

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia, relating to the
2 Virginia Freedom of Information Act; general record exemption for trade secrets submitted to a
3 public body; enforcement.

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

5 **1. That §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia are amended and reenacted as follows:**

6 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

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

9 Trade Secrets submitted to a Public Body:

10 1. Records submitted to a public body by an entity that is not a public body under this chapter to
11 the extent that (i) the submitted record contains a trade secret as defined in the Uniform Trade Secrets
12 Act (§ 59.1-336 et seq.); (ii) the record was submitted to the public body (a) in compliance with, or in
13 relation to, a statute, regulation or other law of Commonwealth or the United States or (b) as a
14 component of a submission made in relation to public procurement, public financing, or public
15 contracts; and (iii) the information that the submitting entity seeks to protect was specifically identified
16 by the submitting entity as a trade secret at the time of its submission to the public body, such
17 identification being a representation by the submitting entity that it has made a good faith effort only to
18 designate as trade secrets those portions of the submission that are entitled to protection under the law,
19 [and the submitting entity states the reasons why protection is necessary]. This [] portion inserted by

20 Maria--query is it needed?

21 Existing 2015 § 2.2-3705.6 Provisions

22 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

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

- 25 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
26 132.4 or 62.1-134.1.
- 27 2. Financial statements not publicly available filed with applications for industrial development
28 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
- 29 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
30 promise of confidentiality from a public body, used by the public body for business, trade and tourism
31 development or retention; and memoranda, working papers or other records related to businesses that are
32 considering locating or expanding in Virginia, prepared by a public body, where competition or
33 bargaining is involved and where, if such records are made public, the financial interest of the public
34 body would be adversely affected.
- 35 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
36 239 et seq.), as such Act existed prior to July 1, 1992.
- 37 5. Fisheries data that would permit identification of any person or vessel, except when required
38 by court order as specified in § 28.2-204.
- 39 6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost
40 projections provided to the Department of Rail and Public Transportation, provided such information is
41 exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other
42 laws administered by the Surface Transportation Board or the Federal Railroad Administration with
43 respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad
44 Administration.
- 45 7. Confidential proprietary records related to inventory and sales, voluntarily provided by private
46 energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy
47 contingency planning purposes or for developing consolidated statistical information on energy supplies.
- 48 8. Confidential proprietary information furnished to the Board of Medical Assistance Services or
49 the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of
50 Chapter 10 of Title 32.1.

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

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

64 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
65 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed
66 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private
67 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
68 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
69 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
70 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
71 by the responsible public entity; and

72 b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or
73 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 or
74 the Public-Private Education Facilities and Infrastructure Act of 2002, to the extent that such records
75 contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
76 seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that
77 are not generally available to the public through regulatory disclosure or otherwise; or (iii) other

78 information submitted by the private entity, where, if the records were made public prior to the
79 execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining
80 position of the public or private entity would be adversely affected. In order for the records specified in
81 clauses (i), (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make
82 a written request to the responsible public entity:

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

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

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

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

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

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

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

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

134 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
135 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §
136 18.2-340.34.

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

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

142 17. Records submitted as a grant or loan application, or accompanying a grant or loan
143 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-
144 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to
145 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or
146 research-related information produced or collected by the applicant in the conduct of or as a result of
147 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when
148 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of
149 such information would be harmful to the competitive position of the applicant.

150 18. Confidential proprietary records and trade secrets developed and held by a local public body
151 (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television
152 services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to the extent that
153 disclosure of such records would be harmful to the competitive position of the locality. In order for
154 confidential proprietary information or trade secrets to be excluded from the provisions of this chapter,
155 the locality in writing shall (a) invoke the protections of this subdivision, (b) identify with specificity the

156 records or portions thereof for which protection is sought, and (c) state the reasons why protection is
157 necessary.

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

164 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
165 records of a business, including balance sheets and financial statements, that are not generally available
166 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business
167 and Supplier Diversity as part of an application for certification as a small, women-owned, or minority-
168 owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.). In order for such trade secrets or
169 financial records to be excluded from the provisions of this chapter, the business shall (i) invoke such
170 exclusion upon submission of the data or other materials for which protection from disclosure is sought,
171 (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why
172 protection is necessary.

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

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

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

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

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

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

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

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

- 208 2. Identifying with specificity the data, records or other materials for which protection is sought;
209 and
210 3. Stating the reasons why protection is necessary.

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

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

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

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

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

232 The Authority shall determine whether the requested exclusion from disclosure is necessary to
233 protect the trade secrets or financial records of the private entity. To protect other records submitted by
234 the private entity from disclosure, the Authority shall determine whether public disclosure would

235 adversely affect the financial interest or bargaining position of the Authority or private entity. The
236 Authority shall make a written determination of the nature and scope of the protection to be afforded by
237 it under this subdivision.

238 25. Documents and other information of a proprietary nature furnished by an agricultural
239 landowner or operator to the Department of Conservation and Recreation, the Department of
240 Environmental Quality, the Department of Agriculture and Consumer Services or any political
241 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-
242 104.9, other than when required as part of a state or federal regulatory enforcement action.

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

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

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

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

259 **§ 2.2-3713. Proceedings for enforcement of chapter.**

260 A. Any person, including the attorney for the Commonwealth acting in his official or individual
261 capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights

262 and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good
263 cause. Such petition may be brought in the name of the person notwithstanding that a request for public
264 records was made by the person's attorney in his representative capacity. Venue for the petition shall be
265 addressed as follows:

266 1. In a case involving a local public body, to the general district court or circuit court of the
267 county or city from which the public body has been elected or appointed to serve and in which such
268 rights and privileges were so denied;

269 2. In a case involving a regional public body, to the general district or circuit court of the county
270 or city where the principal business office of such body is located; and

271 3. In a case involving a board, bureau, commission, authority, district, institution, or agency of
272 the state government, including a public institution of higher education, or a standing or other committee
273 of the General Assembly, to the general district court or the circuit court of the residence of the
274 aggrieved party or of the City of Richmond.

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

278 C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall
279 be heard within seven days of the date when the same is made, provided the party against whom the
280 petition is brought has received a copy of the petition at least three working days prior to filing. The
281 hearing on any petition made outside of the regular terms of the circuit court of a locality that is included
282 in a judicial circuit with another locality or localities shall be given precedence on the docket of such
283 court over all cases that are not otherwise given precedence by law.

284 D. The petition shall allege with reasonable specificity the circumstances of the denial of the
285 rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges
286 conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the
287 denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover
288 reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the

289 public body if the petitioner substantially prevails on the merits of the case, unless special circumstances
290 would make an award unjust. In making this determination, a court may consider, among other things,
291 the reliance of a public body on an opinion of the Attorney General or a decision of a court that
292 substantially supports the public body's position.

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

296 F. In the event a public body, in response to a request under this chapter denied access to a
297 record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the
298 requested information has been identified by the submitting entity as a trade secret and the requester
299 challenges the characterization of the withheld record as a trade secret, the public body shall notify the
300 submitting entity within two working days of the challenge made by the requester. If the submitting
301 entity and the requester are unable after conferring to reach agreement on the proper designation of the
302 record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an
303 action under this chapter to require the public body to produce the requested record, and shall name as
304 defendant in the action the submitting entity. If as a result of the action the court requires that the public
305 body produce a record or portion thereof that has been improperly designated as a trade secret by the
306 submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting
307 entity and not by the public body.

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

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