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SENATE BILL NO. 387

Offered January 8, 2014

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A *BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; certain proprietary records of the Department of Rail and Public Transportation.*

Patron—Reeves

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted 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, ~~and detailed ridership or freight origin and destination information~~ 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~~ *obtaining and administering* 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, *or provided by the National Railroad Passenger Corporation.* 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 under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public

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59 prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17
60 notwithstanding, the financial interest or bargaining position of the public entity would be adversely
61 affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the
62 responsible public entity; and

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

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

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

77 3. Stating the reasons why protection is necessary.

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

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

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

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

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

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

120 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 (a) invoke the protections of this subdivision, (b) identify with specificity the records or portions thereof for which protection is sought, and (c) 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. (Effective until January 1, 2014) 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.

20. (Effective January 1, 2014) 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 Small Business and Supplier Diversity as part of an application for (i) certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.) 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

182 audit, special investigation, or any study requested by the Office of the State Inspector General in
183 accordance with law.

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

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

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

190 3. 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 records 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. Records submitted as a grant application, or accompanying a grant application, to the Virginia
196 Tobacco Indemnification and Community Revitalization Commission to the extent such records contain
197 (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records
198 of a grant applicant that is not a public body, including balance sheets and financial statements, that are
199 not generally available to the public through regulatory disclosure or otherwise, or (iii) research-related
200 information produced or collected by the applicant in the conduct of or as a result of study or research
201 on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information
202 has not been publicly released, published, copyrighted, or patented, if the disclosure of such information
203 would be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or
204 other records prepared by the Commission or its staff exclusively for the evaluation of grant
205 applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the
206 powers of and in furtherance of the performance of the duties of the Commission pursuant to
207 § 3.2-3103.

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

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

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

213 3. 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 records 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. Records of the Commercial Space Flight Authority relating to rate structures or charges for the
219 use of projects of, the sale of products of, or services rendered by the Authority if public disclosure
220 would adversely affect the financial interest or bargaining position of the Authority or a private entity
221 providing records to the Authority; or

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

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

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

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

233 3. Stating the reasons why protection is necessary.

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

240 25. Documents and other information of a proprietary nature furnished by an agricultural landowner
241 or operator to the Department of Conservation and Recreation, the Department of Environmental
242 Quality, the Department of Agriculture and Consumer Services or any political subdivision, agency, or
243 board of the Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when

required as part of a state or federal regulatory enforcement action.

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

27. Documents and other 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 the records were made public, the financial interest of the public-use airport would be adversely affected.

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

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.