

AMENDED IN SENATE JUNE 15, 2004
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:

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 and ~~which~~ *that* are maintained by any “witness” which
8 is a physician, dentist, ophthalmologist, optometrist, chiropractor,
9 physical therapist, acupuncturist, podiatrist, veterinarian,
10 veterinary hospital, veterinary clinic, pharmacist, pharmacy,
11 hospital, medical center, clinic, radiology or MRI center, clinical
12 or diagnostic laboratory, state or national bank, state or federal
13 association (as defined in Section 5102 of the Financial Code),
14 state or federal credit union, trust company, anyone authorized by
15 this state to make or arrange loans that are secured by real property,
16 security brokerage firm, insurance company, title insurance
17 company, underwritten title company, escrow agent licensed
18 pursuant to Division 6 (commencing with Section 17000) of the
19 Financial Code or exempt from licensure pursuant to Section
20 17006 of the Financial Code, attorney, accountant, institution of
21 the Farm Credit System, as specified in Section 2002 of Title 12
22 of the United States Code, telephone corporation which is a public
23 utility, as defined in Section 216 of the Public Utilities Code,
24 psychotherapist, as defined in Section 1010 of the Evidence Code,
25 a private or public preschool, elementary school, secondary
26 school, or postsecondary school as described in Section 76244 of
27 the Education Code, or an interactive computer service. *For an*
28 *interactive computer service, “personal records” means a first*
29 *and last name, pseudonym, home or other physical address,*
30 *including the name of a city, town, or street, e-mail address,*
31 *telephone number, social security number, Internet protocol (IP)*
32 *address, or any other identifier or combination of information that*
33 *allows for the identification of a consumer.*
34 (2) “Interactive computer service” means any information
35 service, system, or access software provider that provides or



1 *enables computer access by multiple users to a computer service,*
2 *including, but not limited to, a service or system that provides*
3 *access to the Internet and such systems operated or services*
4 *offered by libraries or educational institutions.*

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

9 ~~(3)~~

10 (4) “Subpoenaing party” means the person or persons causing
11 a subpoena duces tecum to be issued or served in connection with
12 any civil action or proceeding pursuant to this code, but shall not
13 include the state or local agencies described in Section 7465 of the
14 Government Code, or any entity provided for under Article VI of
15 the California Constitution in any proceeding maintained before
16 an adjudicative body of that entity pursuant to Chapter 4
17 (commencing with Section 6000) of Division 3 of the Business and
18 Professions Code.

19 ~~(4)~~

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

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

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

37 (1) To the consumer personally, or at his or her last known
38 address, or in accordance with Chapter 5 (commencing with
39 Section 1010) of Title 14 of Part 3, or, if he or she is a party, to his
40 or her attorney of record. If the consumer is a minor, service shall

1 be made on the minor's parent, guardian, conservator, or similar
2 fiduciary, or if one of them cannot be located with reasonable
3 diligence, then service shall be made on any person having the care
4 or control of the minor or with whom the minor resides or by whom
5 the minor is employed, and on the minor if the minor is at least 12
6 years of age.

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

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

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

16 (A) If the subpoenaing party has an e-mail address for the
17 consumer, to the consumer at the e-mail address not less than ~~30~~
18 20 days prior to the date of production, *along with the declaration*
19 *required by paragraph (6).*

20 (B) If the subpoenaing party has neither an e-mail nor *a* postal
21 address for the consumer, on the interactive computer service from
22 which personal records are sought not less than ~~44~~ 34 days prior
23 to the date for production with payment sufficient to cover
24 domestic, first-class postage for mailing to the consumer, ~~and with~~
25 ~~a declaration, without attachments or exhibits, on a CD-ROM or~~
26 ~~in another electronic format as directed by the interactive~~
27 ~~computer service, containing the following:~~

28 ~~(i) A statement of the cause of action, and, if the action relates~~
29 ~~to communications, the communications that are the subject of the~~
30 ~~action, the subpoena, or both.~~

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

33 ~~(iii) A statement that other reasonable efforts to serve the~~
34 ~~consumer have proven fruitless, that the subpoena is issued in good~~
35 ~~faith and not for an improper purpose, and that the interactive~~
36 ~~computer service to which the subpoena is addressed is likely to~~
37 ~~have responsive personal records.~~

38 ~~(iv) The name of all courts in which complaints or motions~~
39 ~~relating to this subpoena have been filed and all corresponding~~
40 ~~case numbers.~~

~~(v) The date of production.~~

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

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

~~(B) If the consumer is not a paid subscriber, or is a paid subscriber without a mailing address on file with the interactive computer service, then if an e-mail address is on file with the interactive computer service, the declaration required in subparagraph (B) of paragraph (4) shall be sent to the onfile e-mail address. If no e-mail address is on file with the interactive computer service, no further action is required to meet the obligations of this subdivision.— subpoena, any supporting affidavits, the notice described in subdivision (e), and the declaration required by paragraph (6) shall be sent via first-class mail to the consumer.~~

(B) If the consumer is not a paid subscriber or is a paid subscriber without a mailing address on file with the interactive computer service, and his or her e-mail address is on file with the interactive computer service, the notice described in subdivision (e) and the declaration required by paragraph (6) shall be sent to the e-mail address on file or the e-mail address specified by the consumer as the address to be used for notice by the interactive computer service. If no e-mail address is on file with the interactive computer service, no further action is required to meet the obligations of this subdivision.

(C) Sections 1013 and 1010.6 do not apply to any notification sent by an interactive computer service to a consumer.

(6) Service made pursuant to subparagraph (B) of paragraph (4) and paragraph (5) shall include a declaration, without attachments or exhibits in an electronic format as directed by the interactive computer service, and shall contain all of the following:

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

1 (B) A statement explaining how, or in what manner, the
2 personal records are directly relevant to a core claim or defense.

3 (C) A statement that other reasonable efforts to serve the
4 consumer have not been effective, that the subpoena is issued in
5 good faith and not for an improper purpose, and that the
6 interactive computer service to which the subpoena is addressed
7 is likely to have responsive personal records.

8 (D) The name of all courts in which complaints or motions
9 relating to this subpoena have been filed, and all corresponding
10 case numbers.

11 (E) The date of production.

12 (F) A statement that the subpoenaing party attests to the
13 accuracy of the foregoing information.

14 (7) The ICS has no duty to track the mail or e-mail notice served
15 under paragraphs (4) and (5). Should notice fail due to an invalid
16 mail or e-mail address, the ICS has no further notification
17 obligations.

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

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

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

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

33 (e) Every copy of the subpoena duces tecum and affidavit, if
34 any, served on a consumer or his or her attorney in accordance with
35 subdivision (b) shall be accompanied by a notice, in a typeface
36 designed to call attention to the notice, indicating that (1) records
37 about the consumer are being sought from the witness named on
38 the subpoena; (2) if the consumer objects to the witness furnishing
39 the records to the party seeking the records, the consumer must file
40 papers with the court or serve a written objection as provided in

1 subdivision (g) prior to the date specified for production on the
2 subpoena; and (3) if the party who is seeking the records will not
3 agree in writing to cancel or limit the subpoena, an attorney should
4 be consulted about the consumer's interest in protecting his or her
5 rights of privacy. If a notice of taking of deposition is also served,
6 that other notice may be set forth in a single document with the
7 notice required by this subdivision.

8 (f) A subpoena duces tecum for personal records maintained by
9 a telephone corporation ~~which~~ *that* is a public utility, as defined
10 in Section 216 of the Public Utilities Code, shall not be valid or
11 effective unless it includes a consent to release, signed by the
12 consumer whose records are requested, as required by Section
13 2891 of the Public Utilities Code.

14 (g) Any consumer whose personal records are sought by a
15 subpoena duces tecum and who is a party to the civil action in
16 which this subpoena duces tecum is served may, prior to the date
17 for production, bring a motion under Section 1987.1 to quash or
18 modify the subpoena duces tecum or other motion that stays or
19 limits discovery. Notice of the bringing of that motion shall be
20 given to the witness and deposition officer at least five days prior
21 to production. The failure to provide notice to the deposition
22 officer shall not invalidate the motion to quash or modify the
23 subpoena duces tecum or other motion, but may be raised by the
24 deposition officer *or witness* as an affirmative defense in any
25 action for liability for improper release of records.

26 Any other consumer or nonparty whose personal records are
27 sought by a subpoena duces tecum may, prior to the date of
28 production, serve on the subpoenaing party the witness, and the
29 deposition officer, a written objection that cites the specific
30 grounds on which production of the personal records should be
31 prohibited.

32 No witness or deposition officer shall be required to produce
33 personal records after receipt of notice that the motion has been
34 brought by consumer, or after receipt of a written objection from
35 a nonparty consumer, except upon order of the court in which the
36 action is pending or by agreement of the parties, witnesses, and
37 consumers affected.

38 The party requesting a consumer's personal records may bring
39 a motion under Section 1987.1 to enforce the subpoena within 20
40 days of service of the written objection. The motion shall be

1 accompanied by a declaration showing a reasonable and good faith
2 attempt at informal resolution of the dispute between the party
3 requesting the personal records and the consumer or the
4 consumer's attorney.

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

10 ~~In the case of a subpoena to an interactive computer service, if the~~
11 ~~consumer whose personal records are sought is the defendant and~~
12 ~~a subpoenaing party is granted a temporary restraining order or~~
13 ~~preliminary injunction to protect an intellectual property interest,~~
14 ~~the notice provisions of subdivision (b) shall be waived and the~~
15 ~~subpoenaing party shall instead serve the notice of entry and~~
16 ~~temporary restraining order or preliminary injunction on the~~
17 ~~interactive computer service concurrent with the subpoena for~~
18 ~~personal records. The notice provisions of paragraphs (4) and (5)~~
19 ~~of subdivision (b) are waived if a court determines that a~~
20 ~~temporary restraining order may issue against the pertinent~~
21 ~~defendant without notice. Instead, the subpoenaing party shall~~
22 ~~serve the temporary restraining order and notice of entry on the~~
23 ~~interactive computer service concurrent with the subpoena for~~
24 ~~personal records.~~

25 *A party moving for a temporary restraining order pursuant to*
26 *Section 527 who cannot give notice to an opposing party because*
27 *the information needed to give notice to that opposing party is*
28 *contained in personal records maintained by an interactive*
29 *computer service, shall be deemed to have met the requirements of*
30 *subparagraph (B) of paragraph (2) of subdivision (c) of Section*
31 *527 as to that opposing party upon attorney or party certification*
32 *of that fact to the court.*

33 ~~(i) Nothing contained in this section shall. This section shall not~~
34 ~~be construed to apply to any subpoena duces tecum that does not~~
35 ~~request the records of any particular consumer or consumers and~~
36 ~~which that requires a custodian of records to delete all information~~
37 ~~which that would in any way identify any consumer whose records~~
38 ~~are to be produced.~~

39 (j) This section does not apply to proceedings conducted under
40 Division 1 (commencing with Section 50), Division 4

(commencing with Section 3200), Division 4.5 (commencing with Section 6100), or Division 4.7 (commencing with Section 6200) of the Labor Code. This section does not apply to subpoenas to interactive computer services issued under Section 11180 of the Government Code or to a subpoena to an interactive computer service issued by or on behalf of a licensee or owner of copyrighted work seeking the identity of an individual pursuant to the Digital Millennium Copyright Act (P.L. 105-304). of the Labor Code, or to civil law enforcement actions brought in the name of the people by the Attorney General or a district attorney, to investigative subpoenas under Section 11180 of the Government Code, or to a subpoena issued by or on behalf of a licensee or owner of copyrighted work seeking the identity of an individual pursuant to the Digital Millennium Copyright Act (17 U.S.C. Sec. 512(h)).

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

(l) In the case of service under subparagraph (B) of paragraph (4) of subdivision (b), the interactive computer service, from which personal records are subpoenaed, ~~shall~~ may bill the subpoenaing party for the reasonably necessary and directly incurred costs ~~associated with searching for, assembling, reproducing, or otherwise providing the personal records or notice required under, including attorney's fees, associated with fulfilling the obligations required under this section.~~ These reimbursable costs shall include any costs due to the necessary disruption of normal operations while complying with the subpoena, and shall not be governed by any fixed rates set forth in paragraph (1) of subdivision (b) of Section 1563 of the Evidence Code or any other statute. The subpoenaing party shall pay the bill in full, or make a motion to the court to reduce these fees based on the unreasonableness of the costs claimed within 30 days of receipt. The interactive computer service may make a motion to the court to compel the payment of any costs provided for in this subdivision, and shall be entitled to recover reasonable attorney's fees and costs from the subpoenaing party if it prevails on that motion.

1	
2	CORRECTIONS
3	Text — Pages 2, 9.
4	
5	

