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HOUSE BILL NO. 1145

Offered January 25, 1994

A *BILL to amend and reenact § 2.1-342 of the Code of Virginia, relating to the Freedom of Information Act; exemptions.*

Patrons—Grayson, Cunningham, Jones, D.C., Mayer, Reid, Rhodes and Woodrum; Senators: Benedetti, Lambert, Marsh and Stosch

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That § 2.1-342 of the Code of Virginia is amended and reenacted as follows:**

§ 2.1-342. Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter.

A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of this Commonwealth, representatives of newspapers and magazines with circulation in this Commonwealth, and representatives of radio and television stations broadcasting in or into this Commonwealth. The custodian of such records shall take all necessary precautions for their preservation and safekeeping. Any public body covered under the provisions of this chapter shall make an initial response to citizens requesting records open to inspection within five work days after the receipt of the request by the public body which is the custodian of the requested records. Such citizen request shall designate the requested records with reasonable specificity. A specific reference to this chapter by the requesting citizen in his request shall not be necessary to invoke the provisions of this chapter and the time limits for response by the public body. The response by the public body within such five work days shall be one of the following responses:

1. The requested records shall be provided to the requesting citizen.

2. If the public body determines that an exemption applies to all of the requested records, it may refuse to release such records and provide to the requesting citizen a written explanation as to why the records are not available with the explanation making specific reference to the applicable Code sections which make the requested records exempt.

3. If the public body determines that an exemption applies to a portion of the requested records, it may delete or excise that portion of the records to which an exemption applies, disclose the remainder of the requested records and provide to the requesting citizen a written explanation as to why these portions of the record are not available to the requesting citizen with the explanation making specific reference to the applicable Code sections which make that portion of the requested records exempt. Any reasonably segregable portion of an official record shall be provided to any person requesting the record after the deletion of the exempt portion.

4. If the public body determines that it is practically impossible to provide the requested records or to determine whether they are available within the five-work-day period, the public body shall so inform the requesting citizen and shall have an additional seven work days in which to provide one of the three preceding responses.

Nothing in this section shall prohibit any public body from petitioning the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with this petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

The public body may make reasonable charges for the copying, search time and computer time expended in the supplying of such records; however, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than fifty acres. Such charges for the supplying of requested records shall be estimated in advance at the request of the citizen. The public body may require the advance payment of charges which are subject to advance determination.

In any case where a public body determines in advance that search and copying charges for producing the requested documents are likely to exceed \$200, the public body may, before continuing to process the request, require the citizen requesting the information to agree to payment of an amount not

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60 to exceed the advance determination by five percent. The period within which the public body must
61 respond under this section shall be tolled for the amount of time that elapses between notice of the
62 advance determination and the response of the citizen requesting the information.

63 Official records maintained by a public body on a computer or other electronic data processing
64 system which are available to the public under the provisions of this chapter shall be made reasonably
65 accessible to the public at reasonable cost.

66 Public bodies shall not be required to create or prepare a particular requested record if it does not
67 already exist. Public bodies may, but shall not be required to, abstract or summarize information from
68 official records or convert an official record available in one form into another form at the request of
69 the citizen. The public body shall make reasonable efforts to reach an agreement with the requester
70 concerning the production of the records requested.

71 Failure to make any response to a request for records shall be a violation of this chapter and deemed
72 a denial of the request.

73 B. The following records are excluded from the provisions of this chapter but may be disclosed by
74 the custodian in his discretion, except where such disclosure is prohibited by law:

75 1. Memoranda, correspondence, evidence and complaints related to criminal investigations; *adult*
76 *arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases*, reports
77 submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the
78 campus police departments of public institutions of higher education as established by Chapter 17
79 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions
80 that would identify individuals providing information about crimes or criminal activities under a promise
81 of anonymity; records of local police departments relating to neighborhood watch programs that include
82 the names, addresses, and operating schedules of individual participants in the program that are provided
83 to such departments under a promise of confidentiality; and all records of persons imprisoned in penal
84 institutions in this Commonwealth provided such records relate to the imprisonment. Information in the
85 custody of law-enforcement officials relative to the identity of any individual other than a juvenile who
86 is arrested and charged, and the status of the charge or arrest, shall not be excluded from the provisions
87 of this chapter.

88 Criminal incident information relating to felony offenses shall not be excluded from the provisions of
89 this chapter; however, where the release of criminal incident information is likely to jeopardize an
90 ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection,
91 or result in the destruction of evidence, such information may be withheld until the above-referenced
92 damage is no longer likely to occur from release of the information.

93 2. Confidential records of all investigations of applications for licenses and all licensees made by or
94 submitted to the Alcoholic Beverage Control Board or the State Lottery Department.

95 3. State income, business, and estate tax returns, personal property tax returns, scholastic records and
96 personnel records containing information concerning identifiable individuals, except that such access
97 shall not be denied to the person who is the subject thereof, and medical and mental records, except that
98 such records can be personally reviewed by the subject person or a physician of the subject person's
99 choice; however, the subject person's mental records may not be personally reviewed by such person
100 when the subject person's treating physician has made a part of such person's records a written statement
101 that in his opinion a review of such records by the subject person would be injurious to the subject
102 person's physical or mental health or well-being.

103 Where the person who is the subject of medical records is confined in a state or local correctional
104 facility, the administrator or chief medical officer of such facility may assert such confined person's right
105 of access to the medical records if the administrator or chief medical officer has reasonable cause to
106 believe that such confined person has an infectious disease or other medical condition from which other
107 persons so confined need to be protected. Medical records shall be reviewed only and shall not be
108 copied by such administrator or chief medical officer. The information in the medical records of a
109 person so confined shall continue to be confidential and shall not be disclosed to any person except the
110 subject by the administrator or chief medical officer of the facility or except as provided by law.

111 For the purposes of this chapter such statistical summaries of incidents and statistical data concerning
112 patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental
113 Retardation and Substance Abuse Services shall be open to inspection and releasable as provided in
114 subsection A of this section. No such summaries or data shall include any patient-identifying
115 information. Where the person who is the subject of scholastic or medical and mental records is under
116 the age of eighteen, his right of access may be asserted only by his guardian or his parent, including a
117 noncustodial parent, unless such parent's parental rights have been terminated or a court of competent
118 jurisdiction has restricted or denied such access. In instances where the person who is the subject thereof
119 is an emancipated minor or a student in a state-supported institution of higher education, such right of
120 access may be asserted by the subject person.

121 4. Memoranda, working papers and correspondence held or requested by members of the General

Assembly or by the office of the Governor or Lieutenant Governor, Attorney General or the mayor or other chief executive officer of any political subdivision of the Commonwealth or the president or other chief executive officer of any state-supported institution of higher education. This exclusion shall not apply to memoranda, studies or other papers held or requested by the mayor or other chief executive officer of any political subdivision which are specifically concerned with the evaluation of performance of the duties and functions of any locally elected official and were prepared after June 30, 1992.

5. Written opinions of the city, county and town attorneys of the cities, counties and towns in the Commonwealth and any other writing protected by the attorney-client privilege.

6. Memoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344 and material furnished in confidence with respect thereto.

7. Confidential letters and statements of recommendation placed in the records of educational agencies or institutions respecting (i) admission to any educational agency or institution, (ii) an application for employment, or (iii) receipt of an honor or honorary recognition.

8. Library records which can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed.

9. Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by any public body.

As used in this subdivision 9, "test or examination" shall include (i) any scoring key for any such test or examination, and (ii) any other document which would jeopardize the security of such test or examination. Nothing contained in this subdivision 9 shall prohibit the release of test scores or results as provided by law, or limit access to individual records as is provided by law. However, the subject of such employment tests shall be entitled to review and inspect all documents relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, such test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

10. Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Professions or any board in that department on individual licensees or applicants. However, such material may be made available during normal working hours for copying, at the requester's expense, by the individual who is the subject thereof, in the offices of the Department of Health Professions or in the offices of any health regulatory board, whichever may possess the material.

11. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth.

12. Memoranda, legal opinions, working papers and records recorded in or compiled exclusively for executive or closed meetings lawfully held pursuant to § 2.1-344.

13. Reports, documentary evidence and other information as specified in §§ 2.1-373.2 and 63.1-55.4.

14. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or § 62.1-134.1.

15. Contract cost estimates prepared for the confidential use of the Department of Transportation in awarding contracts for construction or the purchase of goods or services and records, documents and automated systems prepared for the Department's Bid Analysis and Monitoring Program.

16. Vendor proprietary information software which may be in the official records of a public body. For the purpose of this section, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of this Commonwealth.

17. Data, records or information of a proprietary nature produced or collected by or for faculty or staff of state institutions of higher learning, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

18. Financial statements not publicly available filed with applications for industrial development financings.

19. Lists of registered owners of bonds issued by a political subdivision of the Commonwealth, whether the lists are maintained by the political subdivision itself or by a single fiduciary designated by the political subdivision.

183 20. Confidential proprietary records, voluntarily provided by private business pursuant to a promise
184 of confidentiality from the Department of Economic Development, used by that Department for business,
185 trade and tourism development.

186 21. Information which was filed as confidential under the Toxic Substances Information Act
187 (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

188 22. Documents as specified in § 58.1-3.

189 23. Confidential records, including victim identity, provided to or obtained by staff in a rape crisis
190 center or a program for battered spouses.

191 24. Computer software developed by or for a state agency, state-supported institution of higher
192 education or political subdivision of the Commonwealth.

193 25. Investigator notes, and other correspondence and information, furnished in confidence with
194 respect to an active investigation of individual employment discrimination complaints made to the
195 Department of Personnel and Training; however, nothing in this section shall prohibit the disclosure of
196 information taken from inactive reports in a form which does not reveal the identity of charging parties,
197 persons supplying the information or other individuals involved in the investigation.

198 26. Fisheries data which would permit identification of any person or vessel, except when required
199 by court order as specified in § 28.2-204.

200 27. Records of active investigations being conducted by the Department of Medical Assistance
201 Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

202 28. Documents and writings furnished by a member of the General Assembly to a meeting of a
203 standing committee, special committee or subcommittee of his house established solely for the purpose
204 of reviewing members' annual disclosure statements and supporting materials filed under § 2.1-639.40 or
205 of formulating advisory opinions to members on standards of conduct, or both.

206 29. Customer account information of a public utility affiliated with a political subdivision of the
207 Commonwealth, including the customer's name and service address, but excluding the amount of utility
208 service provided and the amount of money paid for such utility service.

209 30. Investigative notes and other correspondence and information furnished in confidence with
210 respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice
211 under the Virginia Human Rights Act (§ 2.1-714 et seq.); however, nothing in this section shall prohibit
212 the distribution of information taken from inactive reports in a form which does not reveal the identity
213 of the parties involved or other persons supplying information.

214 31. Investigative notes; proprietary information not published, copyrighted or patented; information
215 obtained from employee personnel records; personally identifiable information regarding residents,
216 clients or other recipients of services; and other correspondence and information furnished in confidence
217 to the Department of Social Services in connection with an active investigation of an applicant or
218 licensee pursuant to Chapters 9 (§ 63.1-172 et seq.) and 10 (§ 63.1-195 et seq.) of Title 63.1; however,
219 nothing in this section shall prohibit disclosure of information from the records of completed
220 investigations in a form that does not reveal the identity of complainants, persons supplying information,
221 or other individuals involved in the investigation.

222 32. Reports, manuals, specifications, documents, minutes or recordings of staff meetings or other
223 information or materials of the Virginia Board of Corrections, the Virginia Department of Corrections or
224 any institution thereof to the extent, as determined by the Director of the Department of Corrections or
225 his designee or of the Virginia Board of Youth and Family Services, the Virginia Department of Youth
226 and Family Services or any facility thereof to the extent as determined by the Director of the
227 Department of Youth and Family Services, or his designee, that disclosure or public dissemination of
228 such materials would jeopardize the security of any correctional or juvenile facility or institution, as
229 follows:

230 (i) Security manuals, including emergency plans that are a part thereof;

231 (ii) Engineering and architectural drawings of correctional and juvenile facilities, and operational
232 specifications of security systems utilized by the Departments, provided the general descriptions of such
233 security systems, cost and quality shall be made available to the public;

234 (iii) Training manuals designed for correctional and juvenile facilities to the extent that they address
235 procedures for institutional security, emergency plans and security equipment;

236 (iv) Internal security audits of correctional and juvenile facilities, but only to the extent that they
237 specifically disclose matters described in (i), (ii), or (iii) above or other specific operational details the
238 disclosure of which would jeopardize the security of a correctional or juvenile facility or institution;

239 (v) Minutes or recordings of divisional, regional and institutional staff meetings or portions thereof to
240 the extent that such minutes deal with security issues listed in (i), (ii), (iii), and (iv) of this subdivision;

241 (vi) Investigative case files by investigators authorized pursuant to § 53.1-16; however, nothing in
242 this section shall prohibit the disclosure of information taken from inactive reports in a form which does
243 not reveal the identity of complainants or charging parties, persons supplying information, confidential
244 sources, or other individuals involved in the investigation, or other specific operational details the

disclosure of which would jeopardize the security of a correctional or juvenile facility or institution; nothing herein shall permit the disclosure of materials otherwise exempt as set forth in subdivision 1 of subsection B of this section;

(vii) Logs or other documents containing information on movement of inmates, juvenile clients or employees; and

(viii) Documents disclosing contacts between inmates, juvenile clients and law-enforcement personnel.

Notwithstanding the provisions of this subdivision, reports and information regarding the general operations of the Departments, including notice that an escape has occurred, shall be open to inspection and copying as provided in this section.

33. Personal information, as defined in § 2.1-379, (i) filed with the Virginia Housing Development Authority concerning individuals who have applied for or received loans or other housing assistance or who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by the Virginia Housing Development Authority, (ii) concerning persons participating in or persons on the waiting list for federally funded rent-assistance programs, or (iii) filed with any local redevelopment and housing authority created pursuant to § 36-4 concerning persons participating in or persons on the waiting list for housing assistance programs funded by local governments or by any such authority. However, access to one's own information shall not be denied.

34. Documents regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of them would have a detrimental effect upon the negotiating position of a governing body or on the establishment of the terms, conditions and provisions of the siting agreement.

35. Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

36. Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body which has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exemption shall not apply to requests from the owner of the land upon which the resource is located.

37. Official records, memoranda, working papers, graphics, video or audio tapes, production models, data and information of a proprietary nature produced by or for or collected by or for the State Lottery Department relating to matters of a specific lottery game design, development, production, operation, ticket price, prize structure, manner of selecting the winning ticket, manner of payment of prizes to holders of winning tickets, frequency of drawings or selections of winning tickets, odds of winning, advertising, or marketing, where such official records have not been publicly released, published, copyrighted or patented. Whether released, published or copyrighted, all game-related information shall be subject to public disclosure under this chapter upon the first day of sales for the specific lottery game to which it pertains.

38. Official records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations which cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under subdivisions (iii), (iv) and (v) shall be subject to public disclosure under this chapter upon completion of the study or investigation.

39. Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the building code in obtaining a building permit which would identify specific trade secrets or other information the disclosure of which 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.

40. [Repealed.]

41. Records concerning reserves established in specific claims administered by the Department of General Services through its Division of Risk Management as provided in Article 5.1 (§ 2.1-526.1 et seq.) of Chapter 32 of this title, or by any county, city, or town.

42. Information and records collected for the designation and verification of trauma centers and other specialty care centers within the Statewide Emergency Medical Care System pursuant to § 32.1-112.

43. Reports and court documents required to be kept confidential pursuant to § 37.1-67.3.

44. [Repealed.]

45. Investigative notes; correspondence and information furnished in confidence with respect to an investigation; and official records otherwise exempted by this chapter or any Virginia statute, provided

306 to or produced by or for the Auditor of Public Accounts and the Joint Legislative Audit and Review
307 Commission; or investigative notes, correspondence, documentation and information furnished and
308 provided to or produced by or for the Department of the State Internal Auditor with respect to an
309 investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; however, nothing in
310 this chapter shall prohibit disclosure of information from the records of completed investigations in a
311 form that does not reveal the identity of complainants, persons supplying information or other
312 individuals involved in the investigation.

313 46. Data formerly required to be submitted to the Commissioner of Health relating to the
314 establishment of new or expansion of existing clinical health services, acquisition of major medical
315 equipment, or certain projects requiring capital expenditures pursuant to former § 32.1-102.3:4.

316 47. Documentation or other information which describes the design, function, operation or access
317 control features of any security system, whether manual or automated, which is used to control access to
318 or use of any automated data processing or telecommunications system.

319 48. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections
320 provided to the Department of Rail and Public Transportation, provided such information is exempt
321 under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws
322 administered by the Interstate Commerce Commission or the Federal Rail Administration with respect to
323 data provided in confidence to the Interstate Commerce Commission and the Federal Railroad
324 Administration.

325 49. In the case of corporations organized by the Virginia Retirement System, RF&P Corporation and
326 its wholly owned subsidiaries, (i) proprietary information provided by, and financial information
327 concerning, coventurers, partners, lessors, lessees, or investors, and (ii) records concerning the condition,
328 acquisition, disposition, use, leasing, development, coventuring, or management of real estate the
329 disclosure of which would have a substantial adverse impact on the value of such real estate or result in
330 a competitive disadvantage to the corporation or subsidiary.

331 50. Confidential proprietary records related to inventory and sales, voluntarily provided by private
332 energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy
333 contingency planning purposes or for developing consolidated statistical information on energy supplies.

334 51. Confidential proprietary information furnished to the Board of Medical Assistance Services or the
335 Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of
336 Chapter 10 of Title 32.1.

337 52. Patient level data collected by the Virginia Health Services Cost Review Council and not yet
338 processed, verified, and released, pursuant to § 9-166.7, to the Council by the nonprofit organization
339 with which the Executive Director has contracted pursuant to § 9-166.4.

340 53. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and
341 cost projections provided by a private transportation business to the Virginia Department of
342 Transportation and the Department of Rail and Public Transportation for the purpose of conducting
343 transportation studies needed to obtain grants or other financial assistance under the Intermodal Surface
344 Transportation Efficiency Act of 1991 (P.L. 102-240) for transportation projects, provided such
345 information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce
346 Act or other laws administered by the Interstate Commerce Commission or the Federal Rail
347 Administration with respect to data provided in confidence to the Interstate Commerce Commission and
348 the Federal Railroad Administration. However, the exemption provided by this subdivision shall not
349 apply to any wholly owned subsidiary of a public body.

350 54. Names and addresses of subscribers to Virginia Wildlife magazine, published by the Department
351 of Game and Inland Fisheries, provided the individual subscriber has requested in writing that the
352 Department not release such information.

353 C. Neither any provision of this chapter nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this
354 title shall be construed as denying public access to contracts between a public official and a public
355 body, other than contracts settling public employee employment disputes held confidential as personnel
356 records under subdivision 3 of subsection B of this section, or to records of the position, job
357 classification, official salary or rate of pay of, and to records of the allowances or reimbursements for
358 expenses paid to, any public officer, official or employee at any level of state, local or regional
359 government in this Commonwealth or to the compensation or benefits paid by any corporation organized
360 by the Virginia Retirement System, RF&P Corporation and its wholly owned subsidiaries, to their
361 officers or employees. The provisions of this subsection, however, shall not apply to records of the
362 official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.