

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 84th General Assembly
3 Regular Session, 2003
4

As Engrossed: H4/7/03

A Bill

HOUSE BILL 2203

5 By: Representative Lendall
6
7

For An Act To Be Entitled

9 AN ACT CREATING A PRESUMPTION OF CONFIDENTIALITY
10 OF IDENTITY OF ANONYMOUS INTERNET COMMUNICATORS;
11 AND FOR OTHER PURPOSES.
12
13
14

Subtitle

15 AN ACT CREATING A PRESUMPTION OF
16 CONFIDENTIALITY OF IDENTITY OF ANONYMOUS
17 INTERNET COMMUNICATORS.
18
19
20

21 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
22

23 SECTION 1. Arkansas Code Title 4, Chapter 88, Subchapter 1 is amended
24 by adding an additional section to read as follows:

25 4-88-116. Identity of persons communicating anonymously over the
26 Internet.

27 (a) In civil proceedings in which it is alleged that an anonymous
28 individual has engaged in Internet communications that are tortious, any
29 subpoena seeking information held by a nongovernmental person or entity that
30 would identify the tortfeasor shall be governed by the following procedure
31 unless more expedited scheduling directions have been ordered by the court
32 upon consideration of the interests of each person affected by the order:

33 (1) At least thirty-five (35) days before the date on which
34 disclosure is sought, a party seeking information identifying an anonymous
35 communicator shall file with the appropriate circuit court, a complete copy
36 of the subpoena and all items annexed to or incorporated in the subpoena,



1 along with supporting material showing:

2 (A)(i) That one (1) or more communications that are or may
3 be tortious or illegal have been made by the anonymous communicator, or that
4 the party requesting the subpoena has a legitimate, good faith basis, to
5 contend that the party is the victim of conduct actionable in the
6 jurisdiction where the suit was filed.

7 (ii) A copy of the communications that are the
8 subject of the action or subpoena shall be submitted to the court;

9 (B) That other reasonable efforts to identify the
10 anonymous communicator have proven fruitless;

11 (C) That the identity of the anonymous communicator is
12 important, is centrally needed to advance the claim, relates to a core claim
13 or defense, or is directly and materially relevant to that claim or defense;

14 (D)(i) That no motion to dismiss, motion for judgment on
15 the pleadings, or judgment as a matter of law, demurrer, or summary judgment
16 type motion challenging the viability of the lawsuit of the underlying
17 plaintiff is pending.

18 (ii) The pendency of a motion may be considered by
19 the court in determining whether to enforce, suspend, or strike the proposed
20 disclosure obligation under the subpoena;

21 (E) That the individuals or entities to whom the subpoena
22 is addressed are likely to have responsive information; and

23 (F) If the subpoena sought relates to an action pending in
24 another jurisdiction, the application shall contain a copy of the pleadings
25 in the action, along with the mandate, writ, or order of the court where the
26 action is pending that authorizes the discovery of the information sought;

27 (2) Two (2) copies of the subpoena and supporting materials set
28 forth in subdivisions (a)(1)(A) through (a)(1)(F) of this section shall be
29 served upon the person to whom it is addressed along with payment sufficient
30 to cover postage for mailing one (1) copy of the application within the
31 United States by registered mail, return receipt requested;

32 (3) Unless the anonymous communicator has consented to
33 disclosure in advance, within ten (10) business days after receipt of a
34 subpoena and supporting materials calling for disclosure of identifying
35 information concerning an anonymous communicator, the individual or entity to
36 whom the subpoena is addressed shall:

1 (A) Send an electronic mail notification to the anonymous
2 communicator reporting that the subpoena has been received if an email
3 address is available; and

4 (B) Dispatch one (1) copy, by registered mail or
5 commercial delivery service, return receipt requested, to the anonymous
6 communicator at his or her last known address, if any is on file with the
7 person to whom the subpoena is addressed;

8 (4)(A) At least ten (10) business days prior to the date on
9 which disclosure is sought under the subpoena, any interested person may file
10 a detailed written objection, motion to quash, or motion for protective
11 order.

12 (B) Any papers filed by the anonymous communicator shall
13 be served by the date of filing upon the party seeking the subpoena and the
14 party to whom the subpoena is addressed.

15 (C) Any papers filed by the party to whom the subpoena is
16 addressed shall be served by the date of filing upon the party seeking the
17 subpoena and the anonymous communicator whose identifying information is
18 sought.

19 (D) Service is effective when it has been mailed,
20 dispatched by commercial delivery service, transmitted by facsimile, or
21 delivered to counsel of record and to parties having no counsel;

22 (5) Any written objection, motion to quash, or motion for
23 protective order shall set forth all grounds relied upon for denying the
24 disclosure sought in the subpoena and shall also address to the extent
25 feasible:

26 (A) Whether the identity of the anonymous communicator has
27 been disclosed in any way beyond its recordation in the account records of
28 the party to whom the subpoena is addressed;

29 (B) Whether the subpoena fails to allow a reasonable time
30 for compliance;

31 (C) Whether it requires disclosure of privileged or other
32 protected matter and no exception or waiver applies; and

33 (D) Whether it subjects a person to undue burden;

34 (6)(A) The party to whom the subpoena is addressed shall not
35 comply with the subpoena earlier than three (3) business days before the date
36 on which disclosure is due, to allow the anonymous communicator the

1 opportunity to object.

2 (B) If any person files a written objection, motion to
3 quash, or motion for protective order, compliance with the subpoena shall be
4 deferred until the appropriate court rules on the obligation to comply.

5 (C) If an objection or motion is made, the party serving
6 the subpoena shall not be entitled to inspect or copy the materials except
7 pursuant to an order of the court on behalf of which the subpoena was issued.

8 (D) If an objection or motion has been filed, any
9 interested person may request a hearing on the matter and if so, shall serve
10 two (2) copies of the request of hearing upon the subpoenaed party, who shall
11 mail one (1) copy, by registered mail or commercial delivery service, return
12 receipt requested, to the anonymous communicator, whose identifying
13 information is the subject of the subpoena, at that person's last known
14 address.

15 (b)(1) The party requesting or issuing a subpoena for information
16 identifying an anonymous Internet communicator shall serve along with each
17 copy of the subpoena notices in boldface capital letters.

18 (2) The notice to Internet service providers shall be in
19 substantially the following form:

20
21 NOTICE TO INTERNET SERVICE PROVIDER

22
23 WITHIN TEN (10) BUSINESS DAYS AFTER RECEIPT OF THIS SUBPOENA CALLING FOR
24 IDENTIFYING INFORMATION CONCERNING YOUR CLIENT, SUBSCRIBER, OR CUSTOMER,
25 EXCEPT WHERE CONSENT TO DISCLOSURE HAS BEEN GIVEN IN ADVANCE, YOU ARE
26 REQUIRED BY ARKANSAS CODE § 4-88-116 TO MAIL ONE (1) COPY, BY REGISTERED MAIL
27 OR COMMERCIAL DELIVERY SERVICE, RETURN RECEIPT REQUESTED, TO THE CLIENT,
28 SUBSCRIBER, OR CUSTOMER WHOSE IDENTIFYING INFORMATION IS THE SUBJECT OF THE
29 SUBPOENA. AT LEAST SEVEN (7) BUSINESS DAYS PRIOR TO THE DATE ON WHICH
30 DISCLOSURE IS SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A DETAILED
31 WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR PROTECTIVE ORDER. ANY SUCH
32 OBJECTION OR MOTION SHALL BE SERVED UPON THE PARTY INITIATING THE SUBPOENA
33 AND UPON THE CLIENT, SUBSCRIBER, OR CUSTOMER WHOSE IDENTIFYING INFORMATION IS
34 SOUGHT. IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA, YOU MUST ALLOW TIME FOR
35 YOUR CLIENT, SUBSCRIBER, OR CUSTOMER TO FILE HIS OR HER OWN OBJECTION.
36 THEREFORE, YOU MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER THAN THREE (3)

1 BUSINESS DAYS BEFORE THE DISCLOSURE IS DUE. IF YOU RECEIVE NOTICE THAT YOUR
2 CLIENT, SUBSCRIBER, OR CUSTOMER HAS FILED A WRITTEN OBJECTION, MOTION TO
3 QUASH, OR MOTION FOR PROTECTIVE ORDER REGARDING THIS SUBPOENA, OR IF YOU FILE
4 A MOTION TO QUASH THIS SUBPOENA, NO DISCLOSURE PURSUANT TO THE SUBPOENA SHALL
5 BE MADE EXCEPT PURSUANT TO AN ORDER OF THE COURT ON BEHALF OF WHICH THE
6 SUBPOENA WAS ISSUED.

7 (3) The notice to Internet users shall be in substantially the
8 following form:

9
10 NOTICE TO INTERNET USER

11
12 THE ATTACHED PAPERS MEAN THAT

13 [INSERT NAME OF PARTY REQUESTING OR CAUSING ISSUANCE OF THE SUBPOENA]
14 HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN
15 ISSUED, TO YOUR INTERNET SERVICE PROVIDER

16
17 [INSERT NAME OF INTERNET SERVICE PROVIDER]

18 REQUIRING PRODUCTION OF INFORMATION REGARDING YOUR IDENTITY. UNLESS A
19 DETAILED WRITTEN OBJECTION IS FILED WITH THE COURT, THE SERVICE PROVIDER WILL
20 BE REQUIRED BY LAW TO RESPOND BY PROVIDING THE REQUIRED INFORMATION. IF YOU
21 BELIEVE YOUR IDENTIFYING INFORMATION SHOULD NOT BE DISCLOSED AND OBJECT TO
22 THE DISCLOSURE, YOU HAVE THE RIGHT TO FILE WITH THE CLERK OF COURT A DETAILED
23 WRITTEN OBJECTION, MOTION TO QUASH THE SUBPOENA, OR MOTION TO OBTAIN A
24 PROTECTIVE ORDER. YOU MAY ELECT TO CONTACT AN ATTORNEY TO REPRESENT YOUR
25 INTERESTS. IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR
26 MOTION FOR PROTECTIVE ORDER, IT SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST
27 IN ALL INSTANCES BE FILED NO LESS THAN SEVEN (7) BUSINESS DAYS BEFORE THE
28 DATE ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA). IF YOU ELECT TO
29 FILE A WRITTEN OBJECTION OR MOTION AGAINST THIS SUBPOENA, YOU MUST AT THE
30 SAME TIME SEND A COPY OF THAT OBJECTION OR MOTION TO BOTH YOUR INTERNET
31 SERVICE PROVIDER AND THE PARTY WHO REQUESTED THE SUBPOENA. IF YOU WISH TO
32 OPPOSE THE ATTACHED SUBPOENA, IN WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY
33 FILE A WRITTEN OBJECTION, A MOTION TO QUASH THE SUBPOENA, OR A MOTION FOR A
34 PROTECTIVE ORDER, OR YOU MAY USE THE FORM BELOW, WHICH MUST BE FILED WITH THE
35 COURT AND SERVED UPON THE PARTY REQUESTING THE SUBPOENA AND THE INTERNET
36 SERVICE PROVIDER BY MAILING AT LEAST SEVEN (7) BUSINESS DAYS PRIOR TO THE

1 DATE SET IN THE SUBPOENA FOR DISCLOSURE:

2
3 _____
4 [Name of Court Listed on Subpoena]

5
6 _____
7 [Name of Party Seeking Information]

8 Case No. _____

9 (c) The form for an objection to the subpoena shall be substantially
10 as follows:

11 OBJECTION TO SUBPOENA DUCES TECUM

12 I object to the Subpoena Duces Tecum addressed

13 to _____

14 [Name of Internet Service Provider to Whom the Subpoena is Addressed]

15
16 (Please PRINT. Set forth, in detail, all reasons why the subpoena
17 should not be complied with, and in addition, state:

18 (1) Whether the identity of the anonymous communicator has been
19 disclosed in any fashion;

20 (2) Whether the subpoena fails to allow a reasonable time for
21 compliance;

22 (3) Whether it requires disclosure of privileged or other protected
23 matter and no exception or waiver applies; or

24 (4) Whether it subjects a person to undue burden.)

25 _____
26 _____
27 _____
28 _____
29 _____
30 _____
31 [Attach additional sheets if needed]

32
33 Respectfully Submitted,

34 _____
35 [Name of person objecting to subpoena]

36

1 _____
2 [Email nickname or other alias used in communicating via the Internet service
3 provider to whom the subpoena is addressed]

4
5 CERTIFICATE

6 I hereby certify that a true copy of the above Objection to Subpoena
7 Duces Tecum was mailed this _____ day of _____, (month, year),
8 to _____

9 [Name and address of party seeking information] and

10
11 _____
12 [Name and address of Internet Service Provider]

13
14 _____
15 [Name of person objecting to subpoena]

16
17 _____
18 [Email nickname or other alias used in communicating via the Internet service
19 provider to whom the subpoena is addressed]

20 (d) In addition to postage fees, an Internet service provider required
21 to provide notice of subpoena to an anonymous communicator under this section
22 may collect from the party seeking the information a reasonable
23 administrative fee to reimburse the Internet service provider for providing
24 notice of the subpoena and for responding to the subpoena, if applicable.

25 (e) An Internet service provider shall not be liable for its good
26 faith acts or omissions in compliance with this section.

27 (f) An Internet service provider shall have an affirmative defense to
28 liability under this section if the Internet service provider has implemented
29 a written policy in compliance with this section and acted in good faith in
30 its attempt to comply with this section.

31
32 /s/ Lendall