

Virginia Press Association's Proposed FOIA Exclusion for Trade Secrets
Submitted to a Public Body

VDOT Analysis and Comments

1. From VDOT's perspective, the intended interplay between the language in VPA's proposal (See Attachment 1) and the exemption afforded to PPTA/PPEA-related documents set forth in § 2.2 -3705.6 (11) is not clear.
2. The VPA proposal (See Attachment 1) appears to be devoid of the concept contained in the following language set out in the exemption provided in § 2.2 -3705.6 (11):

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

- The language above is broader than that proposed by the VPA as the VPA exemption appears to only exempt language that is entitled to protection under the Trade Secrets Act.
 - The language above would protect information that is not a Trade Secret per se, but may be information that, if released prior to or after the execution of an interim agreement or a comprehensive agreement, could impact the Commonwealth's ability to effectively negotiate a deal or transaction.

- It is not clear whether the intent of the VPA proposal would be to eliminate the above referenced aspect of the current FOIA exemption.
- VDOT is concerned that eliminating the above referenced language (which was placed in Code in the 2006 Special Session of the General Assembly), if that is the intent, would result in the loss of the exemption as it relates to agency generated records, namely:
 - “Memoranda, staff evaluations, or other information prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.)....”
 - Based on historical documents, this language was enacted into law (with a one year sunset) during a special session of the General Assembly after passage of SB76 during the 2006 regular session of the General Assembly, and was the result of an agreement between the Governor and General Assembly.
 - The language was then re-enacted in the 2007 Session of the General Assembly, after VDOT staff worked with the FOIA council, the patron and others to develop the language in the legislation (SB 1002).
 - The purpose of the language was and continues to be protection of information/records created by responsible public entities that if released could jeopardize the responsible public entity’s ability to protect information that would impact the entity’s financial interest and/or ability to effectively negotiate transactions and obtain the most advantageous deals for the Commonwealth.
- Examples of the type of information contained in records that would lose the current exemption and be made public could include information such as VDOT’s evaluation methodologies

or negotiation strategies for proposals filed under the PPTA or modeling documents/methodologies, etc that may be relevant to more than one PPTA transaction.

- VDOT would have concerns regarding the lack of protection afforded to these types of records and the resulting impact on the agency's ability to maximize its negotiations for the current P3 transaction or future transactions if this portion of the language is removed from the Code/exemption.

3. The VPA proposal conflicts with the following language excluding certain records from the posting requirements in §§33.2-1820 and 56-575.1:

- Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § [2.2-3705.6](#) shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.
- If the intent of the VPA language is to only provide an exemption for/protect trade secrets (and to eliminate protection of financial records and other records" currently protected from disclosure), then the PPTA and PPEA language noted above would be inconsistent with the "corresponding" FOIA exemption.

4. Technical Issue—the VPA draft language, if included in FOIA, would arguably create a "conflict" or result in inconsistent treatment of financial information submitted by a private entity under the PPTA or PPEA (would not provide an exemption) vs financial records submitted under the VPPA(would provide an exemption) for the same type of information or records:

- See Section 2.2-4342 (F) which provides, in subsection F:

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § [2.2-4317](#) shall not be subject to the Virginia Freedom of Information Act (§ [2.2-3700](#) et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon

submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

5. With regard to the substance of the language proposed by the VPA relating to Trade Secrets in Attachment A, VDOT is inclined to defer to industry stakeholders as the records that are the subject of current-day protections and the proposed VPA protection are records belonging to the private sector.
 - The private sector is better equipped to address issues that might be presented by the language proposed by VPA.
 - However, to the extent that the language proposed by VPA would discourage private sector involvement in transactions and/or discourage competition under the PPTA/PPEA and impact the Commonwealth's ability to negotiate optimal deals for the Commonwealth, VDOT would have concerns with the language.