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## HOUSE BILL NO. 2546

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on \_\_\_\_\_)

(Patron Prior to Substitute—Delegate Rasoul)

A *BILL to amend and reenact § 19.2-70.3 of the Code of Virginia, relating to obtaining records concerning electronic communication service or remote computing service without a warrant.*

**Be it enacted by the General Assembly of Virginia:**

**1. That § 19.2-70.3 of the Code of Virginia is amended and reenacted as follows:**

**§ 19.2-70.3. Obtaining records concerning electronic communication service or remote computing service.**

A. A provider of electronic communication service or remote computing service, which, for purposes of subdivisions 2, 3, and 4, includes a foreign corporation that provides such services, shall disclose a record or other information pertaining to a subscriber to or customer of such service, excluding the contents of electronic communications and real-time location data, to an investigative or law-enforcement officer only pursuant to:

1. A subpoena issued by a grand jury of a court of the Commonwealth;
2. A search warrant issued by a magistrate, general district court, or circuit court;
3. A court order issued by a circuit court for such disclosure issued as provided in subsection B; or
4. The consent of the subscriber or customer to such disclosure.

B. A court shall issue an order for disclosure under this section only if the investigative or law-enforcement officer shows that there is reason to believe the records or other information sought are relevant and material to an ongoing criminal investigation, or the investigation of any missing child as defined in § 52-32, any missing senior adult as defined in § 52-34.4, an incapacitated person as defined in § 64.2-2000 who meets the definition of a missing senior adult except for the age requirement, or any critically missing adult as defined in § 15.2-1718.2. Upon issuance of an order for disclosure under this section, the order and any written application or statement of facts may be sealed by the court for 90 days for good cause shown upon application of the attorney for the Commonwealth in an ex parte proceeding. The order and any written application or statement of facts may be sealed for additional 90-day periods for good cause shown upon subsequent application of the attorney for the Commonwealth in an ex parte proceeding. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with such order would otherwise cause an undue burden on such provider.

C. Except as provided in subsection D or E, a provider of electronic communication service or remote computing service, including a foreign corporation that provides such services, shall disclose the contents of electronic communications or real-time location data to an investigative or law-enforcement officer only pursuant to a search warrant issued by a magistrate, a juvenile and domestic relations district court, a general district court, or a circuit court, based upon complaint on oath supported by an affidavit as required in § 19.2-54, or judicial officer or court of any of the several states of the United States or its territories, or the District of Columbia when the warrant issued by such officer or such court complies with the provisions of subsection G. In the case of a search warrant directed to a foreign corporation, the affidavit shall state that the complainant believes that the records requested are actually or constructively possessed by a foreign corporation that provides electronic communication service or remote computing service within the Commonwealth of Virginia. If satisfied that probable cause has been established for such belief and as required by Chapter 5 (§ 19.2-52 et seq.), the magistrate, the juvenile and domestic relations district court, the general district court, or the circuit court shall issue a warrant identifying those records to be searched for and commanding the person seeking such warrant to properly serve the warrant upon the foreign corporation. A search warrant for real-time location data shall be issued if the magistrate, the juvenile and domestic relations district court, the general district court, or the circuit court is satisfied that probable cause has been established that the real-time location data sought is relevant to a crime that is being committed or has been committed or that an arrest warrant exists for the person whose real-time location data is sought.

D. A provider of electronic communication service or remote computing service, including a foreign corporation that provides such services, shall disclose a record or other information pertaining to a subscriber to or customer of such service, including real-time location data but excluding the contents of electronic communications, to an investigative or law-enforcement officer pursuant to an administrative subpoena issued pursuant to § 19.2-10.2 concerning a violation of § 18.2-374.1 or 18.2-374.1:1, former § 18.2-374.1:2, or § 18.2-374.3 when the information sought is relevant and material to an ongoing criminal investigation.

E. When disclosure of real-time location data *or subscriber data* is not prohibited by federal law, an investigative or law-enforcement officer may obtain real-time location data *or subscriber data* without a

60 warrant in the following circumstances:

61 1. To respond to the user's call for emergency services;

62 2. With the informed, affirmative consent of the owner or user of the electronic device concerned if (i) the  
63 device is in his possession; (ii) the owner or user knows or believes that the device is in the possession of an  
64 employee or agent of the owner or user with the owner's or user's consent; or (iii) the owner or user knows or  
65 believes that the device has been taken by a third party without the consent of the owner or user;

66 3. With the informed, affirmative consent of the legal guardian or next of kin of the owner or user, if  
67 reasonably available, if the owner or user is reasonably believed to be deceased, is reported missing, or is  
68 unable to be contacted;

69 4. To locate a child who is reasonably believed to have been abducted or to be missing and endangered; or

70 5. If the investigative or law-enforcement officer reasonably believes that an emergency involving the  
71 immediate danger to a person requires the disclosure, without delay, of real-time location data concerning a  
72 specific person and that a warrant cannot be obtained in time to prevent the identified danger; or

73 6. *If the investigative or law-enforcement officer reasonably believes that (i) an individual or group of*  
74 *individuals has made a credible threat via electronic communication to commit an act of violence upon the*  
75 *property, including the buildings and grounds thereof, of any (a) child day center, as defined in §*  
76 *22.1-289.02, including any preschool program offered by a publicly funded provider; (b) any preschool or*  
77 *nursery school program certified by the Board of Education pursuant to § 22.1-289.032; or (c) public,*  
78 *private, or religious elementary or secondary school, as defined in § 22.1-1, and (ii) a warrant cannot be*  
79 *obtained in time to prevent the identified danger or identify the source of the threat.*

80 No later than three business days after seeking disclosure of real-time location data or subscriber data  
81 pursuant to this subsection, the investigative or law-enforcement officer seeking the information shall file  
82 with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts  
83 as to why the person whose real-time location data or subscriber data was sought is believed to be important  
84 in addressing the emergency. *No real-time location data or subscriber data obtained pursuant to subdivision*  
85 *6 shall be admissible in a criminal proceeding unless a search warrant for such data has been issued after*  
86 *the threat has subsided and such data is otherwise admissible, provided that no such data obtained is used to*  
87 *establish probable cause for the issuance of such warrant.*

88 F. In order to comply with the requirements of § 19.2-54, any search of the records of a foreign  
89 corporation shall be deemed to have been made in the same place wherein the search warrant was issued.

90 G. A Virginia corporation or other entity that provides electronic communication services or remote  
91 computing services to the general public, when properly served with a search warrant and affidavit in support  
92 of the warrant, issued by a judicial officer or court of any of the several states of the United States or its  
93 territories, or the District of Columbia with jurisdiction over the matter, to produce a record or other  
94 information pertaining to a subscriber to or customer of such service, including real-time location data, or the  
95 contents of electronic communications, or both, shall produce the record or other information, including  
96 real-time location data, or the contents of electronic communications as if that warrant had been issued by a  
97 Virginia court. The provisions of this subsection shall only apply to a record or other information, including  
98 real-time location data, or contents of electronic communications relating to the commission of a criminal  
99 offense that is substantially similar to (i) a violent felony as defined in § 17.1-805, (ii) an act of violence as  
100 defined in § 19.2-297.1, (iii) any offense for which registration is required pursuant to § 9.1-902, (iv)  
101 computer fraud pursuant to § 18.2-152.3, or (v) identity theft pursuant to § 18.2-186.3. The search warrant  
102 shall be enforced and executed in the Commonwealth as if it were a search warrant described in subsection C.

103 H. The provider of electronic communication service or remote computing service may verify the  
104 authenticity of the written reports or records that it discloses pursuant to this section by providing an affidavit  
105 from the custodian of those written reports or records or from a person to whom said custodian reports  
106 certifying that they are true and complete copies of reports or records and that they are prepared in the regular  
107 course of business. When so authenticated, no other evidence of authenticity shall be necessary. The written  
108 reports and records, excluding the contents of electronic communications, shall be considered business  
109 records for purposes of the business records exception to the hearsay rule.

110 I. No cause of action shall lie in any court against a provider of a wire or electronic communication  
111 service or remote computing service or such provider's officers, employees, agents, or other specified persons  
112 for providing information, facilities, or assistance in accordance with the terms of a court order, warrant,  
113 administrative subpoena, or subpoena under this section or the provisions of subsection E.

114 J. A search warrant or administrative subpoena for the disclosure of real-time location data pursuant to  
115 this section shall require the provider to provide ongoing disclosure of such data for a reasonable period of  
116 time, not to exceed 30 days. A court may, for good cause shown, grant one or more extensions, not to exceed  
117 30 days each.

118 K. An investigative or law-enforcement officer shall not use any device to obtain electronic  
119 communications or collect real-time location data from an electronic device without first obtaining a search  
120 warrant authorizing the use of the device if, in order to obtain the contents of such electronic communications

121 or such real-time location data from the provider of electronic communication service or remote computing  
122 service, such officer would be required to obtain a search warrant pursuant to this section. However, an  
123 investigative or law-enforcement officer may use such a device without first obtaining a search warrant under  
124 the circumstances set forth in subsection E. For purposes of subdivision E 5, the investigative or law-  
125 enforcement officer using such a device shall be considered to be the possessor of the real-time location data.

126 L. Upon issuance of any subpoena, search warrant, or order for disclosure issued under this section, upon  
127 written certification by the attorney for the Commonwealth that there is a reason to believe that the victim is  
128 under the age of 18 and that notification or disclosure of the existence of the subpoena, search warrant, or  
129 order will endanger the life or physical safety of an individual, or lead to flight from prosecution, the  
130 destruction of or tampering with evidence, the intimidation of potential witnesses, or otherwise seriously  
131 jeopardize an investigation, the court may in an ex parte proceeding order a provider of electronic  
132 communication service or remote computing service not to disclose for a period of 90 days the existence of  
133 the subpoena, search warrant, or order and written application or statement of facts to another person, other  
134 than an attorney to obtain legal advice. The nondisclosure order may be renewed for additional 90-day  
135 periods for good cause shown upon subsequent application of the attorney for the Commonwealth in an ex  
136 parte proceeding. A court issuing an order for disclosure pursuant to this section, on a motion made promptly  
137 by the service provider, may quash or modify the order if the information or records requested are unusually  
138 voluminous in nature or compliance with such order would otherwise cause an undue burden on such  
139 provider.

140 M. For the purposes of this section:

141 "Electronic device" means a device that enables access to, or use of, an electronic communication service,  
142 remote computing service, or location information service, including a global positioning service or other  
143 mapping, locational, or directional information service.

144 "Foreign corporation" means any corporation or other entity, whose primary place of business is located  
145 outside of the boundaries of the Commonwealth, that makes a contract or engages in a terms of service  
146 agreement with a resident of the Commonwealth to be performed in whole or in part by either party in the  
147 Commonwealth, or a corporation that has been issued a certificate of authority pursuant to § 13.1-759 to  
148 transact business in the Commonwealth. The making of the contract or terms of service agreement or the  
149 issuance of a certificate of authority shall be considered to be the agreement of the foreign corporation or  
150 entity that a search warrant or subpoena, which has been properly served on it, has the same legal force and  
151 effect as if served personally within the Commonwealth.

152 "Properly served" means delivery of a search warrant or subpoena by hand, by United States mail, by  
153 commercial delivery service, by facsimile or by any other manner to any officer of a corporation or its  
154 general manager in the Commonwealth, to any natural person designated by it as agent for the service of  
155 process, or if such corporation has designated a corporate agent, to any person named in the latest annual  
156 report filed pursuant to § 13.1-775.

157 "Real-time location data" means any data or information concerning the current location of an electronic  
158 device that, in whole or in part, is generated, derived from, or obtained by the operation of the device.