

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 records exemption for trade secrets created by a public body.

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 or for a public body or an employee or agent of the public body to the
10 extent that the record (i) contains a trade secret as defined in the Uniform Trade Secrets Act (§ 59.1-336
11 et seq.) and (ii) has not been the subject of any prior publication, been patented, or otherwise been
12 disclosed in any manner that is inconsistent with the continued need to shield the information from
13 public disclosure.

14 Existing 2015 § 2.2-3705.6 Provisions

15 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

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

18 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
19 132.4 or 62.1-134.1.

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

22 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
23 promise of confidentiality from a public body, used by the public body for business, trade and tourism
24 development or retention; and memoranda, working papers or other records related to businesses that are
25 considering locating or expanding in Virginia, prepared by a public body, where competition or

26 bargaining is involved and where, if such records are made public, the financial interest of the public
27 body would be adversely affected.

28 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
29 239 et seq.), as such Act existed prior to July 1, 1992.

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

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

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

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

44 9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue
45 and cost projections provided by a private transportation business to the Virginia Department of
46 Transportation and the Department of Rail and Public Transportation for the purpose of conducting
47 transportation studies needed to obtain grants or other financial assistance under the Transportation
48 Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is
49 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
50 laws administered by the Surface Transportation Board or the Federal Railroad Administration with
51 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad

52 Administration. However, the exemption provided by this subdivision shall not apply to any wholly
53 owned subsidiary of a public body.

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

57 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
58 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed
59 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private
60 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
61 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
62 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
63 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
64 by the responsible public entity; and

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

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

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

79 3. Stating the reasons why protection is necessary.

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

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

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

102 12. Confidential proprietary information or trade secrets, not publicly available, provided by a
103 private person or entity to the Virginia Resources Authority or to a fund administered in connection with
104 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such
105 information were made public, the financial interest of the private person or entity would be adversely

106 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of
107 confidentiality.

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

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

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

127 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
128 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §
129 18.2-340.34.

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

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

135 17. Records submitted as a grant or loan application, or accompanying a grant or loan
136 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-
137 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to
138 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or
139 research-related information produced or collected by the applicant in the conduct of or as a result of
140 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when
141 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of
142 such information would be harmful to the competitive position of the applicant.

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

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

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

159 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business
160 and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-
161 owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.). In order for such trade secrets or
162 financial records to be excluded from the provisions of this chapter, the business shall (i) invoke such
163 exclusion upon submission of the data or other materials for which protection from disclosure is sought,
164 (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why
165 protection is necessary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

231 25. Documents and other information of a proprietary nature furnished by an agricultural
232 landowner or operator to the Department of Conservation and Recreation, the Department of
233 Environmental Quality, the Department of Agriculture and Consumer Services or any political
234 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-
235 104.9, other than when required as part of a state or federal regulatory enforcement action.

236 26. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to
237 the Department of Environmental Quality pursuant to the provisions of § 10.1-1458. In order for such
238 trade secrets to be excluded from the provisions of this chapter, the submitting party shall (i) invoke this

239 exclusion upon submission of the data or materials for which protection from disclosure is sought, (ii)
240 identify the data or materials for which protection is sought, and (iii) state the reasons why protection is
241 necessary.

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

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

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

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