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SENATE BILL NO. 1212

Offered January 9, 2013

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A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia and to amend the Code of Virginia by adding in Article 8 of Chapter 14 of Title 10.1 a section numbered 10.1-1458, relating to the protection of trade secrets.

Patron—Stuart

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 8 of Chapter 14 of Title 10.1 a section numbered 10.1-1458 as follows:

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

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

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

3. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade and tourism development or retention; and memoranda, working papers or other records related to businesses that are considering locating 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.

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

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

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

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

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

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

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

11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed

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59 under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education
60 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public
61 prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17
62 notwithstanding, the financial interest or bargaining position of the public entity would be adversely
63 affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the
64 responsible public entity; and

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

76 1. Invoking such exclusion upon submission of the data or other materials for which protection from
77 disclosure is sought;

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

79 3. Stating the reasons why protection is necessary.

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

90 Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to
91 authorize the withholding of (a) procurement records as required by § 56-573.1:1 or 56-575.17; (b)
92 information concerning the terms and conditions of any interim or comprehensive agreement, service
93 contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity
94 and the private entity; (c) information concerning the terms and conditions of any financing arrangement
95 that involves the use of any public funds; or (d) information concerning the performance of any private
96 entity developing or operating a qualifying transportation facility or a qualifying project.

97 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction,"
98 "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation
99 facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined
100 in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and
101 Infrastructure Act of 2002.

102 12. Confidential proprietary information or trade secrets, not publicly available, provided by a private
103 person or entity to the Virginia Resources Authority or to a fund administered in connection with
104 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such
105 information were made public, the financial interest of the private person or entity would be adversely
106 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of
107 confidentiality.

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

118 In order for trade secrets or confidential proprietary information to be excluded from the provisions
119 of this chapter, the bidder, applicant, or franchisee shall (i) invoke such exclusion upon submission of
120 the data or other materials for which protection from disclosure is sought, (ii) identify the data or other

materials for which protection is sought, and (iii) state the reason why protection is necessary.

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

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

15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to § 3.2-1215.

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

17. Records submitted as a grant or loan application, or accompanying a grant or loan application, to the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-2233.1 et seq.) of Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

18. Confidential proprietary records and trade secrets developed and held by 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, to the extent that disclosure of such records would be harmful to the competitive position of the locality. In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (i) invoke the protections of this subdivision, (ii) identify with specificity the records or portions thereof for which protection is sought, and (iii) state the reasons why protection is necessary.

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

20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Minority Business Enterprise as part of an application for (i) certification as a small, women-owned, or minority-owned business in accordance with Chapter 14 (§ 2.2-1400 et seq.) of this title or (ii) a claim made by a disadvantaged business or an economically disadvantaged individual against the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reasons why protection is necessary.

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

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

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

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.

182 The State Inspector General shall determine whether the requested exclusion from disclosure is
183 necessary to protect the trade secrets or financial records of the private entity. The State Inspector
184 General shall make a written determination of the nature and scope of the protection to be afforded by it
185 under this subdivision.

186 23. Records submitted as a grant application, or accompanying a grant application, to the Virginia
187 Tobacco Indemnification and Community Revitalization Commission to the extent such records contain
188 (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records
189 of a grant applicant that is not a public body, including balance sheets and financial statements, that are
190 not generally available to the public through regulatory disclosure or otherwise, or (iii) research-related
191 information produced or collected by the applicant in the conduct of or as a result of study or research
192 on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information
193 has not been publicly released, published, copyrighted, or patented, if the disclosure of such information
194 would be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or
195 other records prepared by the Commission or its staff exclusively for the evaluation of grant
196 applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the
197 powers of and in furtherance of the performance of the duties of the Commission pursuant to
198 § 3.2-3103.

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

201 1. Invoking such exclusion upon submission of the data or other materials for which protection from
202 disclosure is sought;

203 2. Identifying with specificity the data, records or other materials for which protection is sought; and

204 3. Stating the reasons why protection is necessary.

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

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

213 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent that
214 such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act
215 (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial
216 statements, that are not generally available to the public through regulatory disclosure or otherwise; or
217 (iii) other information submitted by the private entity, where, if the records were made public, the
218 financial interest or bargaining position of the Authority or private entity would be adversely affected.

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

221 1. Invoking such exclusion upon submission of the data or other materials for which protection from
222 disclosure is sought;

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

224 3. Stating the reasons why protection is necessary.

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

231 25. Documents and other information of a proprietary nature furnished by an agricultural landowner
232 or operator to the Department of Conservation and Recreation, the Department of Environmental
233 Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or
234 board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when
235 required as part of a state or federal regulatory enforcement action.

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

242 **§ 10.1-1458. Persons to provide plans, specifications, and information.**

243 *Every person the Department has reason to believe is generating, storing, transporting, disposing of,*

244 or treating waste shall, on request of the Department, furnish such plans, specifications, and information
245 as the Department may require in the discharge of its duties under this chapter. Trade secret
246 information included within any plans, specifications, or information submitted pursuant to this section
247 shall be excluded from the provisions of the Virginia Freedom of Information Act as provided in
248 subdivision 26 of § 2.2-3705.6. At all times, the Department may disclose such trade secret information
249 to the appropriate officials of the Environmental Protection Agency pursuant to the requirements of the
250 federal Solid Waste Disposal Act, 42 U.S.C. § 3251, et seq., or as otherwise required by law.