

18100455D

SENATE BILL NO. 730

Offered January 10, 2018

Prefiled January 10, 2018

A BILL to amend and reenact §§ 2.2-3701, 2.2-3705.7, and 2.2-3713 of the Code of Virginia, relating to the Virginia Freedom of Information Act.

Patron—DeSteph

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3701, 2.2-3705.7, and 2.2-3713 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-3701. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means any audio or combined audio and visual communication method.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information" as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708 or 2.2-3708.1, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (i) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (ii) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. *Records that are not prepared for or used in the transaction of public business are not public records.*

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, which unit includes two or more localities.

INTRODUCED

SB730

59 "Scholastic records" means those records containing information directly related to a student or an
60 applicant for admission and maintained by a public body that is an educational agency or institution or
61 by a person acting for such agency or institution.

62 **§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain**
63 **other limited exclusions.**

64 The following information contained in a public record is excluded from the mandatory disclosure
65 provisions of this chapter but may be disclosed by the custodian in his discretion, except where such
66 disclosure is prohibited by law. Redaction of information excluded under this section from a public
67 record shall be conducted in accordance with § 2.2-3704.01.

68 1. State income, business, and estate tax returns, personal property tax returns, and confidential
69 records held pursuant to § 58.1-3.

70 2. *a.* Working papers and correspondence of the Office of the Governor, the Lieutenant Governor, or
71 the Attorney General; the members of the General Assembly, the Division of Legislative Services, or the
72 Clerks of the House of Delegates or the Senate of Virginia; the mayor or chief executive officer of any
73 political subdivision of the Commonwealth; or the president or other chief executive officer of any
74 public institution of higher education in the Commonwealth. However, no information that is otherwise
75 open to inspection under this chapter shall be deemed excluded by virtue of the fact that it has been
76 attached to or incorporated within any working paper or correspondence. Further, information publicly
77 available or not otherwise subject to an exclusion under this chapter or other provision of law that has
78 been aggregated, combined, or changed in format without substantive analysis or revision shall not be
79 deemed working papers. Nothing in this subdivision shall be construed to authorize the withholding of
80 any resumes or applications submitted by persons who are appointed by the Governor pursuant to
81 § 2.2-106 or 2.2-107.

82 *b.* *Social media records of the members of the General Assembly when such records relate to the use*
83 *of a social media account by a member in such member's individual capacity.*

84 As used in this subdivision 2:

85 "Members of the General Assembly" means each member of the Senate of Virginia and the House of
86 Delegates and their legislative aides when working on behalf of such member.

87 "Office of the Governor" means the Governor; the Governor's chief of staff, counsel, director of
88 policy, and Cabinet Secretaries; the Assistant to the Governor for Intergovernmental Affairs; and those
89 individuals to whom the Governor has delegated his authority pursuant to § 2.2-104.

90 "*Social media account*" means a personal account with an electronic medium, service, or application
91 through which users may create, share, or view user-generated content, including, without limitation,
92 videos, photographs, blogs, podcasts, messages, emails, and website profiles and locations.

93 "Working papers" means those records prepared by or for a public official identified in this
94 subdivision for his personal or deliberative use.

95 3. Information contained in library records that can be used to identify (i) both (a) any library patron
96 who has borrowed material from a library and (b) the material such patron borrowed or (ii) any library
97 patron under 18 years of age. For the purposes of clause (ii), access shall not be denied to the parent,
98 including a noncustodial parent, or guardian of such library patron.

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

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

105 6. Information furnished by a member of the General Assembly to a meeting of a standing
106 committee, special committee, or subcommittee of his house established solely for the purpose of
107 reviewing members' annual disclosure statements and supporting materials filed under § 30-110 or of
108 formulating advisory opinions to members on standards of conduct, or both.

109 7. Customer account information of a public utility affiliated with a political subdivision of the
110 Commonwealth, including the customer's name and service address, but excluding the amount of utility
111 service provided and the amount of money charged or paid for such utility service.

112 8. Personal information, as defined in § 2.2-3801, (i) filed with the Virginia Housing Development
113 Authority concerning individuals who have applied for or received loans or other housing assistance or
114 who have applied for occupancy of or have occupied housing financed, owned or otherwise assisted by
115 the Virginia Housing Development Authority; (ii) concerning persons participating in or persons on the
116 waiting list for federally funded rent-assistance programs; (iii) filed with any local redevelopment and
117 housing authority created pursuant to § 36-4 concerning persons participating in or persons on the
118 waiting list for housing assistance programs funded by local governments or by any such authority; or
119 (iv) filed with any local redevelopment and housing authority created pursuant to § 36-4 or any other
120 local government agency concerning persons who have applied for occupancy or who have occupied

affordable dwelling units established pursuant to § 15.2-2304 or 15.2-2305. However, access to one's own information shall not be denied.

9. Information regarding the siting of hazardous waste facilities, except as provided in § 10.1-1441, if disclosure of such information 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.

10. 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 that has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. This exclusion shall not apply to requests from the owner of the land upon which the resource is located.

11. Memoranda, graphics, video or audio tapes, production models, data, and information of a proprietary nature produced by or for or collected by or for the Virginia Lottery 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 information 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.

12. Information held by the Virginia Retirement System, acting pursuant to § 51.1-124.30, or a local retirement system, acting pursuant to § 51.1-803, or by a local finance board or board of trustees of a trust established by one or more local public bodies to invest funds for post-retirement benefits other than pensions, acting pursuant to Article 8 (§ 15.2-1544 et seq.) of Chapter 15 of Title 15.2, or by the board of visitors of the University of Virginia, acting pursuant to § 23.1-2210, or by the Virginia College Savings Plan, acting pursuant to § 23.1-704, relating to the acquisition, holding, or disposition of a security or other ownership interest in an entity, where such security or ownership interest is not traded on a governmentally regulated securities exchange, if disclosure of such information would (i) reveal confidential analyses prepared for the board of visitors of the University of Virginia, prepared by the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan, or provided to the retirement system, a local finance board or board of trustees, or the Virginia College Savings Plan under a promise of confidentiality of the future value of such ownership interest or the future financial performance of the entity and (ii) have an adverse effect on the value of the investment to be acquired, held, or disposed of by the retirement system, a local finance board or board of trustees, the board of visitors of the University of Virginia, or the Virginia College Savings Plan. Nothing in this subdivision shall be construed to prevent the disclosure of information relating to the identity of any investment held, the amount invested, or the present value of such investment.

13. Financial, medical, rehabilitative, and other personal information concerning applicants for or recipients of loan funds submitted to or maintained by the Assistive Technology Loan Fund Authority under Chapter 11 (§ 51.5-53 et seq.) of Title 51.5.

14. Information held by the Virginia Commonwealth University Health System Authority pertaining to any of the following: an individual's qualifications for or continued membership on its medical or teaching staffs; proprietary information gathered by or in the possession of the Authority from third parties pursuant to a promise of confidentiality; contract cost estimates prepared for confidential use in awarding contracts for construction or the purchase of goods or services; information of a proprietary nature produced or collected by or for the Authority or members of its medical or teaching staffs; financial statements not publicly available that may be filed with the Authority from third parties; the identity, accounts, or account status of any customer of the Authority; consulting or other reports paid for by the Authority to assist the Authority in connection with its strategic planning and goals; the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the Authority; and information of a proprietary nature produced or collected by or for employees of the Authority, other than the Authority's 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 Authority alone or in conjunction with a governmental body or a private concern, when such information has not been publicly released, published, copyrighted, or patented. This exclusion shall also apply when such information is in the possession of Virginia Commonwealth University.

15. Information held by the Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to (i) active federal environmental enforcement actions that are considered confidential under federal law and (ii) enforcement strategies, including proposed sanctions for enforcement actions. Upon request, such information shall be disclosed after a proposed sanction resulting from the investigation has been proposed to the director of the agency. This subdivision shall not be construed to prevent the disclosure

182 of information related to inspection reports, notices of violation, and documents detailing the nature of
183 any environmental contamination that may have occurred or similar documents.

184 16. Information related to the operation of toll facilities that identifies an individual, vehicle, or travel
185 itinerary, including vehicle identification data or vehicle enforcement system information; video or
186 photographic images; Social Security or other identification numbers appearing on driver's licenses;
187 credit card or bank account data; home addresses; phone numbers; or records of the date or time of toll
188 facility use.

189 17. Information held by the Virginia Lottery pertaining to (i) the social security number, tax
190 identification number, state sales tax number, home address and telephone number, personal and lottery
191 banking account and transit numbers of a retailer, and financial information regarding the nonlottery
192 operations of specific retail locations and (ii) individual lottery winners, except that a winner's name,
193 hometown, and amount won shall be disclosed.

194 18. Information held by the Board for Branch Pilots relating to the chemical or drug testing of a
195 person regulated by the Board, where such person has tested negative or has not been the subject of a
196 disciplinary action by the Board for a positive test result.

197 19. Information pertaining to the planning, scheduling, and performance of examinations of holder
198 records pursuant to the Uniform Disposition of Unclaimed Property Act (§ 55-210.1 et seq.) prepared by
199 or for the State Treasurer or his agents or employees or persons employed to perform an audit or
200 examination of holder records.

201 20. Information held by the Virginia Department of Emergency Management or a local governing
202 body relating to citizen emergency response teams established pursuant to an ordinance of a local
203 governing body that reveal the name, address, including e-mail address, telephone or pager numbers, or
204 operating schedule of an individual participant in the program.

205 21. Information held by state or local park and recreation departments and local and regional park
206 authorities concerning identifiable individuals under the age of 18 years. However, nothing in this
207 subdivision shall operate to prevent the disclosure of information defined as directory information under
208 regulations implementing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, unless the
209 public body has undertaken the parental notification and opt-out requirements provided by such
210 regulations. Access shall not be denied to the parent, including a noncustodial parent, or guardian of
211 such person, unless the parent's parental rights have been terminated or a court of competent jurisdiction
212 has restricted or denied such access. For such information of persons who are emancipated, the right of
213 access may be asserted by the subject thereof. Any parent or emancipated person who is the subject of
214 the information may waive, in writing, the protections afforded by this subdivision. If the protections are
215 so waived, the public body shall open such information for inspection and copying.

216 22. Information submitted for inclusion in the Statewide Alert Network administered by the
217 Department of Emergency Management that reveal names, physical addresses, email addresses, computer
218 or internet protocol information, telephone numbers, pager numbers, other wireless or portable
219 communications device information, or operating schedules of individuals or agencies, where the release
220 of such information would compromise the security of the Statewide Alert Network or individuals
221 participating in the Statewide Alert Network.

222 23. Information held by the Judicial Inquiry and Review Commission made confidential by
223 § 17.1-913.

224 24. Information held by the Virginia Retirement System acting pursuant to § 51.1-124.30, a local
225 retirement system acting pursuant to § 51.1-803 (hereinafter collectively referred to as the retirement
226 system), or the Virginia College Savings Plan, acting pursuant to § 23.1-704 relating to:

227 a. Internal deliberations of or decisions by the retirement system or the Virginia College Savings
228 Plan on the pursuit of particular investment strategies, or the selection or termination of investment
229 managers, prior to the execution of such investment strategies or the selection or termination of such
230 managers, if disclosure of such information would have an adverse impact on the financial interest of
231 the retirement system or the Virginia College Savings Plan; and

232 b. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a
233 private entity to the retirement system or the Virginia College Savings Plan if disclosure of such records
234 would have an adverse impact on the financial interest of the retirement system or the Virginia College
235 Savings Plan.

236 For the records specified in subdivision b to be excluded from the provisions of this chapter, the
237 entity shall make a written request to the retirement system or the Virginia College Savings Plan:

238 (1) Invoking such exclusion prior to or upon submission of the data or other materials for which
239 protection from disclosure is sought;

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

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

242 The retirement system or the Virginia College Savings Plan shall determine whether the requested
243 exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to prevent the disclosure of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses.

25. Information held by the Department of Corrections made confidential by § 53.1-233.

26. Information maintained by the Department of the Treasury or participants in the Local Government Investment Pool (§ 2.2-4600 et seq.) and required to be provided by such participants to the Department to establish accounts in accordance with § 2.2-4602.

27. Personal information, as defined in § 2.2-3801, contained in the Veterans Care Center Resident Trust Funds concerning residents or patients of the Department of Veterans Services Care Centers, except that access shall not be denied to the person who is the subject of the information.

28. Information maintained in connection with fundraising activities by the Veterans Services Foundation pursuant to § 2.2-2716 that reveal the address, electronic mail address, facsimile or telephone number, social security number or other identification number appearing on a driver's license, or credit card or bank account data of identifiable donors, except that access shall not be denied to the person who is the subject of the information. Nothing in this subdivision, however, shall be construed to prevent the disclosure of information relating to the amount, date, purpose, and terms of the pledge or donation or the identity of the donor, unless the donor has requested anonymity in connection with or as a condition of making a pledge or donation. The exclusion provided by this subdivision shall not apply to protect from disclosure (i) the identities of sponsors providing grants to or contracting with the foundation for the performance of services or other work or (ii) the terms and conditions of such grants or contracts.

29. Information prepared for and utilized by the Commonwealth's Attorneys' Services Council in the training of state prosecutors or law-enforcement personnel, where such information is not otherwise available to the public and the disclosure of such information would reveal confidential strategies, methods, or procedures to be employed in law-enforcement activities or materials created for the investigation and prosecution of a criminal case.

30. Information provided to the Department of Aviation by other entities of the Commonwealth in connection with the operation of aircraft where the information would not be subject to disclosure by the entity providing the information. The entity providing the information to the Department of Aviation shall identify the specific information to be protected and the applicable provision of this chapter that excludes the information from mandatory disclosure.

31. Information created or maintained by or on the behalf of the judicial performance evaluation program related to an evaluation of any individual justice or judge made confidential by § 17.1-100.

32. Information reflecting the substance of meetings in which (i) individual sexual assault cases are discussed by any sexual assault team established pursuant to § 15.2-1627.4 or (ii) individual child abuse or neglect cases or sex offenses involving a child are discussed by multidisciplinary child abuse teams established pursuant to § 15.2-1627.5. The findings of any such team may be disclosed or published in statistical or other aggregated form that does not disclose the identity of specific individuals.

33. Information contained in the strategic plan, marketing plan, or operational plan prepared by the Virginia Economic Development Partnership Authority pursuant to § 2.2-2237.1 regarding target companies, specific allocation of resources and staff for marketing activities, and specific marketing activities that would reveal to the Commonwealth's competitors for economic development projects the strategies intended to be deployed by the Commonwealth, thereby adversely affecting the financial interest of the Commonwealth. The executive summaries of the strategic plan, marketing plan, and operational plan shall not be redacted or withheld pursuant to this subdivision.

§ 2.2-3713. Proceedings for enforcement of chapter.

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its

305 officer, director or managing agent without the assistance of counsel, notwithstanding any provision of
306 law or Rule of the Supreme Court of Virginia to the contrary.

307 C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be
308 heard within seven days of the date when the same is made, provided the party against whom the
309 petition is brought has received a copy of the petition at least three working days prior to filing. The
310 hearing on any petition made outside of the regular terms of the circuit court of a locality that is
311 included in a judicial circuit with another locality or localities shall be given precedence on the docket
312 of such court over all cases that are not otherwise given precedence by law.

313 D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights
314 and privileges conferred by this chapter. A single instance of denial of the rights and privileges
315 conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the
316 denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover
317 reasonable costs, ~~including costs and reasonable fees for expert witnesses, and attorneys' attorney fees~~
318 from the public body, *such costs including costs and reasonable fees for expert witnesses*, if the
319 petitioner substantially prevails on the merits of the case, unless special circumstances would make an
320 award unjust. In making this determination, a court may consider, among other things, the reliance of a
321 public body on an opinion of the Attorney General or a decision of a court that substantially supports
322 the public body's position.

323 E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of
324 proof to establish an exclusion by a preponderance of the evidence. No court shall be required to accord
325 any weight to the determination of a public body as to whether an exclusion applies. Any failure by a
326 public body to follow the procedures established by this chapter shall be presumed to be a violation of
327 this chapter.

328 F. Failure by any person to request and receive notice of the time and place of meetings as provided
329 in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this
330 chapter.

331 G. *The public body shall be a necessary party to any enforcement proceeding brought pursuant to*
332 *this section even though an officer, employee, or member may also be named in his official capacity.*