2021 SPECIAL SESSION I

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2 Offered January 13: 2021 Profile of January 12: 2021 4 A BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Virginia Freedom of Information Act; record exclusion for proprietary records and trade secrets; carbon sequestration agreements. 7 Patron—Vogel 8 Referred to Committee on General Laws and Technology 9 Referred to Committee on General Laws and Technology 10 Be it enacted by the General Assembly of Virginia: 11. That § 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets. 7 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 crecord shall be conducted in accordance with § 2.2-3704.01. 10 1. Proprietary information, guthered 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 formation; information, youtnarily provided by private businesse 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 neversely affect the financial interest of the public body.	1	
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52 Federal Railroad Administration. However, the exclusion provided by this subdivision shall not apply to		
<i>ss</i> any whony 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
56 who has submitted to a public body an application for prequalification to bid on public construction		who has submitted to a public body an application for prequalification to bid on public construction
57 projects in accordance with subsection B of § 2.2-4317.		

58 11. a. Memoranda, staff evaluations, or other information prepared by the responsible public entity,

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

66 b. Information provided by a private entity to a responsible public entity, affected jurisdiction, or 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 69 (§ 56-575.1 et seq.) if disclosure of such information would reveal (i) trade secrets of the private entity; 70 (ii) financial information of the private entity, including balance sheets and financial statements, that are 71 not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity where if such information was made public prior to the execution of an 72 73 interim agreement or a comprehensive agreement, the financial interest or bargaining position of the 74 public or private entity would be adversely affected. In order for the information specified in clauses (i), 75 (ii), and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written 76 request to the 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

(3) Stating the reasons why protection is necessary.

81 The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other 82 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 responsible public entity shall make a written determination of the nature and scope of the protection to 86 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) information concerning the terms and conditions of any interim or comprehensive agreement, service 93 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," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined 99 100 in the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.) or in the Public-Private Education 101 102 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 person or entity pursuant to a promise of confidentiality to the Virginia Resources Authority or to a 104 fund administered in connection with financial assistance rendered or to be rendered by the Virginia 105 Resources Authority where, if such information were made public, the financial interest of the private 106 107 person or entity would be adversely affected.

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

117 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 118 119 the data or other materials for which protection from disclosure is sought, (b) identify the data or other 120 materials for which protection is sought, and (c) state the reason why protection is necessary.

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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.

125 14. Information of a proprietary or confidential nature furnished by a supplier or manufacturer of charitable gaming supplies to the Department of Agriculture and Consumer Services (i) pursuant to subsection E of § 18.2-340.34 and (ii) pursuant to regulations promulgated by the Charitable Gaming
128 Board related to approval of electronic and mechanical equipment.

129 15. Information related to Virginia apple producer sales provided to the Virginia State Apple Board130 pursuant to § 3.2-1215.

131 16. Trade secrets submitted by CMRS providers as defined in § 56-484.12 to the former Wireless
 132 Carrier E-911 Cost Recovery Subcommittee created pursuant to former § 56-484.15, relating to the provision of wireless E-911 service.

134 17. Information relating to a grant or loan application, or accompanying a grant or loan application,
135 to the Commonwealth Health Research Board pursuant to Chapter 5.3 (§ 32.1-162.23 et seq.) of Title
136 32.1 if disclosure of such information would (i) reveal proprietary business or research-related
137 information produced or collected by the applicant in the conduct of or as a result of study or research
138 on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information
139 has not been publicly released, published, copyrighted, or patented, and (ii) be harmful to the
140 competitive position of the applicant.

141 18. Confidential proprietary information and trade secrets developed and held by a local public body
142 (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television
143 services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2 if disclosure of such
144 information would be harmful to the competitive position of the locality.

145 In order for confidential proprietary information or trade secrets to be excluded from the provisions 146 of this chapter, the locality in writing shall (a) invoke the protections of this subdivision, (b) identify 147 with specificity the information for which protection is sought, and (c) state the reasons why protection 148 is necessary. However, the exemption provided by this subdivision shall not apply to any authority 149 created pursuant to the BVU Authority Act (§ 15.2-7200 et seq.).

150 19. Confidential proprietary information and trade secrets developed by or for a local authority 151 created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to 152 provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of 153 Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive 154 position of the authority, except that information required to be maintained in accordance with 155 § 15.2-2160 shall be released.

156 20. Trade secrets or financial information of a business, including balance sheets and financial 157 statements, that are not generally available to the public through regulatory disclosure or otherwise, 158 provided to the Department of Small Business and Supplier Diversity as part of an application for 159 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 160 161 provisions of this chapter, the business shall (i) invoke such exclusion upon submission of the data or 162 other materials for which protection from disclosure is sought, (ii) identify the data or other materials for 163 which protection is sought, and (iii) state the reasons why protection is necessary.

164 21. Information of a proprietary or confidential nature disclosed by a carrier to the State Health 165 Commissioner pursuant to §§ 32.1-276.5:1 and 32.1-276.7:1.

166 22. Trade secrets, including, but not limited to, financial information, including balance sheets and
167 financial statements, that are not generally available to the public through regulatory disclosure or
168 otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the State
169 Inspector General for the purpose of an audit, special investigation, or any study requested by the Office
170 of the State Inspector General in accordance with law.

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

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

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

177 c. Stating the reasons why protection is necessary.

178 The State Inspector General shall determine whether the requested exclusion from disclosure is 179 necessary to protect the trade secrets or financial information of the private entity. The State Inspector 180 General shall make a written determination of the nature and scope of the protection to be afforded by it 181 under this subdivision.

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182 23. Information relating to a grant application, or accompanying a grant application, submitted to the 183 Tobacco Region Revitalization Commission that would (i) reveal (a) trade secrets, (b) financial 184 information of a grant applicant that is not a public body, including balance sheets and financial 185 statements, that are not generally available to the public through regulatory disclosure or otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or as a result of 186 187 study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when 188 such information has not been publicly released, published, copyrighted, or patented, and (ii) be harmful 189 to the competitive position of the applicant; and memoranda, staff evaluations, or other information 190 prepared by the Commission or its staff exclusively for the evaluation of grant applications. The 191 exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in 192 furtherance of the performance of the duties of the Commission pursuant to § 3.2-3103.

193 In order for the information specified in this subdivision to be excluded from the provisions of this 194 chapter, the applicant shall make a written request to the Commission:

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

197 b. Identifying with specificity the data, information or other materials for which protection is sought; 198 and 199

c. Stating the reasons why protection is necessary.

200 The Commission shall determine whether the requested exclusion from disclosure is necessary to 201 protect the trade secrets, financial information, or research-related information of the applicant. The 202 Commission shall make a written determination of the nature and scope of the protection to be afforded 203 by it under this subdivision.

24. a. Information held by the Commercial Space Flight Authority relating to rate structures or 204 charges for the use of projects of, the sale of products of, or services rendered by the Authority if 205 206 disclosure of such information would adversely affect the financial interest or bargaining position of the Authority or a private entity providing the information to the Authority; or 207

208 b. Information provided by a private entity to the Commercial Space Flight Authority if disclosure of 209 such information would (i) reveal (a) trade secrets of the private entity; (b) financial information of the 210 private entity, 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 211 212 entity and (ii) adversely affect the financial interest or bargaining position of the Authority or private 213 entity.

214 In order for the information specified in clauses (a), (b), and (c) of subdivision 24 b to be excluded 215 from the provisions of this chapter, the private entity shall make a written request to the Authority:

216 (1) Invoking such exclusion upon submission of the data or other materials for which protection from 217 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.

220 The Authority shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial information of the private entity. To protect other information submitted by 221 222 the private entity from disclosure, the Authority shall determine whether public disclosure would 223 adversely affect the financial interest or bargaining position of the Authority or private entity. The 224 Authority shall make a written determination of the nature and scope of the protection to be afforded by 225 it under this subdivision.

226 25. Information of a proprietary nature furnished by an agricultural landowner or operator to the 227 Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Agriculture and Consumer Services, or any political subdivision, agency, or 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 228 229 230 of a state or federal regulatory enforcement action.

231 26. Trade secrets provided to the Department of Environmental Quality pursuant to the provisions of 232 § 10.1-1458. In order for such trade secrets to be excluded from the provisions of this chapter, the 233 submitting party shall (i) invoke this exclusion upon submission of the data or materials for which 234 protection from disclosure is sought, (ii) identify the data or materials for which protection is sought, 235 and (iii) state the reasons why protection is necessary.

236 27. Information of a proprietary nature furnished by a licensed public-use airport to the Department 237 of Aviation for funding from programs administered by the Department of Aviation or the Virginia 238 Aviation Board, where if such information was made public, the financial interest of the public-use 239 airport would be adversely affected.

In order for the information specified in this subdivision to be excluded from the provisions of this 240 241 chapter, the public-use airport shall make a written request to the Department of Aviation:

242 a. Invoking such exclusion upon submission of the data or other materials for which protection from 243 disclosure is sought;

- 244 b. Identifying with specificity the data or other materials for which protection is sought; and
- 245 c. Stating the reasons why protection is necessary.

246 28. Information relating to a grant, loan, or investment application, or accompanying a grant, loan, or 247 investment application, submitted to the Commonwealth of Virginia Innovation Partnership Authority 248 (the Authority) established pursuant to Article 11 (§ 2.2-2351 et seq.) of Chapter 22, an advisory 249 committee of the Authority, or any other entity designated by the Authority to review such applications, 250 to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a 251 grant, loan, or investment application that is not a public body, including balance sheets and financial 252 statements, that are not generally available to the public through regulatory disclosure or otherwise; or 253 (c) research-related information produced or collected by a party to the application in the conduct of or 254 as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly 255 issues, when such information has not been publicly released, published, copyrighted, or patented, and 256 (ii) be harmful to the competitive position of a party to a grant, loan, or investment application; and 257 memoranda, staff evaluations, or other information prepared by the Authority or its staff, or a reviewing 258 entity designated by the Authority, exclusively for the evaluation of grant, loan, or investment applications, including any scoring or prioritization documents prepared for and forwarded to the 259 260 Authority.

261 29. Proprietary information, voluntarily provided by a private business pursuant to a promise of 262 confidentiality from a public body, used by the public body for a solar services or carbon sequestration 263 agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private 264 business; (b) financial information of the private business, including balance sheets and financial 265 statements, that are not generally available to the public through regulatory disclosure or otherwise; or 266 (c) other information submitted by the private business and (ii) adversely affect the financial interest or 267 bargaining position of the public body or private business.

268 In order for the information specified in clauses (i)(a), (b), and (c) to be excluded from the 269 provisions of this chapter, the private business shall make a written request to the public body:

270 a. Invoking such exclusion upon submission of the data or other materials for which protection from 271 disclosure is sought; 272

- b. Identifying with specificity the data or other materials for which protection is sought; and
- c. Stating the reasons why protection is necessary.

273 274 30. Information contained in engineering and construction drawings and plans submitted for the sole 275 purpose of complying with the Building Code in obtaining a building permit if disclosure of such 276 information would identify specific trade secrets or other information that would be harmful to the 277 competitive position of the owner or lessee. However, such information shall be exempt only until the 278 building is completed. Information relating to the safety or environmental soundness of any building 279 shall not be exempt from disclosure.

280 31. Trade secrets, including, but not limited to, financial information, including balance sheets and 281 financial statements that are not generally available to the public through regulatory disclosure or 282 otherwise, and revenue and cost projections supplied by a private or nongovernmental entity to the 283 Virginia Department of Transportation for the purpose of an audit, special investigation, or any study 284 requested by the Virginia Department of Transportation in accordance with law.

285 In order for the records specified in this subdivision to be excluded from the provisions of this 286 chapter, the private or nongovernmental entity shall make a written request to the Department:

287 a. Invoking such exclusion upon submission of the data or other materials for which protection from 288 disclosure is sought;

- 289 b. Identifying with specificity the data or other materials for which protection is sought; and 290
 - c. Stating the reasons why protection is necessary.

291 The Virginia Department of Transportation shall determine whether the requested exclusion from 292 disclosure is necessary to protect trade secrets or financial records of the private entity. The Virginia 293 Department of Transportation shall make a written determination of the nature and scope of the 294 protection to be afforded by it under this subdivision.

295 32. Information related to a grant application, or accompanying a grant application, submitted to the 296 Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) 297 financial information of a grant applicant that is not a public body, including balance sheets and 298 financial statements, that are not generally available to the public through regulatory disclosure or 299 otherwise, or (c) research-related information produced or collected by the applicant in the conduct of or 300 as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly 301 issues, when such information has not been publicly released, published, copyrighted, or patented, and 302 (ii) be harmful to the competitive position of the applicant. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant 303 to § 36-139, Article 26 (§ 2.2-2484 et seq.) of Chapter 24, or the Virginia Telecommunication Initiative 304

305 as authorized by the appropriations act.

306 In order for the information submitted by the applicant and specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the 308 Department:

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

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

313 c. Stating the reasons why protection is necessary.

The Department shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or confidential proprietary information of the applicant. The Department shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

318 33. Financial and proprietary records submitted with a loan application to a locality for the
319 preservation or construction of affordable housing that is related to a competitive application to be
320 submitted to either the U.S. Department of Housing and Urban Development (HUD) or the Virginia
321 Housing Development Authority (VHDA), when the release of such records would adversely affect the
322 bargaining or competitive position of the applicant. Such records shall not be withheld after they have

323 been made public by HUD or VHDA.