

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 record exemption for trade secrets submitted to 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 submitted to a Public Body:

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

19 In order for records specified in clause (ii) (b) to be excluded from the provisions of this chapter,
20 the public body shall determine whether the requested exclusion from disclosure is necessary to protect
21 the trade secrets of the submitting entity, which determination shall be set forth in writing, reflecting the
22 agreement between it and the submitting entity of the nature and scope of the protection to be afforded
23 by it under this subdivision.

24 In the event a public body, in response to a request under this chapter denied access to a record
25 or portion thereof exempted under this subdivision on the ground that the requested record has been

26 identified by the submitting entity as a trade secret and the requester challenges the characterization of
27 the withheld record as a trade secret, the public body shall notify the submitting entity within two
28 working days of the challenge made by the requester. If the submitting entity and the requester are
29 unable after conferring to reach agreement on the proper designation of the record in dispute or the
30 submitting entity refuses to confer with the requester, the requester may bring an action under this
31 chapter to require the public body to product the requested record, and shall name as defendant in the
32 action the submitting entity. If as a result of the action the court requires the public body to produce a
33 record or portion thereof that has been improperly designated as a trade secret by the submitting entity,
34 any award of attorneys' fees in favor of the requester shall be paid by the submitting entity and not by
35 the public body. [NOTE by Maria Everett: Consider alternate placement of this paragraph as a
36 subsection in § 2.2-3713, set out at the end of this draft.]

37 Existing 2014 § 2.2-3705.6 Provisions

- 38 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
39 132.4 or 62.1-134.1.
- 40 2. Financial statements not publicly available filed with applications for industrial development
41 financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.
- 42 3. Confidential proprietary records, voluntarily provided by private business pursuant to a
43 promise of confidentiality from a public body, used by the public body for business, trade and tourism
44 development or retention; and memoranda, working papers or other records related to businesses that are
45 considering locating or expanding in Virginia, prepared by a public body, where competition or
46 bargaining is involved and where, if such records are made public, the financial interest of the public
47 body would be adversely affected.
- 48 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
49 239 et seq.), as such Act existed prior to July 1, 1992.
- 50 5. Fisheries data that would permit identification of any person or vessel, except when required
51 by court order as specified in § 28.2-204.

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

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

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

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

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

77 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity,
78 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed

79 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public Private
80 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
81 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
82 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
83 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
84 by the responsible public entity; and

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

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

100 The responsible public entity shall determine whether the requested exclusion from disclosure is
101 necessary to protect the trade secrets or financial records of the private entity. To protect other records
102 submitted by the private entity from disclosure, the responsible public entity shall determine whether
103 public disclosure prior to the execution of an interim agreement or a comprehensive agreement would
104 adversely affect the financial interest or bargaining position of the public or private entity. The
105 responsible public entity shall make a written determination of the nature and scope of the protection to

106 be afforded by the responsible public entity under this subdivision. Once a written determination is made
107 by the responsible public entity, the records afforded protection under this subdivision shall continue to
108 be protected from disclosure when in the possession of any affected jurisdiction or affected local
109 jurisdiction.

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

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

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

128 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or
129 confidential proprietary records that are not generally available to the public through regulatory
130 disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under
131 Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a
132 promise of confidentiality from the franchising authority, to the extent the records relate to the bidder's,

133 applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies
134 or implementation of improvements, where such new services, technologies or improvements have not
135 been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such
136 records were made public, the competitive advantage or financial interests of the franchisee would be
137 adversely affected.

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

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

147 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
148 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of §
149 18.2-340.34.

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

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

155 17. Records submitted as a grant or loan application, or accompanying a grant or loan
156 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-
157 2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to
158 Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or
159 research-related information produced or collected by the applicant in the conduct of or as a result of

160 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when
161 such information has not been publicly released, published, copyrighted, or patented, if the disclosure of
162 such information would be harmful to the competitive position of the applicant.

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

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

177 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
178 records of a business, including balance sheets and financial statements, that are not generally available
179 to the public through regulatory disclosure or otherwise, provided to the Department of Small Business
180 and Supplier Diversity as part of an application for (i) certification as a small, women-owned, or
181 minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.) or (ii) a claim made by a
182 disadvantaged business or an economically disadvantaged individual against the Capital Access Fund
183 for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial
184 records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion
185 upon submission of the data or other materials for which protection from disclosure is sought, (b)

186 identify the data or other materials for which protection is sought, and (c) state the reasons why
187 protection is necessary.

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

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

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

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 or other materials for which protection is sought; and

202 3. Stating the reasons why protection is necessary.

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

207 23. Records submitted as a grant application, or accompanying a grant application, to the
208 Virginia Tobacco Indemnification and Community Revitalization Commission to the extent such
209 records contain (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii)
210 financial records of a grant applicant that is not a public body, including balance sheets and financial
211 statements, that are not generally available to the public through regulatory disclosure or otherwise, or
212 (iii) research-related information produced or collected by the applicant in the conduct of or as a result

213 of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues,
214 when such information has not been publicly released, published, copyrighted, or patented, if the
215 disclosure of such information would be harmful to the competitive position of the applicant; and
216 memoranda, staff evaluations, or other records prepared by the Commission or its staff exclusively for
217 the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that
218 are consistent with the powers of and in furtherance of the performance of the duties of the Commission
219 pursuant to § 3.2-3103.

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

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

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

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

235 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent
236 that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets
237 Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and
238 financial statements, that are not generally available to the public through regulatory disclosure or
239 otherwise; or (iii) other information submitted by the private entity, where, if the records were made

240 public, the financial interest or bargaining position of the Authority or private entity would be adversely
241 affected.

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

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

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

247 3. Stating the reasons why protection is necessary.

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

254 25. Documents and other information of a proprietary nature furnished by an agricultural
255 landowner or operator to the Department of Conservation and Recreation, the Department of
256 Environmental Quality, the Department of Agriculture and Consumer Services or any political
257 subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-
258 104.9, other than when required as part of a state or federal regulatory enforcement action.

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

265 27. Documents and other information of a proprietary nature furnished by a licensed public-use
266 airport to the Department of Aviation for funding from programs administered by the Department of

267 Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of
268 the public-use airport would be adversely affected.

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

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

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

274 3. Stating the reasons why protection is necessary.

275 **§ 2.2-3713. Proceedings for enforcement of chapter.**

276 A. Any person, including the attorney for the Commonwealth acting in his official or individual
277 capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights
278 and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good
279 cause. Such petition may be brought in the name of the person notwithstanding that a request for public
280 records was made by the person's attorney in his representative capacity. Venue for the petition shall be
281 addressed as follows:

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

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

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

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

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

300 D. The petition shall allege with reasonable specificity the circumstances of the denial of the
301 rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges
302 conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the
303 denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover
304 reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the
305 public body if the petitioner substantially prevails on the merits of the case, unless special circumstances
306 would make an award unjust. In making this determination, a court may consider, among other things,
307 the reliance of a public body on an opinion of the Attorney General or a decision of a court that
308 substantially supports the public body's position.

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

312 F. In the event a public body, in response to a request under this chapter denied access to a
313 record or portion thereof exempted under subdivision X of § 2.2-3705.6, on the ground that the
314 requested information has been identified by the submitting entity as a trade secret and the requester
315 challenges the characterization of the withheld record as a trade secret, the public body shall notify the
316 submitting entity within two working days of the challenge made by the requester. If the submitting
317 entity and the requester are unable after conferring to reach agreement on the proper designation of the
318 record in dispute or the submitting entity refuses to confer with the requester, the requester may bring an
319 action under this chapter to require the public body to product the requested record, and shall name as
320 defendant in the action the submitting entity. If as a result of the action the court requires that the public

321 body produce a record or portion thereof that has been improperly designated as a trade secret by the
322 submitting entity, any award of attorneys' fees in favor of the requester shall be paid by the submitting
323 entity and not by the public body.

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

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