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HOUSE BILL NO. 1389

Offered January 26, 2016

A BILL to amend and reenact §§ 2.2-3705.6 and 45.1-361.29 of the Code of Virginia, relating to the Virginia Freedom of Information Act; record exclusion for trade secrets submitted to the Department of Mines, Minerals and Energy.

Patron—Robinson

Unanimous consent to introduce

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.6 and 45.1-361.29 of the Code of Virginia are 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 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 (§ 33.2-1800 et seq.) or the Public Private
60 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were
61 made public prior to or after the execution of an interim or a comprehensive agreement, § 33.2-1820 or
62 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be
63 adversely affected, and (ii) the basis for the determination required in clause (i) is documented in writing
64 by the 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 § 33.2-1820 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 (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. 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 certification as a small, women-owned, or minority-owned business in accordance with Chapter 16.1 (§ 2.2-1603 et seq.). In order for such trade secrets or financial records to be excluded from the provisions of this chapter, the business shall (i) invoke such exclusion upon submission of 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 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.

The State Inspector General shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. The State Inspector

182 General shall make a written determination of the nature and scope of the protection to be afforded by it
183 under this subdivision.

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

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

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

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

201 3. Stating the reasons why protection is necessary.

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

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

210 b. Records provided by a private entity to the Commercial Space Flight Authority, to the extent that
211 such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act
212 (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial
213 statements, that are not generally available to the public through regulatory disclosure or otherwise; or
214 (iii) other information submitted by the private entity, where, if the records were made public, the
215 financial interest or bargaining position of the Authority or private entity would be adversely affected.

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

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

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

221 3. Stating the reasons why protection is necessary.

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

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

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

239 27. Documents and other information of a proprietary nature furnished by a licensed public-use
240 airport to the Department of Aviation for funding from programs administered by the Department of
241 Aviation or the Virginia Aviation Board, where if the records were made public, the financial interest of
242 the public-use airport would be adversely affected.

243 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.

28. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted to the Department of Mines, Minerals and Energy pursuant to the provisions of § 45.1-361.29. 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.*

§ 45.1-361.29. Permit required; gas, oil, or geophysical operations; coalbed methane gas wells; environmental assessment.

A. No person shall commence any ground disturbing activity for a well, gathering pipeline, geophysical exploration or associated activity, facilities or structures without first having obtained from the Director a permit to conduct such activity. Every permit application or permit modification application filed with the Director shall be verified by the permit applicant and shall contain all data, maps, plats, plans and other information as required by regulation or the Director. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted to the Director pursuant to this section or applicable regulations concerning the chemical ingredient name, the chemical abstracts number for a chemical ingredient, or the amount or concentration of chemicals or ingredients used to stimulate a well shall be excluded from the mandatory disclosure provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision 28 of § 2.2-3705.6. To the extent this section or applicable regulation requires the submission of trade secrets to the Director, the trade secret claimant shall make the submission.*

B. For permits issued on July 1, 1996, or thereafter, new permits issued by the Director shall be issued only for the following activities: geophysical operations, drilling, casing, equipping, stimulating, producing, reworking initially productive zones and plugging a well, or gathering pipeline construction and operation. Applications for new permits to conduct geophysical operations shall be accompanied by an application fee of \$130. Applications for all other new permits shall be accompanied by an application fee of \$260.

C. For permits issued prior to July 1, 1996, prior to commencing any reworking, deepening or plugging of the well, or other activity not previously approved on the permitted site, a permittee shall first obtain a permit modification from the Director. All applications for permit modifications shall be accompanied by a permit modification fee of \$130. For permits issued on July 1, 1996, or thereafter, prior to commencing any new zone completions a permittee shall first obtain a permit modification from the Director.

D. All permits and operations provided for under this section shall conform to the rules, regulations and orders of the Director and the Board. When permit terms or conditions required or provided for under Article 3 (§ 45.1-361.27 et seq.) of this chapter are in conflict with any provision of a conservation order issued pursuant to the provisions of Article 2 (§ 45.1-361.13 et seq.) of this chapter, the terms of the permit shall control. In this event, the operator shall return to the Board for reconsideration of a conservation order in light of the conflicting permit. Every permittee shall be responsible for all operations, activity or disturbances associated with the permitted site.

E. No permit or permit modification shall be issued by the Director until he has received from the applicant a written certification that (i) all notice requirements of this article have been complied with, together with proof thereof, and (ii) the applicant has the right to conduct the operations as set forth in the application and operations plan.

F. A permit shall be required to drill any coalbed methane gas well or to convert any methane drainage borehole into a coalbed methane gas well. In addition to the other requirements of this section, every permit application for a coalbed methane gas well shall include:

1. The method that the coalbed methane gas well operator will use to stimulate the well.

2. a. A signed consent from the coal operator of each coal seam which is located within 750 horizontal feet of the proposed well location (i) which the applicant proposes to stimulate or (ii) which is within 100 vertical feet above or below a coal bearing stratum which the applicant proposes to stimulate.

b. The consent required by this section may be (i) contained in a lease or other such agreement; (ii) contained in an instrument of title; or (iii) in any case where a coal operator cannot be located or identified and the operator has complied with § 45.1-361.19, provided by a pooling order entered pursuant to § 45.1-361.21 or 45.1-361.22 and provided such order contains a finding that the operator has exercised due diligence in attempting to identify and locate the coal operator. The consent required

305 by this section shall be deemed to be granted for any tract where title to the coal is held by multiple
306 owners if the applicant has obtained consent to stimulate from the co-tenants holding majority interest in
307 the tract and none of the coal co-tenants has leased the tract for coal development. The requirement of
308 signed consent contained in this section shall in no way be considered to impair, abridge or affect any
309 contractual rights or objections arising out of a coalbed methane gas contract or coalbed methane gas
310 lease entered into prior to January 1, 1990, between the applicant and any coal operator, and any
311 extensions or renewals thereto, and the existence of such lease or contractual arrangement and any
312 extensions or renewals thereto shall constitute a waiver of the requirement for the applicant to file an
313 additional signed consent.

314 3. The unit map, if any, approved by the Board.

315 G. No permit required by this chapter for activities to be conducted within an area of Tidewater
316 Virginia where drilling is authorized under subsection B of § 62.1-195.1 shall be granted until the
317 environmental impact assessment required by § 62.1-195.1 has been conducted and the assessment has
318 been reviewed by the Department.

319 H. The applicant for a permit for a gathering pipeline, oil or gas well, or coal bed methane well shall
320 identify in the permit application any cemetery, as identified on a U.S.G.S. topographic map or located
321 by routine field review, within 100 feet of the permitted activity.

322 I. The operator of any coalbed methane well drilled within 250 feet of a cemetery shall comply with
323 a written request of any person owning an interest in a private cemetery or the authorized agent of a
324 public cemetery that the operator of such well suspend operations for a period from two hours before to
325 two hours after any burial service that takes place on the surface area of such cemetery. However, if the
326 well operator or a mine operator determines that suspension of such operations will have an adverse
327 effect on the safety of the well operations or mining operations, the operator shall be under no
328 obligation to comply with the request, and operation of the well shall continue.