, then the Internet service provider or online*
3 *community host shall do either of the following:*

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

6 (B) Notify the subpoenaing party that the conditions contained
7 in paragraph (3) have been met and that the subpoenaing party
8 must now post the subpoena and materials in subdivision (c) on the
9 online bulletin board where the posting was made. If the Internet
10 service provider or online community host chooses to use this
11 provision, it shall provide the subpoenaing party with access to
12 make the posting, as needed, *which shall be at the same cost*
13 *governing others seeking to post.*

14 (e) *In the case of an online subpoena, the Internet service*
15 *provider or online community host from whom information has*
16 *been subpoenaed shall bill the subpoenaing party for the*
17 *reasonably necessary and directly incurred costs associated with*
18 *searching for, assembling, reproducing, or otherwise providing the*
19 *records or notice required under this section. These reimbursable*
20 *costs shall include any costs incurred due to the necessary*
21 *disruption of normal operations while complying with the*
22 *subpoena. The subpoenaing party shall pay the bill in full within*
23 *30 days of receipt. The subpoenaing party may make a motion to*
24 *the court to reduce these fees.*

25 (f) Prior to the production of the records, the subpoenaing party
26 shall do either of the following, or in the case of an online
27 subpoena, follow the procedure under subdivisions (c) and (d):

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

31 (2) Furnish the witness a written authorization to release the
32 records signed by the consumer or by his or her attorney of record.
33 The witness may presume that any attorney purporting to sign the
34 authorization on behalf of the consumer acted with the consent of
35 the consumer, and that any objection to release of records is
36 waived.

37 ~~(f)~~

38 (g) A subpoena duces tecum for the production of personal
39 records shall be served in sufficient time to allow the witness a



1 reasonable time, as provided in paragraph (1) of subdivision (d) of
2 Section 2020, to locate and produce the records or copies thereof.

3 ~~(g)~~

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

19 ~~(h)~~

20 (i) A subpoena duces tecum for personal records maintained by
21 a telephone corporation which is a public utility, as defined in
22 Section 216 of the Public Utilities Code, shall not be valid or
23 effective unless it includes a consent to release, signed by the
24 consumer whose records are requested, as required by Section
25 2891 of the Public Utilities Code.

26 ~~(i)~~

27 (j) Any consumer whose personal records or identifying
28 information are sought by a subpoena duces tecum and who is a
29 party to the civil action in which this subpoena duces tecum is
30 served may, prior to the date for production, bring a motion under
31 Section 1987.1 to quash or modify the subpoena duces tecum.
32 Notice of the bringing of that motion shall be given to the witness
33 and deposition officer at least five days prior to production. The
34 failure to provide notice to the deposition officer shall not
35 invalidate the motion to quash or modify the subpoena duces
36 tecum but may be raised by the deposition officer as an affirmative
37 defense in any action for liability for improper release of records.

38 Any other consumer or nonparty whose personal records or
39 identifying information are sought by a subpoena duces tecum
40 may, prior to the date of production, serve on the subpoenaing



1 party, the witness, and the deposition officer, a written objection
2 that cites the specific grounds on which production of the personal
3 records should be prohibited.

4 No witness or deposition officer shall be required to produce
5 personal records *or identifying information* after receipt of notice
6 that the motion has been brought by consumer, or after receipt of
7 a written objection from a nonparty consumer, except upon order
8 of the court in which the action is pending or by agreement of the
9 parties, witnesses, and consumers affected.

10 The party requesting a consumer's personal records or
11 identifying information may bring a motion under Section 1987.1
12 to enforce the subpoena within 20 days of service of the written
13 objection. The motion shall be accompanied by a declaration
14 showing a reasonable and good faith attempt at informal resolution
15 of the dispute between the party requesting the personal records
16 and the consumer or the consumer's attorney.

17 ~~(j)~~

18 (k) When considering a written objection, motion to quash, or
19 motion for a protective order to prohibit the disclosure of
20 identifying information in the case of an online subpoena, the court
21 shall examine whether the subpoenaing party and the Internet
22 service provider or online community host have substantially
23 complied with the requirements set forth in this chapter and all of
24 the following factors as reflected in the pleadings as well as the
25 evidence submitted by any party to the proceeding:

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

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

28 (3) The necessity for disclosure of the consumer's identity. If
29 the court determines that these elements weigh in favor of the
30 consumer, the court shall quash the subpoena. A prevailing
31 Internet user, Internet service provider, online community host, or
32 other affected party on a written objection, motion to quash, or
33 motion for a protective order pursuant to this chapter shall be
34 entitled to recover attorney's fees and costs *from the subpoenaing*
35 *party*.

36 ~~(k)~~

37 (l) Upon good cause shown and provided that the rights of
38 witnesses and consumers are preserved, a subpoenaing party shall
39 be entitled to obtain an order shortening the time for service of a
40 subpoena duces tecum or waiving the requirements of subdivision



1 (b), (c), or (d) where due diligence by the subpoenaing party has
 2 been shown.

3 ~~(t)~~

4 (m) Nothing contained in this section shall be construed to
 5 apply to any subpoena duces tecum which does not request the
 6 records of any particular consumer or consumers and which
 7 requires a custodian of records to delete all information which
 8 would in any way identify any consumer whose records are to be
 9 produced.

10 ~~(m)~~

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

19 ~~(n)~~

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

23 ~~(o)~~

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

30 (1) Actual attorney's fees and other litigation costs incurred.

31 (2) Actual damages, including economic loss.

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

35 ~~(p) An Internet user~~

36 (q) A consumer may bring a civil action against an Internet
 37 service provider or online community host for actual damages and
 38 actual attorneys' fees and other litigation costs incurred caused by
 39 a willful and intentional *failure to provide notice or* release of
 40 identifying information in violation of subdivision (d). *The*



1 *prevailing party in that action shall be awarded actual attorney's*
2 *fees and costs.*
3 ~~(q)~~
4 (r) The rights and remedies provided in this section are
5 nonexclusive and are in addition to all those rights and remedies
6 that are otherwise available under any provision of law.

