

## **I. Current definition of "trade secret" in the Uniform Trade Secrets Act (§ 59.1-336)**

*Trade secret" means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:*

- 1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*
- 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

## **II. Current definition of "PROPRIETARY"**

- No statutory definition in FOIA
- Virginia Supreme Court: "proprietary" should be given its ordinary meaning: **"a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."**
- Virginia Supreme Court rejected the argument that "information of a proprietary nature" is limited to that which gives a commercial competitive advantage or which, if disclosed, would financially injure the public body

## **III. Definition of "PUBLIC RECORDS" under current law, § 2.2-3701:**

Public records *"means all writings and recordings that consist of letters, words or numbers, or their equivalent...however stored, and regardless of physical form or characteristics, **prepared or owned by, or in the possession of a public body or its officers**, employees or agents in the transaction of public business. Records that are not prepared for or used in the transaction of public business are not public records. [Emphasis added.]*

## **IV. Three- step "earmarking" process used in many, but not all, current exemptions for "proprietary" records:**

Sample language from current subdivision 11 b of § 2.2-3706:

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

- 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 responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity.*

#### **V. Question: Should there be a general exemption for trade secrets?**

- Sample language:  
"Those portions of records containing trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.)."
- Alternative language with "earmark" provision:  
"Those portions of records containing trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.). In order for trade secrets to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:  
Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;  
Identifying with specificity the data or other materials for which protection is sought; and  
Stating the reasons why protection is necessary.  
The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets of the private entity."

#### **VI. Categories re: "proprietary" records - should there be one or more general exemptions for "proprietary" records?**

A. Records "of a proprietary nature" and "proprietary information" (may be limited by other terms within any given exemption, but otherwise not defined)

B. Commercial, financial, and similar records

- undefined proprietary "business," "commercial," and "business-related" records
- other records that would adversely affect the financial interest or bargaining position of the public or private entity if disclosed publicly
- financial records of private entities that are otherwise not publicly disclosed
- financial statements, balance sheets, revenue and cost projections

C. Records related to scientific, academic or other research or study

#### **VII. Copyright - not currently addressed in FOIA.**

A. OAG opinions

- 1982 opinion re: county providing copies of maps subject to the county's own copyright: FOIA "requires that the maps you refer to be made available for public inspection and allow the county to make reasonable charges for copying and search time expended in the supplying of such records. The U.S. copyright laws give the county, as owner of the

copyright, the exclusive right to reproduce such maps, thereby prohibiting reproduction of the maps by anyone other than the county without its consent."

- 1998 opinion re: state song submissions from third parties:  
Concludes that "the copyrighted nature of a work does not preclude reproduction and release in response to a [FOIA] request or other activity within the exclusive rights granted under the Copyright Act if the copyright owner has given his express or implied consent or if the activity constitutes a fair use of the work." Recommends including with the response "a cover letter or other form of notification to the requester that the work may be protected by copyright, and that permission should be obtained from the copyright owner before making any further copies, public distribution or other copyright-protected use of the work."

B. Current general copyright law for state agencies and employees, § 2.2-2822, states that "Nothing in this section shall be construed to limit access to public records as provided in the Virginia Freedom of Information Act (§ 2.2-3700 et seq.)."

C. QUESTION: Should there be a general exemption for records protected by copyrights held by third parties?

- Sample language reflecting the 1998 opinion of the Attorney General:  
"Records protected by copyright, except to the extent disclosure would be allowed as a fair use under copyright law or by permission of the copyright holder."
- Alternative approach: Could add a subsection in § 2.2-3703 stating that copyright law controls over FOIA, similar to the current provision concerning election laws. Suggested language: "Public access to records protected by copyright shall be governed by copyright law and this chapter. Copyright law shall be controlling in the event of any conflict."

## **APPENDIX A**

### **Examples of how "proprietary" and "trade secrets" are used in current exemptions**

#### **§ 2.2-3705.1**

6. Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

#### **§ 2.2-3705.4**

4. "Data, records or information of a proprietary nature produced or collected by or for"
5. " All records ... that contain proprietary, business-related information"

#### **§ 2.2-3705.5**

4. "proprietary information not published, copyrighted or patented"
12. "proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant"

#### **§ 2.2-3705.6**

1. "Proprietary information gathered by or for"
3. "Confidential proprietary records, voluntarily provided by"
6. "Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to"
7. "Confidential proprietary records related to inventory and sales, voluntarily provided by"
8. "Confidential proprietary information furnished to"
9. "Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by"
10. " Confidential information designated ... as trade secrets or proprietary information"
11. "(i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected"
12. "Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality"

13. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential proprietary records that are not generally available to the public through regulatory disclosure or otherwise"
14. "Documents and other information of a proprietary nature furnished by"
16. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by"
17. "to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research"
18. "Confidential proprietary records and trade secrets developed and held by"
19. "Confidential proprietary records and trade secrets developed by or for"
20. "Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise"
21. "Documents and other information of a proprietary or confidential nature disclosed by"
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"
23. "(i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (iii) research-related information produced or collected by"
24. b. "(i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected"
25. "Documents and other information of a proprietary nature furnished by"
26. "Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided to"
27. "Documents and other information of a proprietary nature furnished by"

### **§ 2.2-3705.7**

11. "Records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for"
15. "proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality" AND "data, records or information of a proprietary nature produced or collected by or for" AND " data, records or information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the Authority alone or in conjunction with a governmental body or a private concern, when such data, records or information have not been publicly released, published, copyrighted or patented"