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SENATE BILL NO. 210

Offered January 9, 2008

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A *BILL to amend and reenact § 2.2-3705.6 of the Code of Virginia, relating to the Freedom of Information Act; certain audit records of the Virginia Department of Transportation.*

Patron—Stosch

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 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, the Tobacco Indemnification and Community Revitalization Commission, a nonprofit, nonstock corporation created pursuant to § 2.2-2240.1, 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. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed

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59 under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education
60 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public
61 prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17
62 notwithstanding, the financial interest or bargaining position of the public entity would be adversely
63 affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the
64 responsible public entity; and

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

76 1. Invoking such exclusion upon submission of the data or other materials for which protection from
77 disclosure is sought;

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

79 3. Stating the reasons why protection is necessary.

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

90 Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to
91 authorize the withholding of (a) procurement records as required by § 56-573.1:1 or 56-575.17; (b)
92 information concerning the terms and conditions of any interim or comprehensive agreement, service
93 contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity
94 and the private entity; (c) information concerning the terms and conditions of any financing arrangement
95 that involves the use of any public funds; or (d) information concerning the performance of any private
96 entity developing or operating a qualifying transportation facility or a qualifying project.

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

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

108 13. Confidential proprietary records that are provided by a franchisee under Article 1.2
109 (§ 15.2-2108.19 et seq.) of Chapter 21 of Title 15.2 to its franchising authority pursuant to a promise of
110 confidentiality from the franchising authority that relates to the franchisee's potential provision of new
111 services, adoption of new technologies or implementation of improvements, where such new services,
112 technologies or improvements have not been implemented by the franchisee on a nonexperimental scale
113 in the franchise area, and where, if such records were made public, the competitive advantage or
114 financial interests of the franchisee would be adversely affected. In order for confidential proprietary
115 information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such
116 exclusion upon submission of the data or other materials for which protection from disclosure is sought,
117 (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why
118 protection is necessary.

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

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

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 21 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.

20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records 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 Minority Business Enterprise as part of an application for (i) certification as a small, women- or minority-owned business in accordance with Chapter 14 (§ 2.2-1400 et seq.) of this title or (ii) a claim made by a disadvantaged business or an economically disadvantaged individual against the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reasons why protection is necessary.

21. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); financial records, 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 Inspector General of the Virginia Department of Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector General's Office 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:

1. *Invoking such exclusion upon submission of the data or other materials for which protection from 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.*

The Inspector General of the Virginia Department of Transportation shall determine whether the requested exclusion from disclosure is necessary to protect the 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.