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HOUSE BILL NO. 768

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 5, 2008)

(Patron Prior to Substitute—Delegate Tata)

A BILL to amend and reenact §§ 2.2-3705.3 and 2.2-3711 of the Code of Virginia, relating to the Freedom of Information Act; active investigations; teacher licensing.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.3 and 2.2-3711 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

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

1. Confidential records of all investigations of applications for licenses and permits, and of all licensees and permittees, made by or submitted to the Alcoholic Beverage Control Board, the State Lottery Department, the Virginia Racing Commission, the Department of Charitable Gaming, or the Private Security Services Unit of the Department of Criminal Justice Services.

2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth.

3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; (iv) committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or (v) auditors, appointed by the local governing body of any county, city or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer, department or program of such body. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or

60 investigations, and records of communications between employees and agents of the Office and its
61 clients or prospective clients concerning specific complaints, investigations or cases. Upon the
62 conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may
63 not at any time release the identity of any complainant or person with mental illness, mental retardation,
64 developmental disabilities or other disability, unless (i) such complainant or person or his legal
65 representative consents in writing to such identification or (ii) such identification is required by court
66 order.

67 9. Information furnished in confidence to the Department of Employment Dispute Resolution with
68 respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title,
69 and memoranda, correspondence and other records resulting from any such investigation, consultation or
70 mediation. However, nothing in this section shall prohibit the distribution of information taken from
71 inactive reports in a form that does not reveal the identity of the parties involved or other persons
72 supplying information.

73 10. The names, addresses and telephone numbers of complainants furnished in confidence with
74 respect to an investigation of individual zoning enforcement complaints made to a local governing body.

75 11. Records of active investigations being conducted by the Department of Criminal Justice Services
76 pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.)
77 and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

78 12. Records furnished to or prepared by the Board of Education pursuant to subsection D of
79 § 22.1-253.13:3 in connection with the review or investigation of any alleged breach in security,
80 unauthorized alteration, or improper administration of tests by local school board employees responsible
81 for the distribution or administration of the tests. However, this section shall not prohibit the disclosure
82 of records to (i) a local school board or division superintendent for the purpose of permitting such board
83 or superintendent to consider or to take personnel action with regard to an employee or (ii) any
84 requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity
85 of any person making a complaint or supplying information to the Board on a confidential basis and (b)
86 does not compromise the security of any test mandated by the Board.

87 13. *Investigator notes, and other correspondence and information, furnished in confidence with*
88 *respect to an active investigation conducted by or for the Board of Education related to the denial,*
89 *suspension, or revocation of teacher licenses. However, this subdivision shall not prohibit the disclosure*
90 *of records to a local school board or division superintendent for the purpose of permitting such board*
91 *or superintendent to consider or to take personnel action with regard to an employee. Records of*
92 *completed investigations shall be disclosed in a form that does not reveal the identity of any*
93 *complainant or person supplying information to investigators. The records disclosed shall include*
94 *information regarding the school or facility involved, the identity of the person who was the subject of*
95 *the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an*
96 *investigation fails to support a complaint or does not lead to corrective action, the identity of the person*
97 *who was the subject of the complaint may be released only with the consent of the subject person. No*
98 *personally identifiable information in the records regarding a current or former student shall be*
99 *released except as permitted by state or federal law.*

100 § 2.2-3711. Closed meetings authorized for certain limited purposes.

101 A. Public bodies may hold closed meetings only for the following purposes:

102 1. Discussion, consideration, or interviews of prospective candidates for employment; assignment,
103 appointment, promotion, performance, demotion, salaries, disciplining, or resignation of specific public
104 officers, appointees, or employees of any public body; and evaluation of performance of departments or
105 schools of public institutions of higher education where such evaluation will necessarily involve
106 discussion of the performance of specific individuals. Any teacher shall be permitted to be present
107 during a closed meeting in which there is a discussion or consideration of a disciplinary matter that
108 involves the teacher and some student and the student involved in the matter is present, provided the
109 teacher makes a written request to be present to the presiding officer of the appropriate board.

110 2. Discussion or consideration of admission or disciplinary matters or any other matters that would
111 involve the disclosure of information contained in a scholastic record concerning any student of any
112 Virginia public institution of higher education or any state school system. However, any such student,
113 legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to
114 be present during the taking of testimony or presentation of evidence at a closed meeting, if such
115 student, parents, or guardians so request in writing and such request is submitted to the presiding officer
116 of the appropriate board.

117 3. Discussion or consideration of the acquisition of real property for a public purpose, or of the
118 disposition of publicly held real property, where discussion in an open meeting would adversely affect
119 the bargaining position or negotiating strategy of the public body.

120 4. The protection of the privacy of individuals in personal matters not related to public business.

121 5. Discussion concerning a prospective business or industry or the expansion of an existing business

or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

6. Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

7. Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

8. In the case of boards of visitors of public institutions of higher education, discussion or consideration of matters relating to gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed by such institution. However, the terms and conditions of any such gifts, bequests, grants, and contracts made by a foreign government, a foreign legal entity, or a foreign person and accepted by a public institution of higher education in Virginia shall be subject to public disclosure upon written request to the appropriate board of visitors. For the purpose of this subdivision, (i) "foreign government" means any government other than the United States government or the government of a state or a political subdivision thereof; (ii) "foreign legal entity" means any legal entity created under the laws of the United States or of any state thereof if a majority of the ownership of the stock of such legal entity is owned by foreign governments or foreign persons or if a majority of the membership of any such entity is composed of foreign persons or foreign legal entities, or any legal entity created under the laws of a foreign government; and (iii) "foreign person" means any individual who is not a citizen or national of the United States or a trust territory or protectorate thereof.

9. In the case of the boards of trustees of the Virginia Museum of Fine Arts, the Virginia Museum of Natural History, and The Science Museum of Virginia, discussion or consideration of matters relating to specific gifts, bequests, and grants.

10. Discussion or consideration of honorary degrees or special awards.

11. Discussion or consideration of tests, examinations, or other records excluded from this chapter pursuant to subdivision 4 of § 2.2-3705.1.

12. Discussion, consideration, or review by the appropriate House or Senate committees of possible disciplinary action against a member arising out of the possible inadequacy of the disclosure statement filed by the member, provided the member may request in writing that the committee meeting not be conducted in a closed meeting.

13. Discussion of strategy with respect to the negotiation of a hazardous waste siting agreement or to consider the terms, conditions, and provisions of a hazardous waste siting agreement if the governing body in open meeting finds that an open meeting will have an adverse effect upon the negotiating position of the governing body or the establishment of the terms, conditions and provisions of the siting agreement, or both. All discussions with the applicant or its representatives may be conducted in a closed meeting.

14. Discussion by the Governor and any economic advisory board reviewing forecasts of economic activity and estimating general and nongeneral fund revenues.

15. Discussion or consideration of medical and mental records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5.

16. Deliberations of the State Lottery Board in a licensing appeal action conducted pursuant to subsection D of § 58.1-4007 regarding the denial or revocation of a license of a lottery sales agent; and discussion, consideration or review of State Lottery Department matters related to proprietary lottery game information and studies or investigations exempted from disclosure under subdivision 6 of § 2.2-3705.3 and subdivision 11 of § 2.2-3705.7.

17. Those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed.

18. Those portions of meetings in which the Board of Corrections discusses or discloses the identity of, or information tending to identify, any prisoner who (i) provides information about crimes or criminal activities, (ii) renders assistance in preventing the escape of another prisoner or in the apprehension of an escaped prisoner, or (iii) voluntarily or at the instance of a prison official renders other extraordinary services, the disclosure of which is likely to jeopardize the prisoner's life or safety.

19. Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff

183 members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to
184 respond to such activity or a related threat to public safety; or discussion of reports or plans related to
185 the security of any governmental facility, building or structure, or the safety of persons using such
186 facility, building or structure.

187 20. Discussion by the Board of the Virginia Retirement System, acting pursuant to § 51.1-124.30, or
188 of any local retirement system, acting pursuant to § 51.1-803, or of the Rector and Visitors of the
189 University of Virginia, acting pursuant to § 23-76.1, regarding the acquisition, holding or disposition of
190 a security or other ownership interest in an entity, where such security or ownership interest is not
191 traded on a governmentally regulated securities exchange, to the extent that such discussion (i) concerns
192 confidential analyses prepared for the Rector and Visitors of the University of Virginia, prepared by the
193 retirement system or provided to the retirement system under a promise of confidentiality, of the future
194 value of such ownership interest or the future financial performance of the entity, and (ii) would have an
195 adverse effect on the value of the investment to be acquired, held or disposed of by the retirement
196 system or the Rector and Visitors of the University of Virginia. Nothing in this subdivision shall be
197 construed to prevent the disclosure of information relating to the identity of any investment held, the
198 amount invested or the present value of such investment.

199 21. Those portions of meetings in which individual child death cases are discussed by the State Child
200 Fatality Review team established pursuant to § 32.1-283.1, and those portions of meetings in which
201 individual child death cases are discussed by a regional or local child fatality review team established
202 pursuant to § 32.1-283.2, and those portions of meetings in which individual death cases are discussed
203 by family violence fatality review teams established pursuant to § 32.1-283.3.

204 22. Those portions of meetings of the University of Virginia Board of Visitors or the Eastern
205 Virginia Medical School Board of Visitors, as the case may be, and those portions of meetings of any
206 persons to whom management responsibilities for the University of Virginia Medical Center or Eastern
207 Virginia Medical School, as the case may be, have been delegated, in which there is discussed
208 proprietary, business-related information pertaining to the operations of the University of Virginia
209 Medical Center or Eastern Virginia Medical School, as the case may be, including business development
210 or marketing strategies and activities with existing or future joint venturers, partners, or other parties
211 with whom the University of Virginia Medical Center or Eastern Virginia Medical School, as the case
212 may be, has formed, or forms, any arrangement for the delivery of health care, if disclosure of such
213 information would adversely affect the competitive position of the Medical Center or Eastern Virginia
214 Medical School, as the case may be.

215 23. In the case of the Virginia Commonwealth University Health System Authority, discussion or
216 consideration of any of the following: the acquisition or disposition of real or personal property where
217 disclosure would adversely affect the bargaining position or negotiating strategy of the Authority;
218 operational plans that could affect the value of such property, real or personal, owned or desirable for
219 ownership by the Authority; matters relating to gifts, bequests and fund-raising activities; grants and
220 contracts for services or work to be performed by the Authority; marketing or operational strategies
221 where disclosure of such strategies would adversely affect the competitive position of the Authority;
222 members of its medical and teaching staffs and qualifications for appointments thereto; and qualifications
223 or evaluations of other employees.

224 24. Those portions of the meetings of the Intervention Program Committee within the Department of
225 Health Professions to the extent such discussions identify any practitioner who may be, or who actually
226 is, impaired pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

227 25. Meetings or portions of meetings of the Board of the Virginia College Savings Plan wherein
228 personal information, as defined in § 2.2-3801, which has been provided to the Board or its employees
229 by or on behalf of individuals who have requested information about, applied for, or entered into
230 prepaid tuition contracts or savings trust account agreements pursuant to Chapter 4.9 (§ 23-38.75 et seq.)
231 of Title 23 is discussed.

232 26. Discussion or consideration, by the Wireless Carrier E-911 Cost Recovery Subcommittee created
233 pursuant to § 56-484.15, of trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et
234 seq.), submitted by CMRS providers as defined in § 56-484.12, related to the provision of wireless
235 E-911 service.

236 27. Those portions of disciplinary proceedings by any regulatory board within the Department of
237 Professional and Occupational Regulation, Department of Health Professions, or the Board of
238 Accountancy conducted pursuant to § 2.2-4019 or 2.2-4020 during which the board deliberates to reach
239 a decision or meetings of health regulatory boards or conference committees of such boards to consider
240 settlement proposals in pending disciplinary actions or modifications to previously issued board orders as
241 requested by either of the parties.

242 28. Discussion or consideration of records excluded from this chapter pursuant to subdivision 11 of
243 § 2.2-3705.6 by a responsible public entity or an affected local jurisdiction, as those terms are defined in
244 § 56-557, or any independent review panel appointed to review information and advise the responsible

public entity concerning such records.

29. Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

30. Discussion or consideration by the Commonwealth Health Research Board of grant application records excluded from this chapter pursuant to subdivision 17 of § 2.2-3705.6.

31. Discussion or consideration by the Commitment Review Committee of records excluded from this chapter pursuant to subdivision 9 of § 2.2-3705.2 relating to individuals subject to commitment as sexually violent predators under Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.

32. —Expired.]

33. Discussion or consideration of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 18 of § 2.2-3705.6.

34. Discussion or consideration by a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) of confidential proprietary records and trade secrets excluded from this chapter pursuant to subdivision 19 of § 2.2-3705.6.

35. Discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to § 24.2-625.1.

36. Discussion or consideration by the Forensic Science Board or the Scientific Advisory Committee created pursuant to Article 2 (§ 9.1-1109 et seq.) of Chapter 11 of Title 9.1 of records excluded from this chapter pursuant to subdivision F 1 of § 2.2-3706.

37. Discussion or consideration by the Brown v. Board of Education Scholarship Program Awards Committee of records or confidential matters excluded from this chapter pursuant to subdivision 3 of § 2.2-3705.4, and meetings of the Committee to deliberate concerning the annual maximum scholarship award, review and consider scholarship applications and requests for scholarship award renewal, and cancel, rescind, or recover scholarship awards.

38. Discussion or consideration by the Virginia Port Authority of records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.6.

39. Discussion or consideration by the Board of Trustees of the Virginia Retirement System acting pursuant to § 51.1-124.30, or the Investment Advisory Committee appointed pursuant to § 51.1-124.26, or by any local retirement system, acting pursuant to § 51.1-803 of records excluded from this chapter pursuant to subdivision 25 of § 2.2-3705.7.

40. *Discussion or consideration by the Board of Education of records relating to the denial, suspension, or revocation of teacher licenses excluded from this chapter pursuant to subdivision 13 of § 2.2-3705.3.*

B. No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting.

C. Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section shall be de facto officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.

D. Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same procedures for holding closed meetings as are applicable to any other public body.

E. This section shall not be construed to (i) require the disclosure of any contract between the Intervention Program Committee within the Department of Health Professions and an impaired practitioner entered into pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1 or (ii) require the board of directors of any authority created pursuant to the Industrial Development and Revenue Bond Act (§ 15.2-4900 et seq.), or any public body empowered to issue industrial revenue bonds by general or special law, to identify a business or industry to which subdivision A 5 applies. However, such business or industry shall be identified as a matter of public record at least 30 days prior to the actual date of the board's authorization of the sale or issuance of such bonds.