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## SENATE BILL NO. 5011

Offered April 19, 2006

A *BILL to amend and reenact §§ 2.2-3705.6 and 56-573.1:1 of the Code of Virginia, relating to disclosure of procurement records under the Public-Private Transportation Act of 1995 and the Public Private Education Facilities and Infrastructure Act of 2002.*

Patron—Houck

Referred to Committee on General Laws and Technology

**Be it enacted by the General Assembly of Virginia:****1. That §§ 2.2-3705.6 and 56-573.1:1 of the Code of Virginia are amended as follows:**

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

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

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. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade, and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by such entities, where competition or bargaining is involved and where, if such records are made public, the financial interest of the governmental unit would be adversely affected.

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. Confidential proprietary records 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, 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. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information 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. ~~Records~~ *Memoranda, staff evaluations, or other records prepared by or for the responsible public entity for the evaluation and negotiation of proposals filed under the Public Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education Facilities and*

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59 *Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (a) if such records were made public prior to*  
60 *their disclosure as required by § 56-573.1:1 or § 56-575.17, the financial interest or bargaining position*  
61 *of the public or private entity would be adversely affected, and (b) the basis for the determination*  
62 *required in clause (a) is documented in writing by the responsible public entity; and records provided*  
63 *by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction*  
64 *pursuant to the provisions of the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the*  
65 *Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), to the extent that*  
66 *such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act*  
67 *(§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial*  
68 *statements, that are not generally available to the public through regulatory disclosure or otherwise; or*  
69 *(iii) other information submitted by the private entity, where, if the records were made public prior to*  
70 *the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining*  
71 *position of the public or private entity would be adversely affected.*

72 In order for the records specified in clauses (i), (ii) and (iii) to be excluded from the provisions of  
73 this chapter, the private entity shall make a written request to the responsible public entity:

- 74 1. Invoking such exclusion upon submission of the data or other materials for which protection from  
75 disclosure is sought;
- 76 2. Identifying with specificity the data or other materials for which protection is sought; and
- 77 3. Stating the reasons why protection is necessary.

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

88 Nothing in this subdivision shall be construed to authorize the withholding of (a) procurement  
89 records as required by § 56-573.1:1 or 56-575.17; (b) information concerning the terms and conditions  
90 of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any  
91 kind entered into by the responsible public entity and the private entity; (c) information concerning the  
92 terms and conditions of any financing arrangement that involves the use of any public funds; or (d)  
93 information concerning the performance of any private entity developing or operating a qualifying  
94 transportation facility or a qualifying project.

95 For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction,"  
96 "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation  
97 facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined  
98 in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and  
99 Infrastructure Act of 2002.

100 12. Confidential proprietary information or trade secrets, not publicly available, provided by a private  
101 person or entity to the Virginia Resources Authority or to a fund administered in connection with  
102 financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such  
103 information were made public, the financial interest of the private person or entity would be adversely  
104 affected, and, after June 30, 1997, where such information was provided pursuant to a promise of  
105 confidentiality.

106 13. Confidential proprietary records that are provided by a franchisee under § 15.2-2108 to its  
107 franchising authority pursuant to a promise of confidentiality from the franchising authority that relates  
108 to the franchisee's potential provision of new services, adoption of new technologies or implementation  
109 of improvements, where such new services, technologies or improvements have not been implemented  
110 by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were  
111 made public, the competitive advantage or financial interests of the franchisee would be adversely  
112 affected. In order for confidential proprietary information to be excluded from the provisions of this  
113 chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for  
114 which protection from disclosure is sought, (ii) identify the data or other materials for which protection  
115 is sought, and (iii) state the reason why protection is necessary.

116 14. Documents and other information of a proprietary nature furnished by a supplier of charitable  
117 gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 18.2-340.34.

118 15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple  
119 Board pursuant to §§ 3.1-622 and 3.1-624.

120 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. Records submitted as a grant application, or accompanying a grant application, to the Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent 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, 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.

18. Confidential proprietary records 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 2 of Title 15.2, to the extent that disclosure of such records 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 (i) invoke the protections of this subdivision, (ii) identify with specificity the records or portions thereof for which protection is sought, and (iii) state the reasons why protection is necessary.

19. Confidential proprietary records 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 records required to be maintained in accordance with § 15.2-2160 shall be released.

§ 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement records.

A. Conceptual proposals submitted in accordance with subsection A or B of § 56-560 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities that are state agencies, departments, and institutions, posting shall be on the Department of General Service's web-based electronic procurement program commonly known as "eVA;" and

2. For responsible public entities that are local public bodies, posting shall be on the responsible public entity's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. Posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the local responsible public entity.

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.

B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public comment on the proposals. The public comment period required by this subsection may include a public hearing in the sole discretion of the responsible public entity. After the end of the public comment period, no additional posting shall be required.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete and a decision to award has been made by a responsible public entity, the responsible public entity shall present the major business points of the interim or comprehensive agreement, including the use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open to the public.

D. Once an interim agreement or a comprehensive agreement has been entered into *and the process of bargaining of other interim agreements related to the qualifying transportation facility or the process of bargaining of all phases or aspects of the comprehensive agreement is complete*, a responsible public entity shall make procurement records available for public inspection, upon request. For the purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.

182 E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible  
183 public entity shall not be open to public inspection.

184 F. Any inspection of procurement transaction records under this section shall be subject to reasonable  
185 restrictions to ensure the security and integrity of the records.

186 G. The provisions of this section shall apply to accepted proposals regardless of whether the process  
187 of bargaining will result in an interim or a comprehensive agreement.

188 *H. A responsible public entity and any independent review panel appointed to review information*  
189 *and advise the responsible public entity may hold closed meetings to discuss or consider records exempt*  
190 *from disclosure pursuant to subdivision 11 of § 2.2-3705.6, provided such meetings are held in*  
191 *accordance with the procedural requirements of § 2.2-3712.*

192 **2. That the provisions of this act shall expire on July 1, 2007.**