COMMONWEALTH of VIRGINIA

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

Dear Maria,

I was forwarded a copy of the Review of your agency's FOIA exemptions RE: Proprietary Records and Trade Secrets that was sent to Keith McCrea, our Air Service & Policy Manager, and was asked to comment. The Department of Aviation's exemption for information of a proprietary nature furnished by licensed public use airports to the Virginia Department of Aviation was approved in 2013 because it was established that no other current exemption, general or agency specific, allowed this information to be withheld.

Therefore, we feel that it is important to maintain this exemption and I've attached some brief comments.

Please let us know if you need any additional information from us.

Sincerely,

Betty P. Wilson

Betty Wilson
Public Relations Manager

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.