



HIGH LEVEL SAFETY CONFERENCE 2010

Montréal, 29 March to 1 April 2010

Theme 2: Towards the proactive management of safety

Topic 2.4: The protection of sources of safety information

INFORMATION PROTECTION FOR ACCIDENT INVESTIGATIONS

(Presented by Australia)

SUMMARY

Australia is supportive of the Secretariat's proposal (HLSC 2010-WP/7) to establish a multi-disciplinary group to review the protections of certain accident and incident records and the protections for safety data from other sources. Australia submits that with respect to the protection of accident and incident records, the review should focus on providing protections that are commensurate with the nature of the information and the purpose for which it is proposed to be disclosed.

Action: The Conference is invited to:

- a) agree that any group established in accordance with the Secretariat's proposed actions include a focus on reviewing the appropriate protections for accident and incident investigation records; and
- b) agree that the group, if established, be invited to consider the proposals in paragraphs 3.1 to 3.10 as a part of its review.

1. INTRODUCTION

1.1 In AN-WP/8356, the Secretariat stated that it supports a review of the safety information protection regime in Annex 13 and that this matter should be raised at the next ordinary meeting of the Assembly in 2010. The Secretariat's paper for this Conference HLSC 2010-WP/7 reaffirms the support for the review by inviting the Conference to agree on the establishment of a multi-disciplinary group including States and industry.

1.2 The Secretariat has proposed that the group assist ICAO to separate the protection of certain accident and incident records from the protection of safety data from other sources. At the same time, the Secretariat has proposed that the focus of the task on the protection of data from other sources should be its protection from inappropriate use by aviation organizations.

1.3 Australia supports the action items in the Secretariat's paper. To further the beneficial outcomes from this review, Australia submits that the focus of determining the protections for accident

and incident records should be on making sure that those protections are commensurate with the sensitivity of the information and adaptable to various legal systems, having regard to the particular purposes to which such information might be put. The discussion below on the way this may be achieved could also be useful when considering the appropriate protections for safety data from other sources.

2. DISCUSSION

2.1 Determining the sensitivity of information should involve considering and balancing the significance of two factors:

- a) the nature of the information; and
- b) the purpose for which it is proposed to be disclosed.

2.2 These two factors combined affect whether or not the disclosure of the information is likely to have an adverse impact on the free flow of information. The information on its own might be sensitive because of its very nature, such as Cockpit Voice Recordings (CVRs). Other information, such as a witness statement taken from a person not involved in the accident, may not, by its nature, be as sensitive as a CVR. However, it may be considered sensitive if it is proposed to disclose the person's statement for the purpose of a criminal prosecution of the flight crew.

2.3 Disclosure of accident investigation information for a criminal prosecution warrants a high level of protection. Disclosure for other purposes, however, may warrant a different approach. An example would be where it is proposed to disclose the information so that a regulatory authority can take administrative action, which may include the variation or suspension of an authorisation, in order to prevent a serious and demonstrable threat to air safety, or otherwise, to health or life. The administrative action in this context is intended to address a real and serious threat to safety, rather than seeking to achieve a punitive or disciplinary outcome.

2.4 Standard 5.12, of Annex 13, does not establish protections that are commensurate with the varying nature of accident investigation information and the purposes for which it may be disclosed. Disclosure under standard 5.12 is only allowed if the appropriate authority for the administration of justice (**'the justice authority'**) determines that the need for the disclosure outweighs the adverse domestic and international impact such information may have on the investigation or any future investigation (**'the balancing test'**).

2.5 While the balancing test allows flexibility in considering the nature of accident investigation information, and the purpose of its disclosure, an initial problem with the regime is that the guidance provided to facilitate implementation is deficient. Attachment E to Annex 13 explains the principles behind the need for protection, but it does not provide guidance on steps which may be taken for the effective administration of the balancing test in a variety of situations.

2.6 A second problem is that only the justice authority can administer the balancing test. This is an inappropriate burden when the disclosure may be for the purpose of preventing a serious threat to air safety.

2.7 The third problem with standard 5.12 is that it seeks to protect all the information at its source rather than only requiring the accident investigation agency to protect the information when it is in its possession. Some information, like CVR information, should continue to be protected at its source so that any person seeking access to it is subject to the same restrictions. However, other information that is

listed in standard 5.12, such as private information, potentially should not be subject to the need for the administration of the balancing test by the justice authority before its disclosure. Australia is doubtful that any State imposes a requirement on an operator to go through this process when it discloses the name of a passenger or the flight crew for the purposes of a criminal investigation.

2.8 While this is an example of where it is unreasonable to impose the standard 5.12 protection on the information at its source, it is still reasonable to expect that standard 5.12 would mandate the imposition of a requirement on the accident investigation agency to protect the information in its possession. This is in the interests of ensuring the agency's investigation is separated from blame and liability processes.

3. PROPOSAL

3.1 Having regard to the three problems identified, a suggested approach to reforming the protections for accident and incident investigation information is to seek to determine:

- a) what information should be protected by standard 5.12;
- b) what is the sensitivity of the information;
- c) whether the information should be protected at its source, or whether standard 5.12 should only require the accident investigation agency to protect the information in its possession;
- d) who should administer the balancing test;
- e) the appropriate guidance to include in Attachment E for administering the balancing test.

3.2 Once a determination is made for the purposes of paragraph 3.1 a) above about what information should be protected by standard 5.12, consideration should be given to the sensitivity of the information. The sensitivity of the information would be determined by taking account of the nature of the information in the context of the potential purposes for which it could be disclosed (refer to paragraph 2.1 of this paper). These purposes could, for example, include criminal proceedings; civil proceedings; coronial proceedings; administrative/regulatory action generally; disciplinary action; administrative/regulatory action for the purposes of preventing a serious threat to air safety or health or life; and public release.

3.3 When the sensitivity of the information has been determined, consideration can then be given to the matters in paragraphs 3.1 c), d) and e) above, which will affect the requirements for the information's disclosure in relation to each of the potential purposes.

3.4 To assist with determining what guidance material might be included in Annex 13 for the purpose of administering the balancing test, Australia proposes giving consideration to the following:

Requirement to seek the information from a source other than the accident investigation agency

3.5 The fact that there is an Annex 13 investigation being conducted does not, and should not, prevent other authorities, organisations or individuals from making their own inquiries into an accident or incident. However, where the disclosure of information would be associated with a

proceeding connected to blame, liability or drawing adverse inferences, it is more appropriate for that proceeding to seek the information from sources other than the accident investigation agency.

3.6 During the administration of the balancing test, the fact that the information is not available from any other source would not automatically mean that the information should be disclosed. There may still be sensitivities associated with the disclosure of the information that need to be taken into account.

Consent

3.7 Obtaining the consent of the person who provided the information, or who is affected by its disclosure, may be sufficient in some situations for ensuring that the disclosure does not have an adverse impact on the free-flow of information. A high threshold for the consent would be required where the consequences of the disclosure are serious, such as in civil and criminal proceedings. This would include the consent being express, voluntary and informed. By 'informed' it is meant that the person/organization providing the consent is aware of the likely consequences of providing the consent.

3.8 In some circumstances, obtaining consent from a person may be deemed problematic. This might be the case if the person is counselled to refuse consent no matter what the intended purpose of the disclosure. In these cases an alternative would be to seek the person's perspective on the disclosure and take their perspective into account in the administration of the balancing test. Taking this approach would avoid making a decision to disclose the information in direct contravention of the person's refusal to provide consent.

Notification of potential use of information

3.9 If a person is notified of the potential uses of information before the information is sought from them, then less emphasis may need to be placed on the need to obtain the person's consent, or seek their perspective, at a later time when a decision is being made to release the information from the accident investigation agency. Accident investigation agencies should bear in mind that following this procedure affords the person providing the information an element of natural justice in the investigation process. This is important if they do not intend to seek the person's consent or perspective on releasing the information for purposes other than the accident investigation.

Publication and use limitation

3.10 When information is disclosed for a purpose other than the accident investigation, consideration should be given to imposing a publication and use limitation on the information. For example, if information is disclosed to a person or organisation to prevent a serious threat to air safety, then the information should only be used for that purpose, and not communicated further, or used in a different way.

4. CONCLUSIONS

4.1 Australia is fully supportive of the action items in the Secretariat's paper HLSC 2010-WP/7. Australia submits that the additional action items proposed in this paper will complement the review proposed to be conducted of the information protection regime for accident and incident investigation records as well as information from other sources.