



## VIRGINIA COMMERCIAL SPACE FLIGHT AUTHORITY

Maria J. K. Everett, Executive Director  
Virginia FOIA Council  
General Assembly Building  
201 North 9<sup>th</sup> Street, Second Floor  
Richmond, Virginia 23219

SUBJECT: Review of FOIA exemptions  
Virginia Commercial Space Flight Authority

Dear Ms. Everett:

This letter is in response to your letter of December 22, 2015, which requested written comments or alternative proposals of the Virginia Commercial Space Flight Authority (VCSFA) for potential amendment of the Virginia Freedom of Information Act (FOIA), namely with respect to the exemption in VA CODE § 2.2-3705.6 ¶ 24.

A fundamental purpose of VCSFA is to promote economic and industrial development of the commercial space flight industry in the Commonwealth of Virginia. VA CODE § 2.2-2202. To this end, VCSFA is empowered to acquire property, develop facilities such as spaceports, and to charge fees for the use of such facilities. VA CODE § 2.2-2204.

The commercial space launch industry is highly competitive in both private and public domains. This explains why the existing VCSFA exemption in VA CODE § 2.2-3705.6 ¶ 24 refers multiple times to "...the financial interest or bargaining position of the Authority..." VCSFA's Mid-Atlantic Regional Spaceport (MARS) competes with state and private spaceports for the provision of spaceport launch services. In some cases, the competition may be exclusively spaceport against spaceport. More commonly, a spaceport competes with other spaceports as part of a team. MARS often operates within tiers of multiple private and public entities to form a competitive team. Records and information from both public and private entities may be combined for many reasons, including for use in estimates, competitive bids or proposals, feasibility studies, development of rates of both the public and private entities, negotiating subcontractor charges, etc. In some cases, technical trade secrets of a private entity may be combined with technical developments of VCSFA to form a technical solution at MARS that improves the bargaining position of VCSFA.

First, the draft created by the Virginia Press Association does not address the fact that VCSFA, as a public entity, operates on teams with private entities. The financial interest or bargaining position of the Authority can be adversely affected by disclosure of private records. Conceptually, a general exemption for proprietary records and trade secrets of a private entity might address some of the interests of a private entity in its dealings with a public entity. However, such an exemption would not address the valid policy interest of protecting "the financial interest or bargaining position" of VCSFA, in order to advance economic development in the Commonwealth. This valid policy interest is recognized by the existing

exemption and it should not be deleted or narrowed. Accordingly, VCSFA has attached is an alternative amendment to VA CODE § 2.2-3705.6 ¶ 24 that seeks to protect this policy interest.

Second, we have been unable to locate within the materials anything that would maintain protection for the category of private entity records corresponding to “other information submitted by the private entity.” VA CODE § 2.2-3705.6 ¶ 24.b(iii). The attached alternative amendment to VA CODE § 2.2-3705.6 ¶ 24 preserves this category for “the financial interest or bargaining position” of VCSFA. However, VCSFA reasonably expects that the elimination of this category from exemption will narrow the scope of records and information private entities will be willing to disclose to VCSFA. It is common for private entities to protect internally developed information prior to or without full assessment of the strength of arguments that such information qualifies (under scrutiny) as a bona fide trade secret under the Uniform Trade Secret Act. For example, a private entity with internally developed new information may be unable to readily ascertain: (a) whether or not that information carries “independent economic value;” or (b) whether or not it is otherwise “readily ascertainable by [third parties using] proper means.” VA CODE § 59.1-336. VCSFA recommends preserving this exemption. If this exemption is determined not to be generally applicable for private entities, then it could be added to the attached alternative for VA CODE § 2.2-3705.6 ¶ 24.

Third, the consideration of a general exemption provides an opportunity to address the situation in which a Virginia public entity receives Federal records and information under an obligation of confidentiality. For example, VCSFA (or, for example, a public university or law enforcement agency) may reasonably receive national security classified information or other Federal information that meets one or more exemption under the U.S. Freedom of Information Act, 5 U.S.C. § 552. A general exemption could clearly include or extend to such Federal records. While this concept might be addressed in a variety of ways, we note that it might be addressed within the draft amendment to VA CODE § 2.2-3705.6 in RDF 1 of 216 as follows:

(ii) the record was submitted to the public body (a) in compliance with, or in relation to, or as a Federal record exempt from Federal disclosure by, a statute, regulation or other law of Commonwealth or the United States or (b) as a component of a submission made in relation to public procurement, public financing, or public contracts...

If you have any questions, or would like to discuss the enclosed, please feel free to contact me.

Sincerely,



Dale Nash  
Executive Director  
Virginia Commercial Space Flight Authority

Enclosure

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Attachment

VCSFA Proposal

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

b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent that such records contain (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 any of the foregoing records were made public, the financial interest or bargaining position of the Authority or private entity would be adversely affected.

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

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