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SENATE BILL NO. 1343

Offered January 13, 2021

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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; record exclusion for proprietary records and trade secrets; carbon sequestration agreements.*

Patron—Vogel

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That § 2.2-3705.6 of the Code of Virginia is amended and reenacted as follows:****§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.**

The following 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,

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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
61 Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where (i) if such information
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
67 affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995
68 (§ 33.2-1800 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002
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
72 submitted by the private entity where if such information was made public prior to the execution of an
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

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 or confidential proprietary information that is not generally available to the public
109 through regulatory disclosure or otherwise, provided by a (i) bidder or applicant for a franchise or (ii)
110 franchisee under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority
111 pursuant to a promise of confidentiality from the franchising authority, to the extent the information
112 relates to the bidder's, applicant's, or franchisee's financial capacity or provision of new services,
113 adoption of new technologies or implementation of improvements, where such new services,
114 technologies, or improvements have not been implemented by the franchisee on a nonexperimental scale
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
118 of this chapter, the bidder, applicant, or franchisee shall (a) invoke such exclusion upon submission of
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.

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 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 Board related to approval of electronic and mechanical equipment.

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

16. Trade secrets submitted by CMRS providers as defined in § 56-484.12 to the former Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to former § 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 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 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, 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 General shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

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
186 (c) research-related information produced or collected by the applicant in the conduct of or as a result of
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.

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

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
211 public through regulatory disclosure or otherwise; or (c) other information submitted by the private
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;

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

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

220 The Authority shall determine whether the requested exclusion from disclosure is necessary to protect
221 the trade secrets or financial information of the private entity. To protect other information submitted by
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
228 of Agriculture and Consumer Services, or any political subdivision, agency, or board of the
229 Commonwealth pursuant to §§ 10.1-104.7, 10.1-104.8, and 10.1-104.9, other than when required as part
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.

240 In order for the information specified in this subdivision to be excluded from the provisions of this
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;

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

28. Information relating to a grant, loan, or investment application, or accompanying a grant, loan, or investment application, submitted to the Commonwealth of Virginia Innovation Partnership Authority (the Authority) established pursuant to Article 11 (§ 2.2-2351 et seq.) of Chapter 22, an advisory committee of the Authority, or any other entity designated by the Authority to review such applications, to the extent that such records would (i) reveal (a) trade secrets; (b) financial information of a party to a grant, loan, or investment application that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (c) research-related information produced or collected by a party to the application 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 a party to a grant, loan, or investment application; and memoranda, staff evaluations, or other information prepared by the Authority or its staff, or a reviewing 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 Authority.

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 services or carbon sequestration agreement, where disclosure of such information would (i) reveal (a) trade secrets of the private business; (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 (i)(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.

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

31. Trade secrets, 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 Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Virginia Department of Transportation 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 Department:

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

32. Information related to a grant application, or accompanying a grant application, submitted to the Department of Housing and Community Development that would (i) reveal (a) trade secrets, (b) financial information of a grant applicant that is not a public body, including balance sheets and financial 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 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. The exclusion provided by this subdivision shall only apply to grants administered by the Department, the Director of the Department, or pursuant to § 36-139, Article 26 (§ 2.2-2484 et seq.) of Chapter 24, or the Virginia Telecommunication Initiative

305 as authorized by the appropriations act.

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

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

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

313 c. Stating the reasons why protection is necessary.

314 The Department shall determine whether the requested exclusion from disclosure is necessary to
315 protect the trade secrets or confidential proprietary information of the applicant. The Department shall
316 make a written determination of the nature and scope of the protection to be afforded by it under this
317 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.