

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; general record exemption for trade secrets and financial 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 General Record Exemption for Trade Secrets and Financial Records

9 1. Those portions of records containing (i) trade secrets as defined in the Uniform Trade Secrets  
10 Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets and financial statements that  
11 are not generally available to the public through regulatory disclosure or otherwise. In order for the  
12 records specified in this subdivision to be excluded from the provisions of this chapter, the submitting  
13 entity shall make a written request to the public body:

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

16 2. Identifying with specificity the data or other materials for which protection is sought; and

17 3. Stating the reasons why protection is necessary.

18 The public body shall determine whether the requested exclusion from disclosure is necessary to  
19 protect the trade secrets or financial records of the submitting entity, which determination shall be set  
20 forth in writing, reflecting the agreement between it and the submitting entity of the nature and scope of  
21 the protection to be afforded by it under this subdivision.

22 In the event a public body, in response to a request under this chapter denied access to a record  
23 or portion thereof exempted under this subdivision on the ground that the requested record has been  
24 identified by the submitting entity as a trade secret and the requester challenges the characterization of  
25 the withheld record as a trade secret, the public body shall notify the submitting entity within two

26 working days of the challenge made by the requester. If the submitting entity and the requester are  
27 unable after conferring to reach agreement on the proper designation of the record in dispute or the  
28 submitting entity refuses to confer with the requester, the requester may bring an action under this  
29 chapter to require the public body to product the requested record, and shall name as defendant in the  
30 action the submitting entity. If as a result of the action the court requires the public body to produce a  
31 record or portion thereof that has been improperly designated as a trade secret by the submitting entity,  
32 any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by  
33 the public body. [NOTE by Maria Everett: Consider alternate placement of this paragraph as a  
34 subsection in § 2.2-3713, set out at the end of this draft.]

35 Existing 2014 § 2.2-3705.6 Provisions

- 36 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-  
37 132.4 or 62.1-134.1.
- 38 2. Financial statements not publicly available filed with applications for industrial development  
39 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
- 40 3. Confidential proprietary records, voluntarily provided by private business pursuant to a  
41 promise of confidentiality from a public body, used by the public body for business, trade and tourism  
42 development or retention; and memoranda, working papers or other records related to businesses that are  
43 considering locating or expanding in Virginia, prepared by a public body, where competition or  
44 bargaining is involved and where, if such records are made public, the financial interest of the public  
45 body would be adversely affected.
- 46 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-  
47 239 et seq.), as such Act existed prior to July 1, 1992.
- 48 5. Fisheries data that would permit identification of any person or vessel, except when required  
49 by court order as specified in § 28.2-204.
- 50 6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost  
51 projections provided to the Department of Rail and Public Transportation, provided such information is  
52 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other

53 laws administered by the Surface Transportation Board or the Federal Railroad Administration with  
54 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad  
55 Administration.

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

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

62 9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue  
63 and cost projections provided by a private transportation business to the Virginia Department of  
64 Transportation and the Department of Rail and Public Transportation for the purpose of conducting  
65 transportation studies needed to obtain grants or other financial assistance under the Transportation  
66 Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is  
67 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other  
68 laws administered by the Surface Transportation Board or the Federal Railroad Administration with  
69 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad  
70 Administration. However, the exemption provided by this subdivision shall not apply to any wholly  
71 owned subsidiary of a public body.

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

75 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,  
76 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed  
77 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private  
78 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were  
79 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or

80 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be  
81 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing  
82 by the responsible public entity; and

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

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

98 The responsible public entity shall determine whether the requested exclusion from disclosure is  
99 necessary to protect the trade secrets or financial records of the private entity. To protect other records  
100 submitted by the private entity from disclosure, the responsible public entity shall determine whether  
101 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would  
102 adversely affect the financial interest or bargaining position of the public or private entity. The  
103 responsible public entity shall make a written determination of the nature and scope of the protection to  
104 be afforded by the responsible public entity under this subdivision. Once a written determination is made  
105 by the responsible public entity, the records afforded protection under this subdivision shall continue to

106 be protected from disclosure when in the possession of any affected jurisdiction or affected local  
107 jurisdiction.

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

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

120 12. Confidential proprietary information or trade secrets, not publicly available, provided by a  
121 private person or entity to the Virginia Resources Authority or to a fund administered in connection with  
122 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such  
123 information were made public, the financial interest of the private person or entity would be adversely  
124 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of  
125 confidentiality.

126 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or  
127 confidential proprietary records that are not generally available to the public through regulatory  
128 disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under  
129 Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a  
130 promise of confidentiality from the franchising authority, to the extent the records relate to the bidder's,  
131 applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies  
132 or implementation of improvements, where such new services, technologies or improvements have not

133 been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such  
134 records were made public, the competitive advantage or financial interests of the franchisee would be  
135 adversely affected.

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

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

145 14. Documents and other information of a proprietary nature furnished by a supplier of charitable  
146 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §  
147 18.2-340.34.

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

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

153 17. Records submitted as a grant or loan application, or accompanying a grant or loan  
154 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-  
155 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to  
156 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or  
157 research-related information produced or collected by the applicant in the conduct of or as a result of  
158 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when

159 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of  
160 such information would be harmful to the competitive position of the applicant.

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

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

175 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial  
176 records of a business, including balance sheets and financial statements, that are not generally available  
177 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business  
178 and Supplier Diversity as part of an application for (i) certification as a small, women-owned, or  
179 minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.) or (ii) a claim made by a  
180 disadvantaged business or an economically disadvantaged individual against the Capital Access Fund  
181 for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial  
182 records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion  
183 upon submission of the data or other materials for which protection from disclosure is sought, (b)  
184 identify the data or other materials for which protection is sought, and (c) state the reasons why  
185 protection is necessary.

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

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

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

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

201 The State Inspector General shall determine whether the requested exclusion from disclosure is  
202 necessary to protect the trade secrets or financial records of the private entity. The State Inspector  
203 General shall make a written determination of the nature and scope of the protection to be afforded by it  
204 under this subdivision.

205 23. Records submitted as a grant application, or accompanying a grant application, to the  
206 Virginia Tobacco Indemnification and Community Revitalization Commission to the extent such  
207 records contain (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii)  
208 financial records of a grant applicant that is not a public body, including balance sheets and financial  
209 statements, that are not generally available to the public through regulatory disclosure or otherwise, or  
210 (iii) research-related information produced or collected by the applicant in the conduct of or as a result  
211 of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues,  
212 when such information has not been publicly released, published, copyrighted, or patented, if the



213 disclosure of such information would be harmful to the competitive position of the applicant; and  
214 memoranda, staff evaluations, or other records prepared by the Commission or its staff exclusively for  
215 the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that  
216 are consistent with the powers of and in furtherance of the performance of the duties of the Commission  
217 pursuant to § 3.2-3103.

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

- 220 1. Invoking such exclusion upon submission of the data or other materials for which protection  
221 from disclosure is sought;
- 222 2. Identifying with specificity the data, records or other materials for which protection is sought;
- 223 and
- 224 3. Stating the reasons why protection is necessary.

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

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

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

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

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

244 2. Identifying with specificity the data or other materials for which protection is sought; and

245 3. Stating the reasons why protection is necessary.

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

252 25. Documents and other information of a proprietary nature furnished by an agricultural  
253 landowner or operator to the Department of Conservation and Recreation, the Department of  
254 Environmental Quality, the Department of Agriculture and Consumer Services or any political  
255 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-  
256 104.9, other than when required as part of a state or federal regulatory enforcement action.

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

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

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

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

273 **§ 2.2-3713. Proceedings for enforcement of chapter.**

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

- 280 1. In a case involving a local public body, to the general district court or circuit court of the  
281 county or city from which the public body has been elected or appointed to serve and in which such  
282 rights and privileges were so denied;
- 283 2. In a case involving a regional public body, to the general district or circuit court of the county  
284 or city where the principal business office of such body is located; and
- 285 3. In a case involving a board, bureau, commission, authority, district, institution, or agency of  
286 the state government, including a public institution of higher education, or a standing or other committee  
287 of the General Assembly, to the general district court or the circuit court of the residence of the  
288 aggrieved party or of the City of Richmond.

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

292 C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall  
293 be heard within seven days of the date when the same is made, provided the party against whom the

294 petition is brought has received a copy of the petition at least three working days prior to filing. The  
295 hearing on any petition made outside of the regular terms of the circuit court of a locality that is included  
296 in a judicial circuit with another locality or localities shall be given precedence on the docket of such  
297 court over all cases that are not otherwise given precedence by law.

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

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

310 F. In the event a public body, in response to a request under this chapter denied access to a  
311 record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the  
312 requested information has been identified by the submitting entity as a trade secret and the requester  
313 challenges the characterization of the withheld record as a trade secret, the public body shall notify the  
314 submitting entity within two working days of the challenge made by the requester. If the submitting  
315 entity and the requester are unable after conferring to reach agreement on the proper designation of the  
316 record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an  
317 action under this chapter to require the public body to product the requested record, and shall name as  
318 defendant in the action the submitting entity. If as a result of the action the court requires that the public  
319 body produce a record or portion thereof that has been improperly designated as a trade secret by the

320 submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting  
321 entity and not by the public body.

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

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