

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact §§ 2.2-3705.6 and 56-573.1:1, as they are currently effective and as they
2 will become effective, of the Code of Virginia, relating to public access to procurement records
3 under the Public-Private Transportation Act of 1995 and the Public-Private Education Facilities
4 and Infrastructure Act of 2002.

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

6 **1. That reenact §§ 2.2-3705.6 and 56-573.1:1, as they are currently effective and as they will**
7 **become effective, of the Code of Virginia are amended and reenacted as follows:**

8 § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

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

11 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
12 132.4 or 62.1-134.1.

13 2. Financial statements not publicly available filed with applications for industrial development
14 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

15 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
16 promise of confidentiality from the Department of Business Assistance, the Virginia Economic
17 Development Partnership, the Virginia Tourism Authority, the Tobacco Indemnification and
18 Community Revitalization Commission, or local or regional industrial or economic development
19 authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for
20 business, trade and tourism development; and memoranda, working papers or other records related to
21 businesses that are considering locating or expanding in Virginia, prepared by such entities, where
22 competition or bargaining is involved and where, if such records are made public, the financial interest
23 of the governmental unit would be adversely affected.

24 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
25 239 et seq.), as such Act existed prior to July 1, 1992.

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

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

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

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

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

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

53 11. (Effective until July 1, 2007) ~~Memoranda, staff evaluations, or other records prepared by or~~
54 ~~for the responsible public entity for the evaluation and negotiation of proposals filed under~~ Records of a
55 responsible public entity engaged in a procurement transaction pursuant to the Public-Private
56 Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education Facilities and
57 Infrastructure Act of 2002 (§ 56-575.1 et seq.), ~~where (a) if such records were made public prior to their~~
58 ~~disclosure as required by § 56-573.1:1 or 56-575.17, the financial interest or bargaining position of the~~
59 ~~public or private entity would be adversely affected, and (b) the basis for the determination required in~~
60 ~~clause (a) is documented in writing by the responsible public entity to the extent such records may be~~
61 withheld pursuant to § 56-573.1:1 or 56-575.17; and records provided by a private entity to a responsible
62 public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-
63 Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and
64 Infrastructure Act of 2002 (§ 56-575.1 et seq.), to the extent that such records contain (i) trade secrets of
65 the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records
66 of the private entity, including balance sheets and financial statements, that are not generally available to
67 the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private
68 entity, where, if the records were made public prior to the execution of an interim agreement or a
69 comprehensive agreement, the financial interest or bargaining position of the public or private entity
70 would be adversely affected.

71 In order for the records specified in clauses (i), (ii) and (iii) to be excluded from the provisions of
72 this chapter, the private entity shall make a written request to the responsible public entity:

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

77 The responsible public entity shall determine whether the requested exclusion from disclosure is
 78 necessary to protect the trade secrets or financial records of the private entity. To protect other records
 79 submitted by the private entity from disclosure, the responsible public entity shall determine whether
 80 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would
 81 adversely affect the financial interest or bargaining position of the public or private entity. The
 82 responsible public entity shall make a written determination of the nature and scope of the protection to
 83 be afforded by the responsible public entity under this subdivision. Once a written determination is made
 84 by the responsible public body, the records afforded protection under this subdivision shall continue to
 85 be protected from disclosure when in the possession of any affected jurisdiction or affected local
 86 jurisdiction to which such records are provided by the responsible public entity.

87 Nothing in this subdivision shall be construed to authorize the withholding of (a) procurement
 88 records as required by § 56-573.1:1 or 56-575.17; (b) information concerning the terms and conditions
 89 of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any
 90 kind entered into by the responsible public entity and the private entity; (c) information concerning the
 91 terms and conditions of any financing arrangement that involves the use of any public funds; or (d)
 92 information concerning the performance of any private entity developing or operating a qualifying
 93 transportation facility or a qualifying project.

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

99 11. (Effective July 1, 2007) Records of a responsible public entity engaged in a procurement
 100 transaction pursuant to the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public
 101 Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), to the extent such
 102 records may be withheld pursuant to § 56-573.1:1 or 56-575.17; and records provided by a private entity
 103 to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the

104 provisions of the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private
105 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), to the extent that such records
106 contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
107 seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that
108 are not generally available to the public through regulatory disclosure or otherwise; or (iii) other
109 information submitted by the private entity, where, if the records were made public prior to the
110 execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining
111 position of the public or private entity would be adversely affected. In order for the records specified in
112 clauses (i), (ii) and (iii) to be excluded from the provisions of this chapter, the private entity shall make a
113 written request to the responsible public entity:

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

118 The responsible public entity shall determine whether the requested exclusion from disclosure is
119 necessary to protect the trade secrets or financial records of the private entity. To protect other records
120 submitted by the private entity from disclosure, the responsible public entity shall determine whether
121 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would
122 adversely affect the financial interest or bargaining position of the public or private entity. The
123 responsible public entity shall make a written determination of the nature and scope of the protection to
124 be afforded by the responsible public entity under this subdivision. Once a written determination is made
125 by the responsible public body, the records afforded protection under this subdivision shall continue to
126 be protected from disclosure when in the possession of any affected jurisdiction or affected local
127 jurisdiction to which such records are provided by the responsible public entity.

128 Nothing in this subdivision shall be construed to authorize the withholding of (a) procurement
129 records as required by § 56-573.1:1 or 56-575.17; (b) information concerning the terms and conditions
130 of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any

131 kind entered into by the responsible public entity and the private entity; (c) information concerning the
132 terms and conditions of any financing arrangement that involves the use of any public funds; or (d)
133 information concerning the performance of any private entity developing or operating a qualifying
134 transportation facility or a qualifying project.

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

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

146 13. Confidential proprietary records that are provided by a franchisee under Article 1.2 (§ 15.2-
147 2108.19 et seq.) of Chapter 21 of Title 15.2 to its franchising authority pursuant to a promise of
148 confidentiality from the franchising authority that relates to the franchisee's potential provision of new
149 services, adoption of new technologies or implementation of improvements, where such new services,
150 technologies or improvements have not been implemented by the franchisee on a nonexperimental scale
151 in the franchise area, and where, if such records were made public, the competitive advantage or
152 financial interests of the franchisee would be adversely affected. In order for confidential proprietary
153 information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such
154 exclusion upon submission of the data or other materials for which protection from disclosure is sought,
155 (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why
156 protection is necessary.

157 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
158 gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 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 §§ 3.1-622 and 3.1-624.

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

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

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

183 position of the authority, except that records required to be maintained in accordance with § 15.2-2160
184 shall be released.

185 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
186 records of a business, including balance sheets and financial statements, that are not generally available
187 to the public through regulatory disclosure or otherwise, provided to the Department of Minority
188 Business Enterprise as part of an application for (i) certification as a small, women- or minority-owned
189 business in accordance with Chapter 14 (§ 2.2-1400 et seq.) of this title or (ii) a claim made by a
190 disadvantaged business or an economically disadvantaged individual against the Capital Access Fund
191 for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial
192 records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion
193 upon submission of the data or other materials for which protection from disclosure is sought, (b)
194 identify the data or other materials for which protection is sought, and (c) state the reasons why
195 protection is necessary.

196 § 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement
197 records.

198 A. Conceptual proposals submitted in accordance with subsection A or B of § 56-560 to a
199 responsible public entity shall be posted by the responsible public entity within 10 working days after
200 acceptance of such proposals as follows:

201 1. For responsible public entities that are state agencies, departments, and institutions, posting
202 shall be on the Department of General Service's web-based electronic procurement program commonly
203 known as "eVA;" and

204 2. For responsible public entities that are local public bodies, posting shall be on the responsible
205 public entity's website or by publication, in a newspaper of general circulation in the area in which the
206 contract is to be performed, of a summary of the proposals and the location where copies of the
207 proposals are available for public inspection. Posting may also be on the Department of General
208 Service's web-based electronic procurement program commonly known as "eVA," in the discretion of
209 the local responsible public entity.

210 In addition to the posting requirements, at least one copy of the proposals shall be made available
211 for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual
212 proposals by additional means deemed appropriate by the responsible public entity so as to provide
213 maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial
214 records, or other records of the private entity excluded from disclosure under the provisions of
215 subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the
216 responsible public entity and the private entity.

217 B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an
218 interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public
219 comment on the proposals. The public comment period required by this subsection may include a public
220 hearing in the sole discretion of the responsible public entity. After the end of the public comment
221 period, no additional posting shall be required.

222 C. Once the negotiation phase for the development of an interim or a comprehensive agreement
223 is complete and a decision to award has been made by a responsible public entity, the responsible public
224 entity shall present the major business points of the interim or comprehensive agreement, including the
225 use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open
226 to the public.

227 D. (Effective until July 1, 2007) Once an interim agreement or a comprehensive agreement has
228 been entered into ~~and the process of bargaining of other interim agreements related to the qualifying~~
229 ~~transportation facility or the process of bargaining of all phases or aspects of the comprehensive~~
230 ~~agreement is complete~~, a responsible public entity shall make procurement records available for public
231 inspection, ~~upon request~~ in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et
232 seq.). For the purposes of this subsection, procurement records shall not be interpreted to include (i)
233 trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii)
234 financial records, including balance sheets or financial statements of the private entity that are not
235 generally available to the public through regulatory disclosure or otherwise.

236 D. (Effective July 1, 2007) Once an interim agreement or a comprehensive agreement has been
 237 entered into, a responsible public entity shall make procurement records available for public inspection;
 238 ~~upon request in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).~~ For the
 239 purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of
 240 the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.)~~or;~~ (ii) financial
 241 records, including balance sheets or financial statements of the private entity that are not generally
 242 available to the public through regulatory disclosure or otherwise; or cost estimates relating to a
 243 proposed procurement transaction prepared by or for a responsible public entity.

244 E. ~~Cost estimates relating to a proposed procurement transaction prepared by or for a responsible~~
 245 ~~public entity shall not be open to public inspection.~~

246 ~~F.~~ Any inspection of procurement transaction records under this section shall be subject to
 247 reasonable restrictions to ensure the security and integrity of the records.

248 ~~G.F.~~ The provisions of this section shall apply to accepted proposals regardless of whether the
 249 process of bargaining will result in an interim or a comprehensive agreement.

250 H. (Effective until July 1, 2007) A responsible public entity and any independent review panel
 251 appointed to review information and advise the responsible public entity may hold closed meetings to
 252 discuss or consider records exempt from disclosure pursuant to subdivision 11 of § 2.2-3705.6, provided
 253 such meetings are held in accordance with the procedural requirements of § 2.2-3712.

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