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SENATE BILL NO. 1226

Offered January 11, 2017

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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 sections numbered section numbered 2.2-4329.2 and 15.2-2103.1 relating to the Virginia Freedom of Information Act; Public Procurement Act; proprietary records and trade secrets; solar energy agreements.*

Patron—Edwards

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3705.6 and 15.2-2100 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 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.

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59 11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity,
60 its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed
61 under the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or the Public-Private
62 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where (i) if such information
63 was made public prior to or after the execution of an interim or a comprehensive agreement,
64 § 33.2-1820 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public
65 entity would be adversely affected and (ii) the basis for the determination required in clause (i) is
66 documented in writing by the responsible public entity; and

67 b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or
68 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995
69 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002
70 (§ 56-575.1 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity
71 as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial information of the private
72 entity, including balance sheets and financial statements, that are not generally available to the public
73 through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity
74 where if such information was made public prior to the execution of an interim agreement or a
75 comprehensive agreement, the financial interest or bargaining position of the public or private entity
76 would be adversely affected. In order for the information specified in clauses (i), (ii), and (iii) to be
77 excluded from the provisions of this chapter, the private entity shall make a written request to the
78 responsible public entity:

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

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

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

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

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

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

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

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

120 In order for trade secrets or confidential proprietary information to be excluded from the provisions

of this chapter, the bidder, applicant, or franchisee 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 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.

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

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

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

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

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

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

219 In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded
220 from 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 information of the private entity. To protect other information submitted by
227 the private entity from disclosure, the Authority shall determine whether public disclosure would
228 adversely affect the financial interest or bargaining position of the Authority or private entity. The
229 Authority shall make a written determination of the nature and scope of the protection to be afforded by
230 it under this subdivision.

231 25. Information of a proprietary nature furnished by an agricultural landowner or operator to the
232 Department of Conservation and Recreation, the Department of Environmental Quality, the Department
233 of Agriculture and Consumer Services, or any political subdivision, agency, or board of the
234 Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part
235 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 27. Information of a proprietary nature furnished by a licensed public-use airport to the Department
243 of Aviation for funding from programs administered by the Department of Aviation or the Virginia

Aviation Board, where if such information was made public, the financial interest of the public-use airport would be adversely affected.

In order for the information 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:

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.

28. Records submitted as a grant or loan application, or accompanying a grant or loan application, for an award from the Virginia Research Investment Fund pursuant to Article 8 (§ 23.1-3130 et seq.) of Chapter 31 of Title 23.1, to the extent that 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.

29. *Proprietary information, voluntarily provided by a private business pursuant to a promise of confidentiality from a public body, used by the public body for a solar photovoltaic services agreement, a solar power purchase agreement, or a solar self-generation agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (b) financial information of the private business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) other information submitted by the private business and (ii) adversely affect the financial interest or bargaining position of the public body or private business.*

In order for the information specified in clauses (a), (b), and (c) to be excluded from the provisions of this chapter, the private business shall make a written request to the public body:

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.

§ 2.2-4329.2. Solar energy services, supply, and self-generation agreements.

A. As used in this section, "solar services agreement" means an agreement between a public body and a private entity for services in connection with the installation and operation of solar photovoltaic generation facilities or for the purchase of solar electric energy or solar services by the public body.

B. A solar services agreement may be structured as a service agreement or may be subject to available appropriation.

C. A solar services agreement contractor or provider may designate specific provisions in a solar services agreement as proprietary information. Any such designated provision may address equipment performance guarantees, equipment capacity availability, equipment performance field protocols, performance testing, measured renewable energy, annual alignment of costs also known as the annual true up, termination values, special terms and conditions, input resources, availability of input resources, intellectual property infringement, and other proprietary terms, formulas, ratios, and conditions. The designated provisions shall not be subject to the disclosure provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). Nothing in this section shall be construed as authorizing the withholding of the financial terms of such agreements.

15.2-2103.1. Nondisclosure of proprietary information; solar services agreements.

A. Nothing in this article shall be construed to require the disclosure of proprietary information voluntarily provided by a private entity in connection with a franchise, lease, or use under a solar photovoltaic services agreement, a solar power purchase agreement, or a solar self-generation agreement if the withholding of such information is authorized by subdivision 29 of § 2.2-3705.6 of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Nothing in this subsection shall be construed as authorizing the withholding of the financial terms of such agreements.