

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A BILL to amend and reenact §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia, relating to the
2 Virginia Freedom of Information Act; record exclusion for financial records and certain other
3 proprietary records of a submitting entity. [STAFF ALTERNATIVE TO LD17100016]

4 **Be it enacted by the General Assembly of Virginia:**

5 **1. That §§ 2.2-3705.6 and 2.2-3713 of the Code of Virginia are amended and reenacted as follows:**

6 **§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

7 The following information contained in a public record is excluded from the mandatory
8 disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except
9 where such disclosure is prohibited by law. Redaction of information excluded under this section from a
10 public record shall be conducted in accordance with § 2.2-3704.01.

11 1. Financial information, including balance sheets and financial statements, or other information
12 of a submitting entity that are not (i) generally available to the public through regulatory disclosure or
13 otherwise or (ii) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), where if
14 such information was made public, the financial interest or competitive position of the submitting entity
15 would be adversely affected.

16 In order for such information to be excluded from the provisions of this chapter, the submitting
17 entity shall in writing (i) invoke such exclusion upon submission of the information for which protection
18 from disclosure is sought, (ii) identify with specificity the information for which protection is sought,
19 and (iii) state the reasons why protection is necessary.

20 1a. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-
21 132.4 or 62.1-134.1.

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

24 3. Proprietary information, voluntarily provided by private business pursuant to a promise of
25 confidentiality from a public body, used by the public body for business, trade, and tourism development

26 or retention; and memoranda, working papers, or other information related to businesses that are
27 considering locating or expanding in Virginia, prepared by a public body, where competition or
28 bargaining is involved and where disclosure of such information would adversely affect the financial
29 interest of the public body.

30 4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-
31 239 et seq.), as such Act existed prior to July 1, 1992.

32 5. Fisheries data that would permit identification of any person or vessel, except when required
33 by court order as specified in § 28.2-204.

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

40 7. Proprietary information related to inventory and sales, voluntarily provided by private energy
41 suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy
42 contingency planning purposes or for developing consolidated statistical information on energy supplies.

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

46 9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue
47 and cost projections provided by a private transportation business to the Virginia Department of
48 Transportation and the Department of Rail and Public Transportation for the purpose of conducting
49 transportation studies needed to obtain grants or other financial assistance under the Transportation
50 Equity Act for the 21st Century (P.L. 105-178) for transportation projects if disclosure of such
51 information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce
52 Act or other laws administered by the Surface Transportation Board or the Federal Railroad

53 Administration with respect to data provided in confidence to the Surface Transportation Board and the
54 Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to
55 any wholly owned subsidiary of a public body.

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

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

68 b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or
69 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 (§
70 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1
71 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity as defined in
72 the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial information of the private entity,
73 including balance sheets and financial statements, that are not generally available to the public through
74 regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if
75 such information was made public prior to the execution of an interim agreement or a comprehensive
76 agreement, the financial interest or bargaining position of the public or private entity would be adversely
77 affected. In order for the information specified in clauses (i), (ii), and (iii) to be excluded from the
78 provisions of this chapter, the private entity shall make a written request to the responsible public entity:

79 (1) Invoking such exclusion upon submission of the data or other materials for which protection
80 from disclosure is sought;

81 (2) Identifying with specificity the data or other materials for which protection is sought; and

82 (3) Stating the reasons why protection is necessary.

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

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

100 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local
101 jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying
102 transportation facility," "responsible public entity," and "private entity" shall mean the same as those
103 terms are defined in the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or in the Public-
104 Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.).

105 12. Confidential proprietary information or trade secrets, not publicly available, provided by a
106 private person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or
107 to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia
108 Resources Authority where, if such information were made public, the financial interest of the private
109 person or entity would be adversely affected.

110 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or
111 confidential proprietary information that is not generally available to the public through regulatory
112 disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii) franchisee under
113 Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a
114 promise of confidentiality from the franchising authority, to the extent the information relates to the
115 bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new
116 technologies or implementation of improvements, where such new services, technologies, or
117 improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise
118 area, and where, if such information were made public, the competitive advantage or financial interests
119 of the franchisee would be adversely affected.

120 In order for trade secrets or confidential proprietary information to be excluded from the
121 provisions of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon
122 submission of the data or other materials for which protection from disclosure is sought, (b) identify the
123 data or other materials for which protection is sought, and (c) state the reason why protection is
124 necessary.

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

129 14. Information of a proprietary nature furnished by a supplier of charitable gaming supplies to
130 the Department of Agriculture and Consumer Services pursuant to subsection E of § 18.2-340.34.

131 15. Information related to Virginia apple producer sales provided to the Virginia State Apple
132 Board pursuant to § 3.2-1215.

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

136 17. (Effective until October 1, 2016) Information relating to a grant or loan application, or
137 accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority
138 pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health
139 Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 if disclosure of such information
140 would (i) reveal proprietary business or research-related information produced or collected by the
141 applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific,
142 technical, technological, or scholarly issues, when such information has not been publicly released,
143 published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

144 17. (Effective October 1, 2016) Information relating to a grant or loan application, or
145 accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority
146 pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health
147 Research Board pursuant to Chapter 5.3 (§ 32.1-162.23 et seq.) of Title 32.1 if disclosure of such
148 information would (i) reveal proprietary business or research-related information produced or collected
149 by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific,
150 technical, technological, or scholarly issues, when such information has not been publicly released,
151 published, copyrighted, or patented, and (ii) be harmful to the competitive position of the applicant.

152 18. Confidential proprietary information and trade secrets developed and held by a local public
153 body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable
154 television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2 if
155 disclosure of such information would be harmful to the competitive position of the locality.

156 In order for confidential proprietary information or trade secrets to be excluded from the
157 provisions of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b)

158 identify with specificity the information for which protection is sought, and (c) state the reasons why
159 protection is necessary. However, the exemption provided by this subdivision shall not apply to any
160 authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

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

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

176 21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health
177 Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

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

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

- 187 a. Invoking such exclusion upon submission of the data or other materials for which protection
188 from disclosure is sought;
- 189 b. Identifying with specificity the data or other materials for which protection is sought; and
- 190 c. Stating the reasons why protection is necessary.

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

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

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

- 209 a. Invoking such exclusion upon submission of the data or other materials for which protection
210 from disclosure is sought;

211 b. Identifying with specificity the data, information or other materials for which protection is
212 sought; and

213 c. Stating the reasons why protection is necessary.

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

218 24. a. Information held by the Commercial Space Flight Authority relating to rate structures or
219 charges for the use of projects of, the sale of products of, or services rendered by the Authority if
220 disclosure of such information would adversely affect the financial interest or bargaining position of the
221 Authority or a private entity providing the information to the Authority; or

222 b. Information provided by a private entity to the Commercial Space Flight Authority if
223 disclosure of such information would (i) reveal (a) trade secrets of the private entity as defined in the
224 Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial information of the private entity, including
225 balance sheets and financial statements, that are not generally available to the public through regulatory
226 disclosure or otherwise; or (c) other information submitted by the private entity and (ii) adversely affect
227 the financial interest or bargaining position of the Authority or private entity.

228 In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be
229 excluded from the provisions of this chapter, the private entity shall make a written request to the
230 Authority:

231 (1) Invoking such exclusion upon submission of the data or other materials for which protection
232 from disclosure is sought;

233 (2) Identifying with specificity the data or other materials for which protection is sought; and

234 (3) Stating the reasons why protection is necessary.

235 The Authority shall determine whether the requested exclusion from disclosure is necessary to
236 protect the trade secrets or financial information of the private entity. To protect other information
237 submitted by the private entity from disclosure, the Authority shall determine whether public disclosure

238 would adversely affect the financial interest or bargaining position of the Authority or private entity. The
239 Authority shall make a written determination of the nature and scope of the protection to be afforded by
240 it under this subdivision.

241 25. Information of a proprietary nature furnished by an agricultural landowner or operator to the
242 Department of Conservation and Recreation, the Department of Environmental Quality, the Department
243 of Agriculture and Consumer Services, or any political subdivision, agency, or board of the
244 Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part
245 of a state or federal regulatory enforcement action.

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

252 27. Information of a proprietary nature furnished by a licensed public-use airport to the
253 Department of Aviation for funding from programs administered by the Department of Aviation or the
254 Virginia Aviation Board, where if such information was made public, the financial interest of the public-
255 use airport would be adversely affected.

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

258 a. Invoking such exclusion upon submission of the data or other materials for which protection
259 from disclosure is sought;

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

261 c. Stating the reasons why protection is necessary.

262 28. (Effective until October 1, 2016) Records submitted as a grant or loan application, or
263 accompanying a grant or loan application, for an award from the Virginia Research Investment Fund
264 pursuant to Chapter 28 (§ 23-304 et seq.) of Title 23, to the extent that such records contain proprietary

265 business or research-related information produced or collected by the applicant in the conduct of or as a
266 result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly
267 issues, when such information has not been publicly released, published, copyrighted, or patented, if the
268 disclosure of such information would be harmful to the competitive position of the applicant.

269 28. (Effective October 1, 2016) Records submitted as a grant or loan application, or
270 accompanying a grant or loan application, for an award from the Virginia Research Investment Fund
271 pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1, to the extent that such records
272 contain proprietary business or research-related information produced or collected by the applicant in
273 the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical,
274 technological, or scholarly issues, when such information has not been publicly released, published,
275 copyrighted, or patented, if the disclosure of such information would be harmful to the competitive
276 position of the applicant.

277 **§ 2.2-3713. Proceedings for enforcement of chapter.**

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

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

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

289 3. In a case involving a board, bureau, commission, authority, district, institution, or agency of
290 the state government, including a public institution of higher education, or a standing or other committee

291 of the General Assembly, to the general district court or the circuit court of the residence of the
292 aggrieved party or of the City of Richmond.

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

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

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

311 E. If a public body withholds trade secret information pursuant to subdivision 1 of § 2.2-3705.6
312 and the requester brings an action under this chapter to challenge such withholding, the requester may
313 name the submitting entity or its successor in interest as an additional defendant in the action.
314 Additionally, upon request of the public body, the court, by order pursuant to the provisions of § 8.01-7,
315 may add the submitting entity as an additional defendant in the action. If, as a result of the action, the
316 court requires the public body to produce such information because it was improperly withheld pursuant
317 to this subdivision, any award of reasonable costs and attorney fees to the requester pursuant to the

318 provisions of this subsection shall be paid by the submitting entity or the public body, or both, in the
319 proportion deemed appropriate by the court.

320 E.F. In any action to enforce the provisions of this chapter, the public body shall bear the burden
321 of proof to establish an exclusion by a preponderance of the evidence. No court shall be required to
322 accord any weight to the determination of a public body as to whether an exclusion applies. Any failure
323 by a public body to follow the procedures established by this chapter shall be presumed to be a violation
324 of this chapter.

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

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