

**REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING THE**

**Effectiveness of the Toxic  
Substances Information Act**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**Senate Document No. 21**

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Senate of Virginia

**Report of the**  
**Joint Subcommittee Studying the Effectiveness**  
**of the Toxic Substances Information Act**

**To**  
**The Governor and the General Assembly of Virginia**  
**Richmond, Virginia**  
**December, 1983**

To: The Honorable Charles S. Robb, Governor of Virginia  
and  
The General Assembly of Virginia

**I. Origin of the Study**

The Joint Subcommittee studying the effectiveness of the Toxic Substances Information Act was authorized to conduct its study by Senate Joint Resolution No. 29 agreed to during the 1983 Session of the General Assembly. The resolution may be found in the appendices.

During late October and early November of 1982, a three-part series appeared in the Richmond Times Dispatch, which brought to the attention of the general public and state authorities the apparent ineffectiveness of the Toxic Substances Information Program. The articles charged that state employees who should be using the collected information to protect the public and the state's welfare were not using this data because of fear of the possible consequences, i.e. treble damages. These articles also contained allegations that some companies were using the confidential file unnecessarily. Industry spokesmen maintained that protection of vital trade secrets was essential to maintain profits and employment levels.

A number of legislators became concerned about the effectiveness of the law because of the publicity. This concern prompted the introduction of Senate Joint Resolution Number 29 which was copatroned by Senator Clive L. DuVal, 2d and Delegate J. Samuel Glasscock.

The Joint Subcommittee was charged in SJR No. 29 with studying the effectiveness of the Toxic Substances Information Act by examining the issues to determine any appropriate revisions to the present procedures and law necessary to ensure its effective implementation and to protect the industry from damaging disclosures of secret information. In accomplishing this task, the Joint Subcommittee conferred with the Toxic Substances Advisory Council and heard testimony from employees of the Department of Health and other agencies represented on the Council.

Appointed to serve on the Joint Subcommittee were Senators Frederick T. Gray of Chestefield, Chairman, and Elliot S. Schewel of Lynchburg; Delegates Bernard S. Cohen of Alexandria, Joseph P. Crouch of Lynchburg, and J. Samuel Glasscock of Suffolk, Vice Chairman. The Joint Subcommittee also requested Senator Clive L. Duval, 2d, to serve as a member of the subcommittee.

**II. History and Content of the Legislation**

The kepone pesticide disaster motivated the General Assembly to enact the Toxic Substances Information Act (§§ 32.1-239 through 32.1-244) in 1976 as a means of monitoring the toxic substances produced or used in manufacturing in Virginia. The Act includes definitions of "commercial establishment," "emitting," "manufacturing," "person," and "toxic substance." The State Department of Health is designated as the state toxic substances information agency and was authorized to establish the program for collecting the information. The Board of Health is given the authority and duty to promulgate the procedural and substantive regulations for conducting these activities.

The Act establishes the Toxic Substances Advisory Council, which consists of five members appointed by the Governor from the fields of agriculture, medicine, labor, industry and local government and thirteen ex officio members from the Department of Health, the State Water Control Board, the State Air Pollution Control Board, the Board of Conservation and Economic Development, the Department of Agriculture and Consumer Services, the Division of Consolidated Laboratory Services, the Division of Industrial Development, the Virginia Institute of Marine Science, the Office of Emergency and Energy Services, the Office of the State Fire Marshal, the Council of the Environment, the Department of Labor and Industry and the Marine Resources Commission.

All state agencies are directed to cooperate with the Board of Health by furnishing to the Board all information which they collect concerning toxic substances. All operators or proposed operators of commercial establishments which use or manufacture any chemical compound or substance must report the names of the substances and estimated quantities of raw materials, catalysts and final products to the Board. Such operators have "an affirmative duty to report to the Board that information" and "the further affirmative duty to make reasonable inquiry into the toxicity of any such substance." The Board cannot require any other reports unless such a report is "necessary to prevent or lessen an imminent risk of injury to public health or the environment."

Only the officials, agents or employees of the Department of Health and the other agencies included on the Advisory Council have access to this information. Federal agencies have access to this information if required by law or regulation and a request is made in writing. Any unauthorized disclosure of secret information subjects the person disclosing the information or the person who receives the information and makes use of it liable for "treble the actual damages sustained by the person whose secret..." information is disclosed. An agreement not to disclose any confidential information to any unauthorized person may be executed between the Board and any official or employee having access to any secret data. The Act states: "This agreement shall be enforceable by the Board or by any person harmed by such improper disclosure."

Two files - an open or public file and a confidential file - are maintained by the Department of Health's Bureau of Toxic Substances Information. The first indication of problems connected with the operation of the confidential file came in 1977, when the Advisory Council submitted recommendations for changes related to the civil liability of state employees. Although these recommendations were considered valid, only two of the changes were introduced and passed in 1982. In 1982, the Class 1 list of substances determined to "pose the greatest threats to human health or the environment" was eliminated and the membership of the Advisory Council was increased by adding the State Fire Marshall. The confidentiality issues were not the subject of any introduced bill. The Advisory Council's recommendations were to:

1. Insert authorization for limited emergency disclosure of confidential information by the Commissioner of Health when disclosure would be necessary to prevent personal injury or protect the public health; and
2. Reduce the penalty for unauthorized disclosure of confidential information to \$5,000 and/or imprisonment for up to one year.

The first set of regulations to implement this law was promulgated in 1976. The regulations were completely rewritten in 1977 and since then have been revised five times.

The new regulations (fifth revision) are intended to provide more stringent guidelines to industry for the selection of confidential information. These regulations will, in the opinion of many state officials, provide some relief to the state employees who are users of the public file. However, the threat of treble liability will still, in the view of state employees, provide a psychological disincentive for review of or use of the confidential data.

In response to a request by Senator DuVal to review the problems associated with the Act, the Attorney General's Office stated: "The employees with the greatest need for access to information from the Health Department's confidential files were virtually unanimous in their reluctance to use the confidential file and in the reasons stated for such reluctance. Access to the file can make the regulatory process more thorough and, at the same time, more efficient.

Yet the employees are unwilling to use the file and thus expose themselves to the potential liability for treble damages created by § 32.1-244(E) of the Code. The employee's reluctance is not based solely on the existence of the treble damage provision but also on the vagueness of some terms in the Act and the uncertainty as to how they should be using the information."

The Attorney General's Office and a task force established by the Advisory Council suggested the following alternatives to alleviate the problems related to the confidential information file:

1. Reduction or elimination of the personal liability for treble damages, e.g., by replacing this provision with a \$5,000 fine and/or a criminal penalty for willful violation of the Act (similar to the penalties in the federal statute);

2. Definition of unauthorized disclosure and/or authorized disclosure;

3. Provision that good faith is a defense against personal liability;

4. Definition of the terms included in the Act such as "secret formulae, secret processes, secret methods, or other trade secrets;"

5. Provision for protecting confidentiality following release to authorized officials in agencies needing the data; and

6. Provision for emergency disclosure without liability by the Commissioner in life threatening situations or situations which are threatening to the public health.

### III. The Work of the Joint Subcommittee

The Joint Subcommittee held four meetings and toured the Dupont Plant located in Chesterfield County. During the first two meetings, the Joint Subcommittee received an overview of the issues by staff and heard from representatives of industry, unions, the state agencies who are represented on the Advisory Council, the Attorney General's Office and the public.

The Joint Subcommittee then directed staff to develop an issues and alternatives paper and to draft legislative language for each alternative. Staff was given the Joint Subcommittee's approval to work with the relevant groups in developing this material.

The issues addressed were:

ISSUE 1 - Should the treble damage provision for unauthorized disclosure of secret information be reduced?

#### Discussion

Only the officials, agents or employees of the Department of Health and the other agencies included on the Advisory Council have access to this information. Federal agencies have access to this information if required by law or regulation and a request is made in writing. Any unauthorized disclosure of secret information subjects the person disclosing the information or the person who receives the information and makes use of it liable for "treble the actual damages sustained by the person whose secret **Linformation R**" is disclosed.

It has been alleged that state employees who should be using the collected information to protect the public and the state's welfare were not using this data because of fear of the possible consequences, i.e. treble damages. There were also allegations that some companies were using the confidential file unnecessarily, perhaps for the reason that state employees are afraid of using the confidential file. Industry spokesmen have stated that protection of vital trade secrets is essential to maintain profits and employment levels. Some foreign companies hire local attorneys, it has been alleged, to search the regulatory and TSI files for information that could harm Virginia companies. Certain processes were extremely costly to develop and the disclosure of these processes or the vital ingredients could result in bankruptcy and the loss of millions of dollars in profits.

ISSUE 2 - Can definitions of the terms used in the act be provided as a means of alleviating the

reluctance to access the confidential information file?

Discussion

The regulations for the TSI Act presently contain the following definitions: Act, advisory council, article, assistant commissioner, authorized person, board, bureau, CAS registry number, chemical substance or compound, commercial establishment, commissioner, confidential information, department, deputy commissioner, division director, document, document control number, health hazards evaluation, manufacturer, manufacturing, normal farming, timbering activities, person, public files, and toxic substance. Certain definitions are integral parts of the Act and not amenable to definition by regulation, for example, unauthorized disclosure, authorized disclosure, and secret formulae, secret processes, secret methods, or other trade secrets.

ISSUE 3 : Should the act provide for protecting confidentiality following release to authorized officials in agencies needing the data?

Discussion

Presently, neither the act nor the procedures within the various departments for handling confidential information provide any protection for confidentiality following release to an authorized person. This has created many problems. Although the confidential file is not subject to the State Freedom of Information Act, once the information is released and incorporated in another file then, in the opinion of some, it is subject to the State Freedom of Information Act.

ISSUE 4 : Should the law contain a provision for emergency disclosure without liability by the commissioner in life-threatening situations or situations which pose an imminent threat to public health?

Discussion

Under the present law, regardless of the nature of the threat, for example, in the case of a spill, the Commissioner might be subject to the treble damage liability. Any authorization for emergency disclosure should contain protections for the information either by limiting the individuals to whom the information may be disclosed or some other mechanism.

ISSUE 5 : Should the law contain a provision requiring manufacturers, handlers and storers of toxic substances to report such information to local fire officials or allowing local fire officials access to TSI files?

Discussion

Under the present law, the State Fire Marshal is a member of the Advisory Council and the public information is available to local fire officials on request. The representatives of the fire fighters' union have strongly expressed their concerns for the safety of firefighters when the properties of chemicals involved in fires are unknown. They maintain that in order to preplan adequately for controlling chemical fires, fire officials must have knowledge of the contents of structures. These representatives also recount incidents in which firefighters have been killed or seriously hurt because of lack of knowledge of the chemicals which are in the fire. Although the problem that the firefighters described is serious and timely, providing for these concerns through the Toxic Substances Information Act would require a major revision of the act. This issue is described by some as consistent with "right to know." "Right to know" legislation is currently the subject of national attention.

IV. Recommendations of the Joint Subcommittee

ISSUE 1 : Should the treble damage provision for unauthorized disclosure of secret information be reduced?

The Joint Subcommittee recommends a multifaceted solution to this problem as follows:

1. maintaining the treble damage provision and a class 6 felony penalty for any willful

violation of confidentiality by state employees; and

2. maintaining the treble damage liability for anyone inducing or bribing a state employee to disclose confidential information; and

3. providing that any state employee negligently revealing confidential information would be subject to loss of employment; and

4. setting forth specifically a cause of action for damages under the Virginia Torts Claims Act for any owner of confidential information who is injured by an unauthorized disclosure.

ISSUE 2 - Can definitions of the terms used in the act be provided as a means of alleviating the reluctance to access the confidential information file?

The Joint Subcommittee recommends that the definitions developed by this study be provided in the law for the terms “authorized disclosure,” “unauthorized disclosure,” and “confidential information,”

ISSUE 3 - Should the act provide for protecting confidentiality following release to authorized officials in agencies needing the data?

The Joint Subcommittee recommends that the following steps be taken to protect confidential information after release to authorized officials:

1. that specific provision for exempting all confidential information from the Virginia Freedom of Information Act be provided; and

2. that state agencies be provided authority for coding confidential information being used in regulatory processes; and

3. that a record be kept of all users of confidential information as well as those coming in contact with it.

ISSUE 4 - Should the law contain a provision for emergency disclosure without liability by the Commissioner in life-threatening situations or situations which pose an imminent threat to public health?

The Joint Subcommittee recommends that the Commissioner of Health be provided limited authority to reveal confidential information in life threatening situations to physicians and fire officials.

ISSUE 5 - Should the law contain a provision requiring manufacturers, handlers and storers of toxic substances to report such information to local fire officials or allowing local fire officials access to TSI files?

The Joint Subcommittee felt that this issue and other “right-to-know” issues were important and in need of examination; however, these issues did not appear to be within its purview. Therefore, the Joint Subcommittee recommends that its work be continued to examine these issues with the care and detail they would require.

Drafts of legislation setting forth these recommendations are attached (see Appendix B).

Respectfully submitted,

Frederick T. Gray, Chairman  
J. Samuel Glasscock, Vice-Chairman  
Bernard S. Cohen  
Joseph P. Crouch  
Clive L. DuVal, 2d  
Elliot S. Schewel

APPENDIX A

SENATE JOINT RESOLUTION NO. 29

*Requesting the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions to establish a joint subcommittee to study the effectiveness of the Toxic Substances Information Act.*

Agreed to by the Senate, February 25, 1983

Agreed to by the House of Delegates, February 24, 1983

WHEREAS, The State Department of Health is designated as the state toxic substances information agency under § 32.1-240 of the Code of Virginia; and

WHEREAS, § 32.1-244 provides that unauthorized disclosure of a secret formula, secret process, secret method or other trade secret exposes state employees to the potential liability for treble the actual damages sustained by the owner of such formula, process or method; and

WHEREAS, current procedure allows industries to register toxic substances information, which may be considered secret, in a confidential file; and

WHEREAS, those state employees with the greatest need for access to information from the Health Department's confidential files are virtually unanimous in their reluctance to use such information because of fear of incurring treble damages; and

WHEREAS, the reluctance of state employees, although primarily due to the concern for personal liability, is also based on the ambiguity of the Toxic Substances Information Act and uncertainty as to the authorized uses of confidential information; and

WHEREAS, industries may be using the option to file information as confidential unnecessarily because of this reluctance on the part of state employees to use such information; and

WHEREAS, the Board of Health is given certain responsibilities under the Toxic Substances Information Act, among which the primary responsibility is to "Develop and operate a system of reporting substances posing a high or unreasonable risk to health or the environment, which system shall be for use by agencies whose regulatory functions such information would assist"; and

WHEREAS, if the information in the confidential file is not being used by state employees then the primary purposes of the Act are being frustrated; and

WHEREAS, the effective implementation of the Toxic Substances Information Act is essential in order to protect the environment of the Commonwealth and the health of its citizens from unnecessary and dangerous hazards; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions are hereby requested to establish a joint subcommittee to study the effectiveness of the Toxic Substances Information Act. The joint subcommittee shall be composed of five members, two members to be appointed from the Senate Committee on Education and Health by the Senate Privileges and Elections Committee and three members to be appointed from the House Committee on Health, Welfare and Institutions by the Chairman thereof; and, be it

RESOLVED FURTHER, That the joint subcommittee shall confer with the Toxic Substances Advisory Council and shall hear testimony from employees of the Department of Health, employees of other agencies represented on the Toxic Substances Advisory Council, representatives of industry, and concerned citizens. The joint subcommittee shall examine the issues to determine any appropriate revisions to the present procedures and law necessary to ensure the effective implementation of the Toxic Substances Information Act and to protect industry from damaging disclosures of secret information.

The joint subcommittee shall complete its work in time to report to the 1984 Session of the General Assembly.

The cost of this study shall not exceed \$3,200.



**APPENDIX B**

LD1370466

**HOUSE BILL NO. 524**

**Offered January 23, 1984**

*A BILL to amend and reenact §§ 2.1-342, 32.1-239, 32.1-242, 32.1-244 and 32.1-245 of the Code of Virginia, and to amend the Code of Virginia by adding a section numbered 32.1-244.1, relating to the Toxic Substances Information Act; penalties.*

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**Patrons—Glasscock, Cohen, and Crouch; Senators: DuVal and Schewel**

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**Referred to the Committee on Health, Welfare and Institutions**

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Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-342, 32.1-239, 32.1-242, 32.1-244 and 32.1-245 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 32.1-244.1 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 any such citizen of this Commonwealth, nor to 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 fourteen calendar days from the receipt of the request by the public body. Such citizen request shall designate the requested records with reasonable specificity. If the requested records or public body is excluded from the provisions of this chapter, the public body to which the request is directed shall within fourteen calendar days from the receipt of the request tender a written explanation as to why the records are not available to the requestor. Such explanation shall make specific reference to the applicable provisions of this chapter or other Code sections which make the requested records unavailable. In the event a determination of the availability of the requested records may not be made within the fourteen-calendar-day period, the public body to which the request is directed shall inform the requestor as such, and shall have an additional ten calendar days in which to make a determination of availability. A specific reference to this chapter by the requesting citizen in his records request shall not be necessary to invoke the time limits for response by the public body. The public body may make reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost to the public body in supplying such records. Such charges for the supplying of requested records shall be estimated in advance at the request of the citizen.

(b) The following records are excluded from the provisions of this chapter:

(1) Memoranda, correspondence, evidence and complaints related to criminal investigations, reports submitted to the state and local police and the campus police departments of public institutions of higher education as established by Chapter 17 (§ 23-232 et seq.) of Title 23 of the Code of Virginia in confidence, and all records of persons imprisoned in penal institutions in this Commonwealth provided such records relate to the said imprisonment. Information in the custody of law-enforcement officials relative to the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge of arrest, shall not be excluded from the provisions of this chapter.

(2) Confidential records of all investigations of applications for licenses and all licensees made by or submitted to the Alcoholic Beverage Control Commission.

(3) State income tax returns, personal property tax returns, scholastic records and personnel records, except that such access shall not be denied to the person who is the subject thereof, and medical and mental records, except that such records can be personally reviewed by the subject person or a physician of the subject person's choice; however, the subject person's mental records may not be personally reviewed by such person when the subject person's treating physician has made a part of such person's records a written statement that in his opinion a review of such records by the subject person would be injurious to the subject person's physical or mental health or well-being. Where the person who is the subject of scholastic or medical and mental records is under the age of eighteen, his right of access may be asserted only by his parent or guardian, except in instances where the person who is the subject thereof is an emancipated minor or a student in a state-supported institution of higher education.

(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 institutions of higher education.

(4a) Written opinions of the city and county attorneys of the cities, counties and towns in the Commonwealth and any other writing protected by the attorney-client privilege.

(5) 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.

(6) 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.

(7) 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.

(8) 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, (iii) qualifications for any license or certificate issued by any public body.

As used in this subsection (8), "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 subsection (8) 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.

(9) Applications for admission to examinations or for licensure and scoring records maintained by the Department of Health Regulatory Boards 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 requestor's expense, by the individual who is subject thereof, in the offices of the Department of Health Regulatory Boards or in the offices of any health regulatory board, whichever may possess the material.

(10) Records of active investigations being conducted by the Department of Health Regulatory Boards or by any health regulatory board in the Commonwealth.

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

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

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

(14) Contract cost estimates prepared for the confidential use of the Department of Highways and Transportation in awarding contracts for construction or the purchase of goods or services.

(15) 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.

(16) Data, records or information of a proprietary nature, other than financial or administrative, produced or collected by or for faculty or staff of state institutions of higher learning 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 have not been publicly released, published, copyrighted or patented.

(17) Financial statements not publicly available filed with applications for industrial development financings.

(18) 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.

*(19) Information which meets the criteria for being filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.) of Title 32.1, regardless of how or when it is used by authorized persons in regulatory processes.*

(c) Neither any provision of this chapter nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this title shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of state, local or regional government in this Commonwealth whatsoever. The provisions of this subsection, however, shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is \$10,000 or less.

§ 32.1-239. Definitions.—As used in this article : *the following definitions shall apply.*

*"Authorized disclosure" means disclosure of confidential information to an authorized person for official business purposes which are within the scope of his employment with the Commonwealth.*

A. "Commercial establishment" means any commercial or industrial establishment, mill, factory, plant, refinery and any other works in which any chemical substance is manufactured or used as a raw material, catalyst, final product or process solvent for such; ~~provided~~, however, this term shall not be construed in the administration of this act to include normal farming and timbering activities.

*"Confidential information" means secret formulae, secret processes, secret methods or other trade secrets which are proprietary information certified by the signature of the responsible party to meet the following criteria: (i) information for which the reporting firm has been taking and will continue to take measures to protect confidentiality; (ii) information that has not been and is not presently reasonably obtainable without the reporting firm's consent by private citizens or other firms through legitimate means other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding; (iii) information which is not publicly available from sources other than the reporting firm; and (iv) information the disclosure of which would cause substantial harm to the reporting firm.*

*The Commissioner shall have the right to substitute information received from sources which are not confidential for information claimed as confidential and to inquire as to the basis of the confidentiality claim. Any responsible party for a reporting firm who files information as confidential which does not meet the foregoing criteria may be subject to the penalties provided in § 32.1-27 of this Code.*

B. "Emitting" means the release of any substance from a manufacturing process, whether or not intentional or avoidable, into the work environment, into the air, into the water, or otherwise into the human environment.

C. "Manufacturing" means producing, formulating, packaging or diluting any substance for commercial sale or resale.

D. "Person" includes, in addition to the entities enumerated in paragraph 4 : of § 32.1-3, the Commonwealth and any of its political subdivisions.

E. "Toxic substance" means any substance, including any raw materials, intermediate products, catalysts, final products, or by-products of any manufacturing operation conducted in a commercial establishment, that has the capacity, through its physical, chemical or biological properties, to pose a substantial risk of death or impairment either immediately or over time, to the normal functions of humans, aquatic organisms, or any other animal.

*"Unauthorized disclosure" means disclosure of confidential information for purposes other than official business or to a person who is not authorized to receive such information.*

§ 32.1-242. Toxic Substances Advisory Council established; members; meetings; duties.—A. There is hereby established a Toxic Substances Advisory Council which shall consist of five appointed members and the thirteen ex officio members, with voting power, specified below. The Governor shall appoint to the Advisory Council one member each from the fields of agriculture, medicine, labor, industry, and local government, who shall serve at the pleasure of the Governor. The Commissioner of Health or his designee shall be an ex officio member and chairman of the Advisory Council. The other ex officio members of the Advisory Council shall be the chairmen of the State Water Control Board, the State Air Pollution Control Board and the Board of Conservation and Economic Development, the Commissioner of Labor and Industry, the Commissioner of Marine Resources, the Commissioner of Agriculture and Consumer Services, the Director of the Division of Consolidated Laboratory Services, the Director of the Division of Industrial Development, the Director of the Virginia Institute of Marine Science, the Coordinator of the Office of Emergency and Energy Services, the State Fire Marshal and the Administrator of the Council on the Environment or their designees. The Advisory Council shall meet at least ~~quarterly~~ *annually, but more often, if necessary* .

B. The Advisory Council shall (i) review and evaluate the policies and programs of the Commonwealth with respect to toxic substances and (ii) make recommendations to the Board and furnish such technical advice as may be required on matters relating to toxic substances.

§ 32.1-244. Duty of operators to report; contents of report; diagnosis of employee injuries and

illnesses; disclosure of confidential information.—A.1. Inventory report. - Each person who operates a commercial establishment that uses as a raw material, catalyst, final product or process solvent for such or manufactures a chemical substance or compound shall report to the Board the following information: (a) name and location of the commercial establishment; and (b) names and estimated quantities of raw materials, catalysts and final products. Such inventory shall be filed with the Board by such date as the Board shall establish by regulations.

2. [Repealed.]

B. 1. Inventory report. - Each person who proposes to operate a new commercial establishment or a new process in an existing commercial establishment that will use as a raw material, catalyst, final product or process solvent for such or will manufacture a chemical substance shall report to the Board the following information: (a) name and location of the commercial establishment; and (b) names and estimated quantities of chemical substances to be used as a raw material, catalyst, final product or process solvent or manufactured by it. Such inventory report shall be filed with the Board at least sixty days prior to the date of anticipated use or manufacture and on such form as the Board shall establish.

2. [Repealed.]

C. 1. [Repealed.]

2. (a) Each person who operates a commercial establishment that uses as a raw material, catalyst, final product or process solvent for such or manufactures any chemical substance or mixture in such a manner that such person knows, or reasonably should be expected to know, is toxic and under the circumstances of its manufacture or use may pose a substantial threat to human health or to the environment shall have the affirmative duty to report to the Board that information.

(b) In discharging this duty to report, such person shall have the further affirmative duty to make reasonable inquiry into the toxicity of any such substance. Any knowledge of toxicity that is possessed by an employee or agent of such person, or by the holder of any patent on such substance under which such person is licensed to produce such substance, shall be attributed to such person if such person actually received that knowledge or, in the exercise of due diligence of such person, should have received that knowledge. Any knowledge of toxicity that is possessed by any consultant or independent contractor, who has been retained by such person to perform any evaluation or other task which involves any such substance, shall be attributed to such person if such person actually received that knowledge or, in the exercise of due diligence by such person, should have received that knowledge.

(c) Except as provided in this section, the Board shall not require any reports by operators of commercial establishments to be filed pursuant to this article unless the Board can demonstrate that such report is necessary to prevent or lessen an imminent risk of injury to public health or the environment.

D. Each person who operates a commercial establishment in which any chemical substance is used as a raw material, catalyst, final product or process solvent or manufactured shall direct each of his employees to a physician for diagnosis of any injury or illness of any kind whatever that such person knows, or reasonably should be expected to know may be caused by such chemical substance. *Nothing in this article shall be deemed, however, to authorize or require physical examination or medical treatment for any person who objects thereto on religious grounds.*

E. No official, agent or employee of the Board or any agency or institution represented on the Advisory Council shall disclose any ~~secret formulae, secret processes, secret methods, or other trade secrets~~ confidential information to anyone who is not an official or employee of such agencies or institutions *and authorized to receive such confidential information* . No such official, agent or employee shall disclose any ~~secret formulae, secret process, secret method or other trade secret~~ confidential information to a federal agency or institution unless (1) such agency or institution is required by law or regulation to have such information and (2) the request for such information is made in writing. Any official, agent, or employee who *willfully* makes any unauthorized disclosure in violation of this article shall be liable to the person

owning any ~~secret formulae, secret processes, secret methods, or other trade secrets~~ *confidential information* for treble the actual damages sustained by such person which was caused by any disclosure prohibited by this article *and shall be guilty of a Class 6 felony* . Any official, agent or employee who negligently makes any unauthorized disclosure in violation of this article shall be subject to loss of employment. Any person to whom any prohibited disclosure is made who ~~makes any use of such information or data disclosed in violation of this article~~ *who persuades, induces or bribes any official, agent or employee of the Commonwealth to make an unauthorized disclosure* shall ; ~~also~~, be liable for treble the actual damages sustained by the person whose ~~secret formulae, secret processes, secret methods, or trade secrets~~ *confidential information* ~~are~~ is disclosed as a result of unauthorized or unlawful use thereof. Each official, agent, or employee of the Board and each member of the Advisory Council and his officials and employees having access to any ~~secret formulae, secret processes, secret methods, or other trade secrets~~ *confidential information* in any way obtained pursuant to this article, ~~may~~ *shall* execute an agreement with the Board not to disclose such confidential matters of information to any person who is not acting in an official capacity as required by the article. ~~This~~ *Such* agreement shall be enforceable by the Board or by any person harmed by such improper disclosure. *In addition to any other common law remedies, any owner of confidential information harmed by an unauthorized disclosure shall have a cause of action under the Virginia Torts Claims Act (§ 8.01-195 et seq.) of Title 8.01.*

F. ~~Nothing in this article shall be deemed to authorize or require physical examination or medical treatment for any person who objects thereto on religious grounds.~~

G. *Information which meets the criteria for being filed as confidential under this Act shall not be subject to requests for information as provided in § 2.1-340 et seq. of the Code of Virginia under any circumstances. Any agency making use of confidential information in a regulatory activity which is subject to § 2.1-340 et seq. of the Code of Virginia may identify such confidential information with a code number or name. Further, the true identity of the code number or name shall not be subject to requests for information as provided in § 2.1-340 et seq. of this Code.*

H. *Whenever confidential information is used in the conduct of official business of the Commonwealth as part of written material which may result in the disclosure of such information to unauthorized persons in any manner, such material shall be covered by a statement indicating that the information is confidential and its unauthorized disclosure or use is subject to penalties. A record shall be kept of the use of confidential information and the names of all persons using or coming in contact with it by each agency.*

§ 32.1-244.1. *Emergency disclosure of confidential information.—The Commissioner or his authorized designee shall have the authority to disclose confidential information if an accident has occurred involving release of a toxic substance, or conditions exist whereby individuals who are not employees of the relevant industry are being exposed to a toxic substance, and a situation exists which poses an immediate threat to individual human life or the inhabitants of a community, or a situation exists which poses an immediate or imminent threat to public health.*

*The Commissioner or his authorized designee shall have the authority to disclose such confidential information to: (i) physicians treating any individual whose life or health is threatened because of exposure to a toxic substance which is the subject of the confidential information and (ii) fire officials in charge of handling any fire in a facility containing toxic substances which are considered confidential information or in charge of coordinating efforts to contain any release of toxic substances which are considered confidential information when such release poses an immediate threat to human life or an imminent or immediate threat to public health.*

*Prior to contacting the Commissioner for disclosure of confidential information, any fire official in charge of fire or release of toxic substances shall make reasonable efforts to obtain such information from a representative or agent of its owner.*

*The Commissioner or his authorized designee shall personally notify a designated representative of the owner of the confidential information, if possible, prior to any such disclosure. If such personal notice is not possible, the Commissioner shall prepare and send a*

*written notice to the owner in an expeditious manner.*

§ 32.1-245. Annual report to General Assembly and Governor.—The Board shall advise the General Assembly and the Governor as to all matters relating to toxic substances and shall report ~~annually~~ *biennially* on the status of the control of toxic substances in the Commonwealth.

**HOUSE JOINT RESOLUTION NO. 73**

**Offered January 23, 1984**

*Continuing the work of the Joint Subcommittee of the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions Studying the Toxic Substances Information Act.*

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**Patrons—Glasscock, Cohen, and Crouch; Senators: DuVal and Schewel**

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**Referred to the Committee on Rules**

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WHEREAS, the Joint Subcommittee Studying the Toxic Substances Information Act has worked diligently with representatives of industry, unions, public agencies and the general public to resolve the issues related to the protection of confidential information; and

WHEREAS, the work of the Joint Subcommittee has been fruitful and its recommendations are before the General Assembly; and

WHEREAS, during the course of the Joint Subcommittee's work, several issues were raised which were not, in the opinion of the Joint Subcommittee, within the purview of its study; and

WHEREAS, among these issues were concerns for the safety of firefighters when the properties of chemicals involved in fires are unknown; and

WHEREAS, the need for legislation related to "hazard communication" or "worker right-to-know" has also been expressed; and

WHEREAS, representatives of the firefighters recount numerous incidents in which firefighters have been killed or seriously hurt because of lack of knowledge of the chemicals which were in the fire; and

WHEREAS, proponents contend that workers have a right to a safe work place and to be informed of all hazards to which they are exposed on a daily basis in order to avoid occupational accidents and illnesses; and

WHEREAS, industry representatives have stated that protection of vital trade secrets is essential to maintain profits and employment levels and that "right-to-know" legislation must be structured carefully in order to avoid burdensome regulation and excessive cost to industry and to provide flexibility in tailoring the programs; and

WHEREAS, the Joint Subcommittee felt that these issues deserve careful and detailed examination in order to avoid overlap with federal and other state laws; now, therefore, be it

RESOLVED by the House of Delegates, the Senate, concurring, That the work of the Joint Subcommittee of the Senate Committee on Education and Health and the House Committee on Health, Welfare and Institutions Studying the Toxic Substances Information Act shall be continued to accomplish the following:



1. To examine the issues related to "right-to-know," including those issues related to the concerns of the firefighters and those issues related to "hazard communications" programs;
2. To analyze these issues in relationship to the relevant federal laws, such as the Occupational Safety and Health Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and the Hazardous Materials Transportation Act;
3. To analyze these issues in relationship to the Toxic Substances Information Act and any other relevant state laws; and
4. To evaluate the need for addressing these issues at the state level and the appropriate method for doing so, if this need exists.

The Joint Subcommittee shall complete its work in time to submit its recommendations to the 1985 Session of the General Assembly. The membership of the Joint Subcommittee shall remain the same and shall continue to consist of two members of the Senate and three members of the House of Delegates. The direct and indirect costs of this study are estimated to be \$14,370.

