



Office of the Town Manager

Frank Cassidy

# STAFF REPORT

## Warrenton Town Council

Carter Nevill, Mayor

Heather Sutphin, Ward 1

William Semple, Ward 2

Brett Hamby, Ward 3

James Hartman, Ward 4 Vice Mayor

Jay Heroux, Ward 5

Paul Mooney, At Large

David McGuire, At Large

<b>Council Meeting Date:</b>	October 10, 2023
<b>Agenda Title:</b>	Nondisclosure Agreements
<b>Requested Action:</b>	Information Only
<b>Department / Agency Lead:</b>	Town Attorney
<b>Staff Lead:</b>	Martin Crim

## EXECUTIVE SUMMARY

The purpose of this report is to lay out the background information necessary for an understanding of the issues and tradeoffs involved with nondisclosure agreements (NDA's). The Town Attorney will present this information and respond to questions at the council meeting. Questions regarding specific legal cases, or which reveal confidential client information, should be withheld until a closed session, if one is desired.

## BACKGROUND

This section presents some questions raised and provides the statutes and ordinances governing NDA's in the Town.

**1. Does VA have laws relating to NDAs between State/local governments and other entities such as private sector companies?**

Answer: Yes, besides the general statutes such as the Uniform Trade Secrets Act, [Va. Code Title 59.1 Chapter 26](#), there are specific provisions in the Virginia Freedom of Information Act addressing proprietary records and trade secrets. [Va. Code § 2.2-3705.6](#). In addition, other state statutes make disclosure of certain specific information, like tax records, subject to criminal penalties.

**2. Does the Town of Warrenton have any specific code/ordinances relating to the use of NDAs?**

Answer: Yes, the Town Code's procurement provisions address confidential information which could be the subject of an NDA. See Town Code §§ 2-194 and Appendix B.

**3. Why are NDAs allowed by VA law?**

Answer: While neither the Uniform Trade Secrets Act nor VFOIA have specific purpose language regarding confidential information, the apparent purpose is to protect property rights in certain business information and to encourage communication that facilitates economic development. More broadly, NDA's fall within the right to contract.

**4. What is typically covered in an NDA for economic development?**

Answer: Depending on the stage of development, an NDA could conceal the name of the developer, the nature or size of the proposed project, assessments of market conditions, real estate appraisals, and plans for specific improvements. The Uniform Trade Secrets Act defines "Trade Secret" as follows:

information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

*1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*

*2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

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**5. How long are they in effect?**

Answer: Like any other contract, the NDA will define its own term and the conditions, if any, for termination.

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**6. Does Fauquier County allow the use of NDAs?**

Answer: My understanding is that they do, typically in the context of economic development.

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**STAFF RECOMMENDATION**

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Receive the information; if there are any questions regarding pending legal cases or specific legal claims, they should be deferred to a closed session.

**Service Level/Policy Impact**

Background only.

**Fiscal Impact**

No direct impact.

**Legal Impact**

Failure to protect information covered by NDA's may result in legal action.

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**ATTACHMENTS**

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None.