

AMENDED IN SENATE JULY 8, 2003
AMENDED IN SENATE JULY 2, 2003
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 interactive computer service of online consumer information, 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:

~~SECTION 1. Section 1985.3 of the Code of Civil Procedure~~

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

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

(1) “Personal records” means the original, any copy of books, documents, other writings, or electronic data pertaining to a consumer and which are maintained by any “witness” which is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, ~~or~~ telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, ~~or~~ psychotherapist, as defined in Section 1010 of the Evidence Code, ~~or~~ a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code, *or an interactive computer service.*

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

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

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

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

(5) *“Interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including, but not limited to, a service or system that provides access to the Internet and systems operated or services offered by libraries or educational institutions.*

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

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

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

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

(4) *If a subpoenaing party seeking personal records from an interactive computer service is unable to execute service under paragraph (1), it shall be made as follows:*

1 (A) If the subpoenaing party has an e-mail address for the
2 consumer, to the consumer at the e-mail address not less than 30
3 days prior to the date of production.

4 (B) If the subpoenaing party has neither an e-mail nor postal
5 address for the consumer, on the interactive computer service from
6 which personal records are sought not less than 44 days prior to
7 the date for production with payment sufficient to cover domestic,
8 first-class postage for mailing to the consumer, and with a
9 declaration, without attachments or exhibits, on a CD-ROM or in
10 another electronic format as directed by the interactive computer
11 service, containing the following:

12 (i) A statement of the cause of action, and, if the action relates
13 to communications, the communications that are the subject of the
14 action, the subpoena, or both.

15 (ii) How or in what manner the personal records are directly
16 relevant to a core claim or defense.

17 (iii) A statement that other reasonable efforts to serve the
18 consumer have proven fruitless, that the subpoena is issued in good
19 faith and not for an improper purpose, and that the interactive
20 computer service to which the subpoena is addressed is likely to
21 have responsive personal records.

22 (iv) 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 (v) The date of production.

26 (5) If service is made on an interactive computer service under
27 subparagraph (B) of paragraph (4), the interactive computer
28 service shall serve the consumer no later than 14 days, as follows:

29 (A) If the consumer is a paid subscriber and a mailing address
30 is on file with the interactive computer service, the declaration
31 required in subparagraph (B) of paragraph (4) and the subpoena
32 shall be sent via domestic, first-class mail to the consumer.

33 (B) If the consumer is not a paid subscriber, or is a paid
34 subscriber without a mailing address on file with the interactive
35 computer service, then if an e-mail address is on file with the
36 interactive computer service, the declaration required in
37 subparagraph (B) of paragraph (4) shall be sent to the onfile
38 e-mail address. If no e-mail address is on file with the interactive
39 computer service, no further action is required to meet the
40 obligations of this subdivision.

(c) Prior to the production of the records, the subpoenaing party shall do either of the following:

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

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

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

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

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

(g) Any consumer whose personal records are sought by a subpoena duces tecum and who is a party to the civil action in which this subpoena duces tecum is served may, prior to the date for production, bring a motion under Section 1987.1 to quash or

1 modify the subpoena duces tecum *or other motion that stays or*
2 *limits discovery*. Notice of the bringing of that motion shall be
3 given to the witness and deposition officer at least five days prior
4 to production. The failure to provide notice to the deposition
5 officer shall not invalidate the motion to quash or modify the
6 subpoena duces tecum *or other motion*, but may be raised by the
7 deposition officer as an affirmative defense in any action for
8 liability for improper release of records.

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

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

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

28 (h) Upon good cause shown and provided that the rights of
29 witnesses and consumers are preserved, a subpoenaing party shall
30 be entitled to obtain an order shortening the time for service of a
31 subpoena duces tecum or waiving the requirements of subdivision
32 (b) where due diligence by the subpoenaing party has been shown.
33 *In the case of a subpoena to an interactive computer service, if the*
34 *consumer whose personal records are sought is the defendant and*
35 *a subpoenaing party is granted a temporary restraining order or*
36 *preliminary injunction to protect an intellectual property interest,*
37 *the notice provisions of subdivision (b) shall be waived and the*
38 *subpoenaing party shall instead serve the notice of entry and*
39 *temporary restraining order or preliminary injunction on the*



1 *interactive computer service concurrent with the subpoena for*
2 *personal records.*

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

9 (j) This section ~~shall~~ *does not* apply to proceedings conducted
10 under Division 1 (commencing with Section 50), Division 4
11 (commencing with Section 3200), Division 4.5 (commencing with
12 Section 6100), or Division 4.7 (commencing with Section 6200)
13 of the Labor Code. *This section does not apply to subpoenas to*
14 *interactive computer services issued under Section 11180 of the*
15 *Government Code or to a subpoena to an interactive computer*
16 *service issued by or on behalf of a licensee or owner of copyrighted*
17 *work seeking the identity of an individual pursuant to the Digital*
18 *Millennium Copyright Act (P.L. 105-304).*

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

22 (l) *In the case of service under subparagraph (B) of paragraph*
23 *(4) of subdivision (b), the interactive computer service, from which*
24 *personal records are subpoenaed, shall bill the subpoenaing party*
25 *for the reasonably necessary and directly-incurred costs*
26 *associated with searching for, assembling, reproducing, or*
27 *otherwise providing the personal records or notice required under*
28 *this section. These reimbursable costs shall include any costs due*
29 *to the necessary disruption of normal operations while complying*
30 *with the subpoena. The subpoenaing party shall pay the bill in full,*
31 *or make a motion to the court to reduce these fees based on the*
32 *unreasonableness of the costs claimed within 30 days of receipt.*
33 *The interactive computer service may make a motion to the court*
34 *to compel the payment of any costs provided for in this subdivision,*
35 *and shall be entitled to recover reasonable attorney's fees and*
36 *costs from the subpoenaing party if it prevails on that motion.*

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**All matter omitted in this version of the
bill appears in the bill as amended in the
Senate, July 2, 2003 (JR 11)**

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