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HOUSE BILL NO. 1678

Offered January 11, 2017

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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; trade secrets submitted to the Department of Mines, Minerals, and Energy.

Patron—Robinson

Referred to Committee on General Laws

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

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. Proprietary information, 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 information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure of such information would adversely affect the financial interest of the public body.

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. Proprietary information 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 if disclosure of 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 exclusion 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 in connection with a procurement transaction or 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 information 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 information
61 was made public prior to or after the execution of an interim or a comprehensive agreement,
62 § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public
63 entity would be adversely affected and (ii) the basis for the determination required in clause (i) is
64 documented in writing by the responsible public entity; and

65 b. Information 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
67 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002
68 (§ 56-575.1 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity
69 as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial information of the private
70 entity, including balance sheets and financial statements, that are not generally available to the public
71 through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity
72 where if such information was made public prior to the execution of an interim agreement or a
73 comprehensive agreement, the financial interest or bargaining position of the public or private entity
74 would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be
75 excluded from the provisions of this chapter, the private entity shall make a written request to the
76 responsible public entity:

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

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

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

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

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

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

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

108 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential
109 proprietary information that is not generally available to the public through regulatory disclosure or
110 otherwise, provided by a (i) bidder or applicant for a franchise or (ii) 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 information relates to the bidder's,
113 applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies
114 or implementation of improvements, where such new services, technologies, or improvements have not
115 been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such
116 information were made public, the competitive advantage or financial interests of the franchisee would
117 be 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 (a) invoke such exclusion upon submission of
120 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 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. 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. Information 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. Information relating to 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 5.3 (§ 32.1-162.23 et seq.) of Title 32.1 if disclosure of such information would (i) reveal 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, and (ii) be harmful to the competitive position of the applicant.

18. Confidential proprietary information 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 if disclosure of such information 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 information for which protection is sought, and (c) state the reasons why protection is necessary. However, the exemption provided by this subdivision shall not apply to any authority created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

19. Confidential proprietary information 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 information 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 information 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 information 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. 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 information, 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 information 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:

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

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

c. 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 information 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. Information relating to a grant application, or accompanying a grant application, submitted to the
185 Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets as defined in the
186 Uniform Trade Secrets Act (§ 59.1-336 et seq.), (b) financial information of a grant applicant that is not
187 a public body, including balance sheets and financial statements, that are not generally available to the
188 public through regulatory disclosure or otherwise, or (c) 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, and (ii) be harmful to the competitive position of the
192 applicant; and memoranda, staff evaluations, or other information prepared by the Commission or its
193 staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision
194 shall apply to grants that are consistent with the powers of and in furtherance of the performance of the
195 duties of the Commission pursuant to § 3.2-3103.

196 In order for the information 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 a. Invoking such exclusion upon submission of the data or other materials for which protection from
199 disclosure is sought;

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

202 c. Stating the reasons why protection is necessary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

249 c. Stating the reasons why protection is necessary.

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

257 29. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), submitted to the*
258 *Department of Mines, Minerals and Energy pursuant to requirements for disclosure of chemical*
259 *ingredient names, the chemical abstracts number for a chemical ingredient, or the amount or*
260 *concentration of chemicals or ingredients used to stimulate a well pursuant to § 45.1-361.29 or*
261 *regulations promulgated under § 45.1-361.27. In order for such trade secrets to be excluded from the*
262 *provisions of this chapter, the submitting party shall (i) invoke this exclusion upon submission of the*
263 *data or materials for which protection from disclosure is sought, (ii) identify the data or materials for*
264 *which protection is sought, and (iii) state the reasons why protection is necessary. The Department shall*
265 *determine whether the information claimed to be a trade secret is entitled to such protection.*