



COMMONWEALTH OF VIRGINIA
Office of the State Inspector General

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Maria J.K. Everett, Esq. Executive Director/Senior Attorney
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

SUBJECT: Review of your agency's FOIA exemptions RE: Proprietary Records and Trade Secrets

Dear Ms. Everett,

I have reviewed the proposed changes to FOIA exemption concerning proprietary records and trade secrets that relate to the Office of the State Inspector General (OSIG), and do have some concerns.

Specifically, I am referring to the following language found in § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets:

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

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

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

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

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

The draft created by the Virginia Press Association for November 10, 2015, work group meeting, indicates that the section referenced above “might be eliminated if a general exemption is enacted.”

As paragraph 22 of § 2.2-3705.6 is currently written, the burden of responsibility for requesting an exemption rests with the private or nongovernmental entity and it is up to that entity to make the case and justify reasons the information is proprietary and exempt, and as such, should be withheld. It is only after the entity bears the burden of proof that the State Inspector General has the authority to determine if the withholding of such information is appropriate.

Should this section be amended to remove paragraph 22 of *Code* § 2.2-3705.6, OSIG would be entirely responsible for determining what specific information should be considered for withholding, whether certain information should be exempt from release. By eliminating this section, the State Inspector General and OSIG would bear the total responsibility of invoking such exclusion, identifying with specificity the data or other materials for which protection is sought, and stating the reasons why the protection is warranted.

I believe amending the section to remove paragraph 22, would yield unintended consequences that would pose an undue burden on OSIG. In addition and without seeing the wording of a general exemption, I am unable to determine if I would have other issues or concerns.

I respectfully request that the work group NOT eliminate the OSIG-specific language.

If you have any questions, please feel free to call me at (804) 625-3255 or email me at june.jennings@osig.virginia.gov. I am also available to meet with you or the work group in person to discuss my concerns.

Sincerely,



June W. Jennings, CPA
State Inspector General