

Virginia Retirement System's Comments on Draft Proposal

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6/19/2015 11:05 AM

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SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of
2 Information Act; trade secrets and related records.

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

4 **1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:**

5 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

6 The following records are excluded from the provisions of this chapter but may be disclosed by
7 the custodian in his discretion, except where such disclosure is prohibited by law:

8 Trade Secrets created by a Public Body:

9 1. Any record created by a public body to the extent that the record (i) was created by the public
10 body or by an employee or agent of the public body in connection with or for the purpose of conducting
11 academic, medical or scientific research or commercially exploiting such research for the financial
12 benefit of the public body; (ii) contain (a) a trade secret as defined in the Uniform Trade Secrets Act (§
13 59.1-336 et seq.), or material that would qualify as a trade secret were the public body a private business
14 entity or (b) are the personal working papers of a professor, instructor, researcher or student; and (iii)
15 has not been the subject of any prior publication, been patented, or otherwise been disclosed in any
16 manner that is inconsistent with the continued need to shield the information from public disclosure.

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17 Nothing in this subdivision shall be construed to require the production of computer software in
18 the possession of a public body that is (1) otherwise available to the public as a product offered on a
19 commercial basis, (2) designated for the specific use of the public body in carrying out its operations, or
20 (3) an operating system that is being used to conduct the regular business of the public body.

21 Trade Secrets submitted to a Public Body:

22 2. A record submitted to a public boy by an entity that is not a public body under this chapter to
23 the extent that (i) the record contains information in which the submitting entity has an ownership
24 interest; (ii) the submitted information contains a trade secret as defined in the Uniform Trade Secrets
25 Act (§ 59.1-336 et seq.); (iii) the record was submitted to the public body (a) in compliance with a

or in relation to

contract,

26 statute, regulation or other law of Commonwealth or the United States or (b) as a required component of
 27 a submission made in connection with a public procurement, public financing or economic development
 28 transaction; and (iv) the information that the submitting entity seeks to protect was clearly and
 29 specifically identified by the submitting entity as a trade secret at the time of its submission to the public
 30 body, such identification being a representation by the submitting entity that it has made a good faith
 31 effort only to designate as trade secrets those portions of the submission that are entitled to protection
 32 under the law.

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33 ~~In the event a public body, in response to a request under this chapter denied access to a record~~
 34 ~~or portion thereof exempted under this subdivision on the ground that the requested record has been~~
 35 ~~identified by the submitting entity as a trade secret and the requester challenges the characterization of~~
 36 ~~the withheld record as a trade secret, the public body shall notify the submitting entity within two~~
 37 ~~working days of the challenge made by the requester. If the submitting entity and the requester are~~
 38 ~~unable after conferring to reach agreement on the proper designation of the record in dispute or the~~
 39 ~~submitting entity refuses to confer with the requester, the requester may bring an action under this~~
 40 ~~chapter to require the public body to produce the requested record, and shall name as defendant in the~~
 41 ~~action the submitting entity. If as a result of the action the court requires the public body to produce a~~
 42 ~~record or portion thereof that has been improperly designated as a trade secret by the submitting entity,~~
 43 ~~any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by~~
 44 ~~the public body.~~ [NOTE by Maria Everett: Consider alternate placement of this paragraph as a

45 subsection in § 2.2-3713, set out at the end of this draft.]

46 Existing 2014 § 2.2-3705.6 Provisions

- 47 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
- 48 132.4 or 62.1-134.1.
- 49 2. Financial statements not publicly available filed with applications for industrial development
- 50 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
- 51 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
- 52 promise of confidentiality from a public body, used by the public body for business, trade and tourism

53 development or retention; and memoranda, working papers or other records related to businesses that are
54 considering locating or expanding in Virginia, prepared by a public body, where competition or
55 bargaining is involved and where, if such records are made public, the financial interest of the public
56 body would be adversely affected.

57 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
58 239 et seq.), as such Act existed prior to July 1, 1992.

59 5. Fisheries data that would permit identification of any person or vessel, except when required
60 by court order as specified in § 28.2-204.

61 6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost
62 projections provided to the Department of Rail and Public Transportation, provided such information is
63 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
64 laws administered by the Surface Transportation Board or the Federal Railroad Administration with
65 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad
66 Administration.

67 7. Confidential proprietary records related to inventory and sales, voluntarily provided by private
68 energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy
69 contingency planning purposes or for developing consolidated statistical information on energy supplies.

70 8. Confidential proprietary information furnished to the Board of Medical Assistance Services or
71 the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of
72 Chapter 10 of Title 32.1.

73 9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue
74 and cost projections provided by a private transportation business to the Virginia Department of
75 Transportation and the Department of Rail and Public Transportation for the purpose of conducting
76 transportation studies needed to obtain grants or other financial assistance under the Transportation
77 Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is
78 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
79 laws administered by the Surface Transportation Board or the Federal Railroad Administration with

80 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad
81 Administration. However, the exemption provided by this subdivision shall not apply to any wholly
82 owned subsidiary of a public body.

83 10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade
84 secrets or proprietary information by any person who has submitted to a public body an application for
85 prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

86 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
87 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed
88 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private
89 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
90 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
91 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
92 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
93 by the responsible public entity; and

94 b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or
95 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 or
96 the Public-Private Education Facilities and Infrastructure Act of 2002, to the extent that such records
97 contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
98 seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that
99 are not generally available to the public through regulatory disclosure or otherwise; or (iii) other
100 information submitted by the private entity, where, if the records were made public prior to the
101 execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining
102 position of the public or private entity would be adversely affected. In order for the records specified in
103 clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make
104 a written request to the responsible public entity:

105 1. Invoking such exclusion upon submission of the data or other materials for which protection
106 from disclosure is sought;

- 107 2. Identifying with specificity the data or other materials for which protection is sought; and
108 3. Stating the reasons why protection is necessary.

109 The responsible public entity shall determine whether the requested exclusion from disclosure is
110 necessary to protect the trade secrets or financial records of the private entity. To protect other records
111 submitted by the private entity from disclosure, the responsible public entity shall determine whether
112 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would
113 adversely affect the financial interest or bargaining position of the public or private entity. The
114 responsible public entity shall make a written determination of the nature and scope of the protection to
115 be afforded by the responsible public entity under this subdivision. Once a written determination is made
116 by the responsible public entity, the records afforded protection under this subdivision shall continue to
117 be protected from disclosure when in the possession of any affected jurisdiction or affected local
118 jurisdiction.

119 Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed
120 to authorize the withholding of (a) procurement records as required by § 33.2-1820 or 56-575.17; (b)
121 information concerning the terms and conditions of any interim or comprehensive agreement, service
122 contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity
123 and the private entity; (c) information concerning the terms and conditions of any financing arrangement
124 that involves the use of any public funds; or (d) information concerning the performance of any private
125 entity developing or operating a qualifying transportation facility or a qualifying project.

126 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local
127 jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying
128 transportation facility," "responsible public entity," and "private entity" shall mean the same as those
129 terms are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education
130 Facilities and Infrastructure Act of 2002.

131 12. Confidential proprietary information or trade secrets, not publicly available, provided by a
132 private person or entity to the Virginia Resources Authority or to a fund administered in connection with
133 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such

134 information were made public, the financial interest of the private person or entity would be adversely
135 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of
136 confidentiality.

137 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or
138 confidential proprietary records that are not generally available to the public through regulatory
139 disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under
140 Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a
141 promise of confidentiality from the franchising authority, to the extent the records relate to the bidder's,
142 applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies
143 or implementation of improvements, where such new services, technologies or improvements have not
144 been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such
145 records were made public, the competitive advantage or financial interests of the franchisee would be
146 adversely affected.

147 In order for trade secrets or confidential proprietary information to be excluded from the
148 provisions of this chapter, the bidder, applicant, or franchisee shall (i) invoke such exclusion upon
149 submission of the data or other materials for which protection from disclosure is sought, (ii) identify the
150 data or other materials for which protection is sought, and (iii) state the reason why protection is
151 necessary.

152 No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the
153 bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the
154 applicable franchising authority serves on the management board or as an officer of the bidder,
155 applicant, or franchisee.

156 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
157 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §
158 18.2-340.34.

159 15. Records and reports related to Virginia apple producer sales provided to the Virginia State
160 Apple Board pursuant to § 3.2-1215.

161 16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1,
162 submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery
163 Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

164 17. Records submitted as a grant or loan application, or accompanying a grant or loan
165 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-
166 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to
167 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or
168 research-related information produced or collected by the applicant in the conduct of or as a result of
169 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when
170 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of
171 such information would be harmful to the competitive position of the applicant.

172 18. Confidential proprietary records and trade secrets developed and held by a local public body
173 (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television
174 services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to the extent that
175 disclosure of such records would be harmful to the competitive position of the locality. In order for
176 confidential proprietary information or trade secrets to be excluded from the provisions of this chapter,
177 the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the
178 records or portions thereof for which protection is sought, and (c) state the reasons why protection is
179 necessary.

180 19. Confidential proprietary records and trade secrets developed by or for a local authority
181 created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to
182 provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of
183 Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive
184 position of the authority, except that records required to be maintained in accordance with § 15.2-2160
185 shall be released.

186 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
187 records of a business, including balance sheets and financial statements, that are not generally available

188 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business
189 and Supplier Diversity as part of an application for (i) certification as a small, women-owned, or
190 minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.) or (ii) a claim made by a
191 disadvantaged business or an economically disadvantaged individual against the Capital Access Fund
192 for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial
193 records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion
194 upon submission of the data or other materials for which protection from disclosure is sought, (b)
195 identify the data or other materials for which protection is sought, and (c) state the reasons why
196 protection is necessary.

197 21. Documents and other information of a proprietary or confidential nature disclosed by a
198 carrier to the State Health Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

199 22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including,
200 but not limited to, financial records, including balance sheets and financial statements, that are not
201 generally available to the public through regulatory disclosure or otherwise, and revenue and cost
202 projections supplied by a private or nongovernmental entity to the State Inspector General for the
203 purpose of an audit, special investigation, or any study requested by the Office of the State Inspector
204 General in accordance with law.

205 In order for the records specified in this subdivision to be excluded from the provisions of this
206 chapter, the private or nongovernmental entity shall make a written request to the State Inspector
207 General:

- 208 1. Invoking such exclusion upon submission of the data or other materials for which protection
209 from disclosure is sought;
- 210 2. Identifying with specificity the data or other materials for which protection is sought; and
- 211 3. Stating the reasons why protection is necessary.

212 The State Inspector General shall determine whether the requested exclusion from disclosure is
213 necessary to protect the trade secrets or financial records of the private entity. The State Inspector

214 General shall make a written determination of the nature and scope of the protection to be afforded by it
215 under this subdivision.

216 23. Records submitted as a grant application, or accompanying a grant application, to the
217 Virginia Tobacco Indemnification and Community Revitalization Commission to the extent such
218 records contain (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii)
219 financial records of a grant applicant that is not a public body, including balance sheets and financial
220 statements, that are not generally available to the public through regulatory disclosure or otherwise, or
221 (iii) research-related information produced or collected by the applicant in the conduct of or as a result
222 of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues,
223 when such information has not been publicly released, published, copyrighted, or patented, if the
224 disclosure of such information would be harmful to the competitive position of the applicant; and
225 memoranda, staff evaluations, or other records prepared by the Commission or its staff exclusively for
226 the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that
227 are consistent with the powers of and in furtherance of the performance of the duties of the Commission
228 pursuant to § 3.2-3103.

229 In order for the records specified in this subdivision to be excluded from the provisions of this
230 chapter, the applicant shall make a written request to the Commission:

- 231 1. Invoking such exclusion upon submission of the data or other materials for which protection
232 from disclosure is sought;
- 233 2. Identifying with specificity the data, records or other materials for which protection is sought;
234 and
- 235 3. Stating the reasons why protection is necessary.

236 The Commission shall determine whether the requested exclusion from disclosure is necessary to
237 protect the trade secrets, financial records or research-related information of the applicant. The
238 Commission shall make a written determination of the nature and scope of the protection to be afforded
239 by it under this subdivision.

240 24. a. Records of the Commercial Space Flight Authority relating to rate structures or charges for
241 the use of projects of, the sale of products of, or services rendered by the Authority if public disclosure
242 would adversely affect the financial interest or bargaining position of the Authority or a private entity
243 providing records to the Authority; or

244 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent
245 that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets
246 Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and
247 financial statements, that are not generally available to the public through regulatory disclosure or
248 otherwise; or (iii) other information submitted by the private entity, where, if the records were made
249 public, the financial interest or bargaining position of the Authority or private entity would be adversely
250 affected.

251 In order for the records specified in clauses (i), (ii), and (iii) of subdivision 24 b to be excluded
252 from the provisions of this chapter, the private entity shall make a written request to the Authority:

- 253 1. Invoking such exclusion upon submission of the data or other materials for which protection
254 from disclosure is sought;
- 255 2. Identifying with specificity the data or other materials for which protection is sought; and
- 256 3. Stating the reasons why protection is necessary.

257 The Authority shall determine whether the requested exclusion from disclosure is necessary to
258 protect the trade secrets or financial records of the private entity. To protect other records submitted by
259 the private entity from disclosure, the Authority shall determine whether public disclosure would
260 adversely affect the financial interest or bargaining position of the Authority or private entity. The
261 Authority shall make a written determination of the nature and scope of the protection to be afforded by
262 it under this subdivision.

263 25. Documents and other information of a proprietary nature furnished by an agricultural
264 landowner or operator to the Department of Conservation and Recreation, the Department of
265 Environmental Quality, the Department of Agriculture and Consumer Services or any political

266 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-
267 104.9, other than when required as part of a state or federal regulatory enforcement action.

268 26. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to
269 the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for such
270 trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this
271 exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii)
272 identify the data or materials for which protection is sought, and (iii) state the reasons why protection is
273 necessary.

274 27. Documents and other information of a proprietary nature furnished by a licensed public-use
275 airport to the Department of Aviation for funding from programs administered by the Department of
276 Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of
277 the public-use airport would be adversely affected.

278 In order for the records specified in this subdivision to be excluded from the provisions of this
279 chapter, the public-use airport shall make a written request to the Department of Aviation:

- 280 1. Invoking such exclusion upon submission of the data or other materials for which protection
281 from disclosure is sought;
- 282 2. Identifying with specificity the data or other materials for which protection is sought; and
- 283 3. Stating the reasons why protection is necessary.

284 **§ 2.2-3713. Proceedings for enforcement of chapter.**

285 A. Any person, including the attorney for the Commonwealth acting in his official or individual
286 capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights
287 and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good
288 cause. Such petition may be brought in the name of the person notwithstanding that a request for public
289 records was made by the person's attorney in his representative capacity. Venue for the petition shall be
290 addressed as follows:

291 1. In a case involving a local public body, to the general district court or circuit court of the
292 county or city from which the public body has been elected or appointed to serve and in which such
293 rights and privileges were so denied;

294 2. In a case involving a regional public body, to the general district or circuit court of the county
295 or city where the principal business office of such body is located; and

296 3. In a case involving a board, bureau, commission, authority, district, institution, or agency of
297 the state government, including a public institution of higher education, or a standing or other committee
298 of the General Assembly, to the general district court or the circuit court of the residence of the
299 aggrieved party or of the City of Richmond.

300 B. In any action brought before a general district court, a corporate petitioner may appear
301 through its officer, director or managing agent without the assistance of counsel, notwithstanding any
302 provision of law or Rule of the Supreme Court of Virginia to the contrary.

303 C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall
304 be heard within seven days of the date when the same is made, provided the party against whom the
305 petition is brought has received a copy of the petition at least three working days prior to filing. The
306 hearing on any petition made outside of the regular terms of the circuit court of a locality that is included
307 in a judicial circuit with another locality or localities shall be given precedence on the docket of such
308 court over all cases that are not otherwise given precedence by law.

309 D. The petition shall allege with reasonable specificity the circumstances of the denial of the
310 rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges
311 conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the
312 denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover
313 reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the
314 public body if the petitioner substantially prevails on the merits of the case, unless special circumstances
315 would make an award unjust. In making this determination, a court may consider, among other things,
316 the reliance of a public body on an opinion of the Attorney General or a decision of a court that
317 substantially supports the public body's position.

318 E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of
319 proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to
320 follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

321 F. ~~In the event a public body, in response to a request under this chapter denied access to a~~
322 ~~record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the~~
323 ~~requested information has been identified by the submitting entity as a trade secret and the requester~~
324 ~~challenges the characterization of the withheld record as a trade secret, the public body shall notify the~~
325 ~~submitting entity within two working days of the challenge made by the requester. If the submitting~~
326 ~~entity and the requester are unable after conferring to reach agreement on the proper designation of the~~
327 ~~record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an~~
328 ~~action under this chapter to require the public body to produce the requested record, and shall name as~~
329 ~~defendant in the action the submitting entity. If as a result of the action the court requires that the public~~
330 ~~body produce a record or portion thereof that has been improperly designated as a trade secret by the~~
331 ~~submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting~~
332 ~~entity and not by the public body.~~

333 ~~G.~~ Failure by any person to request and receive notice of the time and place of meetings as
334 provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred
335 by this chapter.

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