



## COMMONWEALTH of VIRGINIA

Jennifer L. Mitchell  
Director

DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION  
600 EAST MAIN STREET, SUITE 2102  
RICHMOND, VA 23219-2416

(804) 786-4440  
FAX (804) 225-3752  
Virginia Relay Center  
800-828-1120 (TDD)

March 22, 2016

Virginia FOIA Council  
Attn: Alan Gernhardt  
201 N. 9<sup>th</sup> Street  
Richmond, Virginia 23219

Dear Mr. Gernhardt:

Please find enclosed a proposal from the Department of Rail and Public Transportation (DRPT) as it relates to the agency's specific proprietary records exemptions – sections 6 and 9 under Va. Code § 2.2-3705.6.

The suggested edit to remove section 6 entirely comes from a bit of redundancy as it relates to the exclusions provided in section 9. Section 9 was somewhat outdated in its reference to federal transportation policy, so by removing that limitation and adding language specific to the practical application of what DRPT does (i.e., administer grants for transportation projects), we are creating a policy for our agency that satisfies both the necessity for open government as well as the importance of legitimate exempting in order to efficiently conduct business with a private entity.

Lastly, we have added to our specific exemption the requirements that are currently applicable to section 11 regarding the process for requesting, evaluating and approving exemptions. While it is only added to section 9, it is important to note that we believe that any public agency agreeing to withhold records on the basis of any given FOIA exclusion should statutorily have the responsibility to review and approve such information. This is not intended to create the need for additional expertise within each agency, but rather, create an expectation of due diligence. That being said, we believe full liability should rightfully be placed on the private entity, but establishing the public entity's role in the process is a necessary element.

We will be happy to discuss our proposed amendments at the upcoming Proprietary Records meeting.

Sincerely,

Bethany Wolfe  
Manager of Policy and Communications

Enclosure

1 **§ 2.2-3705.6. Exclusions to application of chapter;**  
2 **proprietary records and trade secrets.**

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

5 1. Proprietary information gathered by or for the Virginia Port Authority as provided in § [62.1-](#)  
6 [132.4](#) or [62.1-134.1](#).

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

9 3. Confidential proprietary records, voluntarily provided by private business pursuant to a  
10 promise of confidentiality from a public body, used by the public body for business, trade and  
11 tourism development or retention; and memoranda, working papers or other records related to  
12 businesses that are considering locating or expanding in Virginia, prepared by a public body,  
13 where competition or bargaining is involved and where, if such records are made public, the  
14 financial interest of the public body would be adversely affected.

15 4. Information that was filed as confidential under the Toxic Substances Information Act (§ [32.1-](#)  
16 [239](#) et seq.), as such Act existed prior to July 1, 1992.

17 5. Fisheries data that would permit identification of any person or vessel, except when required  
18 by court order as specified in § [28.2-204](#).

19 ~~6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost~~  
20 ~~projections provided to the Department of Rail and Public Transportation, provided such~~  
21 ~~information is exempt under the federal Freedom of Information Act or the federal Interstate~~  
22 ~~Commerce Act or other laws administered by the Surface Transportation Board or the Federal~~  
23 ~~Railroad Administration with respect to data provided in confidence to the Surface~~  
24 ~~Transportation Board and the Federal Railroad Administration.~~

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

29 8. Confidential proprietary information furnished to the Board of Medical Assistance Services or  
30 the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ [32.1-331.12](#) et  
31 seq.) of Chapter 10 of Title 32.1.

32 9. a. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue  
33 and cost projections provided by a private transportation business to the Virginia Department of  
34 Transportation ~~and-or~~ the Department of Rail and Public Transportation for the purpose of  
35 conducting transportation studies ~~of for evaluation by the public body needed~~ to obtain grants or

36 | other financial assistance ~~under the Transportation Equity Act for the 21st Century (P.L. 105-~~  
37 | ~~178)~~ for transportation projects, provided such information is exempt under the federal Freedom  
38 | of Information Act or the federal Interstate Commerce Act or other laws administered by the  
39 | Surface Transportation Board or the Federal Railroad Administration with respect to data  
40 | provided in confidence to the Surface Transportation Board and the Federal Railroad  
41 | Administration. However, the exemption provided by this subdivision shall not apply to any  
42 | wholly owned subsidiary of a public body. Such information required throughout the lifecycle  
43 | of the grant or other awarded financial assistance submitted to the public body for reporting  
44 | purposes or performance measures shall also be exempt.

45 | b. In order for records to be excluded from the provisions of this chapter, the private entity shall  
46 | make a written request to the responsible public entity:

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

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

50 | 3. Stating the reasons why protection is necessary.

51 | The responsible public entity shall determine whether the requested exclusion from disclosure is  
52 | necessary to protect the trade secrets or financial records of the private entity. To protect other  
53 | records submitted by the private entity from disclosure, the responsible public entity shall  
54 | determine whether public disclosure prior to the execution of an interim agreement or a  
55 | comprehensive agreement would adversely affect the financial interest or bargaining position of  
56 | the public or private entity. The responsible public entity shall make a written determination of  
57 | the nature and scope of the protection to be afforded by the responsible public entity under this  
58 | subdivision. Once a written determination is made by the responsible public entity, the records  
59 | afforded protection under this subdivision shall continue to be protected from disclosure when in  
60 | the possession of any affected jurisdiction or affected local jurisdiction.

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  
63 | application for prequalification to bid on public construction projects in accordance with  
64 | subsection B of § [2.2-4317](#).

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

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

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

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

88 3. Stating the reasons why protection is necessary.

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

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

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

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

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

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

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

137 14. Documents and other information of a proprietary nature furnished by a supplier of charitable  
138 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection  
139 E of § [18.2-340.34](#).

140 15. Records and reports related to Virginia apple producer sales provided to the Virginia State  
141 Apple Board pursuant to § [3.2-1215](#).

142 16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ [59.1-336](#) et seq.) of Title 59.1,  
143 submitted by CMRS providers as defined in § [56-484.12](#) to the Wireless Carrier E-911 Cost  
144 Recovery Subcommittee created pursuant to § [56-484.15](#), relating to the provision of wireless E-  
145 911 service.

146 17. Records submitted as a grant or loan application, or accompanying a grant or loan  
147 application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3  
148 (§ [2.2-2233.1](#) et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board  
149 pursuant to Chapter 22 (§ [23-277](#) et seq.) of Title 23 to the extent such records contain  
150 proprietary business or research-related information produced or collected by the applicant in the

151 conduct of or as a result of study or research on medical, rehabilitative, scientific, technical,  
152 technological, or scholarly issues, when such information has not been publicly released,  
153 published, copyrighted, or patented, if the disclosure of such information would be harmful to  
154 the competitive position of the applicant.

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

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

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

178 21. Documents and other information of a proprietary or confidential nature disclosed by a  
179 carrier to the State Health Commissioner pursuant to §§ [32.1-276.5:1](#) and [32.1-276.7:1](#).

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

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

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

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

192 3. Stating the reasons why protection is necessary.

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

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

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

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

214 2. Identifying with specificity the data, records or other materials for which protection is sought;  
215 and

216 3. Stating the reasons why protection is necessary.

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

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

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

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

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

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

238 3. Stating the reasons why protection is necessary.

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

245 25. Documents and other information of a proprietary nature furnished by an agricultural  
246 landowner or operator to the Department of Conservation and Recreation, the Department of  
247 Environmental Quality, the Department of Agriculture and Consumer Services or any political  
248 subdivision, agency, or board of the Commonwealth pursuant to §§ [10.1-104.7](#), [10.1-104.8](#), and  
249 [10.1-104.9](#), other than when required as part of a state or federal regulatory enforcement action.

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

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

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

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

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

265 3. Stating the reasons why protection is necessary

266