



# COMMONWEALTH of VIRGINIA

Randall P. Burdette  
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August 10, 2016

Ms. Maria J. K. Everett, Esq.  
Executive Director  
Virginia Freedom of Information Advisory Council  
General Assembly Building  
201 North 9<sup>th</sup> Street, Second Floor  
Richmond, Virginia 23219

Dear Ms. Everett,

We appreciate your invitation to attend the Records Subcommittee meeting on August 18, 2016 to discuss the importance of our FOIA exemption related to proprietary records and trade secrets and would be there, if at all possible. Unfortunately, the date coincides with the 42<sup>nd</sup> Annual Virginia Aviation Conference, which takes place August 16-19 in Hot Springs, Virginia. A Virginia Aviation Board Workshop takes place on August 18<sup>th</sup> which makes our attendance at the Records Subcommittee meeting in Richmond impossible. We would therefore like to request an opportunity to meet with the Records Subcommittee on another day to discuss our exemption. As Alan Gernhardt advised, we are resubmitting the original details regarding our exemption and we will provide any additional information to the group as needed.

The Virginia Department of Aviation has a Virginia Freedom of Information Act exemption (§ 2.2-3705.6 (27)) that protects "Information of a proprietary nature furnished by a licensed public-use airport to the Department of Aviation for funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected."

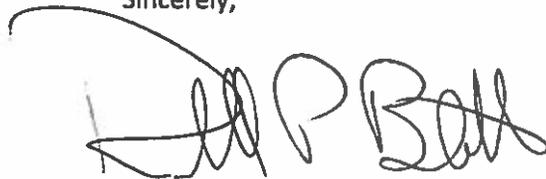
The Department of Aviation has multiple matching grant programs available to airports. Airport operators are required to provide documents such as appraisals, contract copies, receipts (for travel expenses, etc.) to the Department of Aviation in order to qualify for grant reimbursements. Often, because of our grant cycle, these submissions need to be made before the airport completes contract negotiations with airlines, landowners, or others. Because these documents are not academic and scientific research or are not provided from a private entity directly to the Department of Aviation, but from a public entity (airport) to a public entity (Department of Aviation) but related to the airport's interactions with a private entity there are no other exemptions that clearly protect them.



If this information is released prematurely - for example: if documents that identify an airline with whom an airport is negotiating for new or expanded service are released by the Department of Aviation before a final decision has been made by the airline – it could impact further negotiations and adversely affect that airport (and community).

Please contact us, if the Records Subcommittee has any questions or needs further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Randall Burdette". The signature is written in a cursive style with a large, sweeping initial "R" that extends upwards and to the left.

Randall Burdette  
Executive Director

## Review of Department of Aviation FOIA Exemptions: Proprietary Records and Trade Secrets

### Validity of DOAV Exemption

In response to the letter that came in with this request to review our agency's FOIA exemptions, we have reviewed the code and find that the Virginia Department of Aviation's exemption (§ 2.2-3705.6 (27)) is still valid and necessary to protect proprietary information submitted by airports (most publicly owned and a few privately owned) in support of funding from programs administered by the Department of Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of the airport would be adversely affected.

### Comments on Work Groups Ideas

The letter shared that a work group, formed by the Records Subcommittee, believes that the Proprietary Records and Trade Secrets section might be consolidated into one or two general exemptions and the group had categorized these exemptions as follows:

"In general terms, the work group categorized the exemptions as those addressing proprietary records and trade secrets generated by a public body (such as academic and scientific research), proprietary records and trade secrets submitted to a public body by a private entity (the majority of the exemptions) and financial records of a private entity submitted to a public body that are not otherwise made public."

While these cover certain situations, we are not confident that they would allow the Department of Aviation to withhold documents covered in our current exemption. We (a public entity) receive documents from airports (mostly public entities) in support of our grant programs that may result in a negative financial impact on the airport if released prematurely. These public body records are not academic or scientific research but may be receipts or quotes for services, appraisals, or other documents provided by airports to our office in order to fulfill the requirements of our matching grant programs. Here are a couple of examples:

#### Example 1:

Airport X (a public owned, public use airport) is seeking additional airline service. They have applied and received an Air Service Development and Enhancement grant from the Virginia Department of Aviation. Funds are used to hire a consultant to assist them in putting together a presentation and making appointments to meet privately with a selected airline. Once the airline visit is completed, and often before the airport knows whether it succeeded in obtaining new or upgraded air service, the airport submits a request for reimbursement to the Department of Aviation's grant program. This request requires the submission of copies of contracts/invoices and travel receipts (including airline tickets, hotel invoices, etc.) associated with the visit that includes the name of the airline visited and their headquarters city. These documents need to be submitted so the agency can justify the grant reimbursement; however, if they are released to the public prior to the airline formally approving or declining new or expanded service, it may impact the airline's decision.

#### Example 2:

Airport Y, a general aviation airport in Virginia, is looking to lengthen/widen their runway and must purchase additional parcels of land to do so. The public entity operating the airport has obtained an appraisal for one parcel of land involved. A copy of this appraisal is submitted by the airport operator (public entity) to the Virginia Department of Aviation for review in support of a grant request. If an adjacent property owner, whose property is also in negotiations with the airport operator, submits a Virginia Freedom of Information Act request for all documents related to the runway extension project, providing the appraisal for the first parcel, would put the airport operator at a financial disadvantage in negotiating for the second parcel.

#### **VPA Markup**

In reviewing the VPA markup provided, the Department of Aviation's exclusion is marked out entirely. The only general language left is "memoranda, working papers or other records related to businesses that are considering relocating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected." This language is not a substitute for the Department of Aviation's current exemption and would not appear to allow the exemptions for both of the examples that I provided earlier.

In closing, we strongly encourage the working group to maintain the Virginia Department of Aviation's current exemption as written.

However, if the working group decides to draft one or two new Proprietary Records and Trade Secrets general exemptions in lieu of all current general and individual agency exemptions, we encourage them to draft those exemptions to include language that protects the financial interests of Virginia's public use airports when they submit required documents to our agency.

*Rec'd 22 July 2016*  
*Cite*

**VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL**  
COMMONWEALTH OF VIRGINIA

Delegate James M. LeMunyon, Chair

Senator Richard H. Stuart, Vice-Chair

✓ Maria J.K. Everett, Esq., Executive Director/  
Senior Attorney

✓ Alan Gernhardt, Esq., Staff Attorney  
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**MEMORANDUM**

**TO:** Randell P. Burdette, Director  
Department of Aviation

**FROM:** Maria J.K. Everett, Executive Director  
Virginia FOIA Council *MJE*

**DATE:** July 21, 2016

**RE:** Review of your agency's FOIA exclusions in Code § 2.2-3705.6 re: proprietary records and trade secrets

As you may know, House Joint Resolution No. 96 was passed in the 2014 Session of the General Assembly, which directs the Virginia Freedom of Information Advisory Council (FOIA Council) to study all exclusions contained in the Virginia Freedom of Information Act (FOIA) to determine the continued applicability or appropriateness of such exclusions and whether FOIA should be amended to eliminate any exclusion from FOIA that the FOIA Council determines is no longer applicable or appropriate. The three-year study directed by HJR No. 96 is scheduled to conclude this year, with the expectation that it will result in legislation to be introduced at the 2017 Session of the General Assembly.

As part of its study plan, the FOIA Council has created two subcommittees to review exclusions and has set up a schedule for review of the applicable exclusion sections of FOIA. The FOIA exemptions in § 2.2-3705.6 concerning proprietary records and trade secrets are scheduled to be reviewed by the Records Subcommittee at its next meeting to be held at 10:00 AM, on August 18, 2016, in House Room C of the General Assembly Building, 201 N. 9th St., Richmond, Virginia 23219. Your participation in this meeting is requested to discuss the continued need for your agency's exemption(s) in § 2.2-3705.6. Any suggestions you may have for revision, including amendments or the elimination of obsolete language or references to state or federal law will also be a topic of discussion at this meeting.

If you have any questions or require additional information, please do not hesitate to contact me or Alan Gernhardt, Senior Attorney. Your time and prompt attention to this matter is greatly appreciated.

Attachment (1)

List of agencies with exclusions in Va. Code § 2.2-3705.6

| <b>§ 2.2-3705.6 Subdivision &amp; Public Body Affected</b>   |
|--|
| 1 - Virginia Port Authority  |
| 2 - industrial development financings under Title 15.2 (general)   |
| 3 - economic development & retention (Virginia Economic Development Partnership (VEDP), any public body doing economic development)                                    |
| 4 - Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992 (Department of Health)  |
| 5 - Department of Game and Inland Fisheries (DGIF)   |
| 6 - Department of Rail and Public Transportation (DRPT)  |
| 7 - Department of Mines, Minerals and Energy (DMME)  |
| 8 - Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee (DMAS)   |
| 9 - DRPT, Virginia Department of Transportation (VDOT)   |
| 10 - Public Procurement Act (general)  |
| 11 - PPEA/PPTA (general)   |
| 12 - Virginia Resources Authority  |
| 13 - (i) bidder or applicant for a franchise or (ii) franchisee under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority (general) |
| 14 - Department of Agriculture and Consumer Services (VDACS)   |
| 15 - Virginia State Apple Board (VDACS)  |
| 16 - Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15 - Virginia Information Technologies Agency (VITA)                               |
| 17 - Innovation and Entrepreneurship Investment Authority or Commonwealth Health Research Board  |

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| 18 - a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2 (general)         |
| 19 - local authority created in accordance with the Virginia Wireless Service Authorities Act (general)   |
| 20 - Department of Small Business and Supplier Diversity  |
| 21 - State Health Commissioner  |
| 22 - Office of the State Inspector General  |
| 23 - Tobacco Region Revitalization Commission   |
| 24 - Commercial Space Flight Authority  |
| 25 - Department of Conservation and Recreation (DCR), the Department of Environmental Quality (DEQ) , VDACS, or any political subdivision, agency, or board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9 |
| 26 - DEQ  |
| 27 - Department of Aviation or the Virginia Aviation Board  |
| 28 - Virginia Research Investment Fund (SCHEV)  |