



ICAO

# Doc 10053

## Manual on Protection of Safety Information

Part I – Protection of Accident and Incident Investigation Records  
First Edition, 2016



Approved by and published under the authority of the Secretary General

INTERNATIONAL CIVIL AVIATION ORGANIZATION





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## AMENDMENTS

Amendments are announced in the supplements to the *Products and Services Catalogue*; the Catalogue and its supplements are available on the ICAO website at [www.icao.int](http://www.icao.int). The space below is provided to keep a record of such amendments.

## RECORD OF AMENDMENTS AND CORRIGENDA

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## FOREWORD

In response to the Accident Investigation and Prevention (AIG) Divisional Meeting held in Montréal from 13 to 18 October 2008, the High-level Safety Conference held in Montréal from 29 March to 1 April 2010 and the 37th Session of the ICAO Assembly held in Montréal from 28 September to 8 October 2010, a multidisciplinary Safety Information Protection Task Force (SIP TF) was established to provide recommendations for new and/or enhanced ICAO provisions and guidance material related to the protection of safety information. The SIP TF developed recommendations for amendments to Annex 6 — *Operation of Aircraft*, Annex 13 — *Aircraft Accident and Incident Investigation* and Annex 19 — *Safety Management*.

During the 38th Session of the ICAO Assembly, held in Montréal from 24 September to 4 October 2013, the Council was instructed to take into account the findings and recommendations of the SIP TF, to take appropriate steps to ensure meaningful progress toward the development of new and/or amended provisions in Annex 13, other Annexes as appropriate and related guidance material, and to enhance the protection of certain accident and incident records. In April 2014, the Group of Experts on Protection of Accident and Incident Records (GEPAIR) was established with the objective of finalizing certain recommendations of the SIP TF, addressing Standard 5.12 and Attachment E to Annex 13; as well as the protection and use of flight recorder recordings in routine operations in Annex 6, Parts I, II and III. The new provisions on the protection of certain accident and incident investigation records were adopted by the Council on 22 February 2016. GEPAIR activities were integrated into the work of the Accident Investigation Panel (AIGP) which supported the development of this manual.

Existing challenges faced by accident investigation authorities in protecting investigation records, the multiplicity of parties, interests and agendas involved in accident and incident investigations called for an enhanced protective framework for investigation records. Thus, this new framework focuses on enhancing implementation of the protection of records generated or obtained during the conduct of an investigation instituted in accordance with Annex 13; provides a more practical and effective means to protect the records in the custody or control of the accident investigation authority; accommodates different legal systems; considers different methodologies and practices in implementing effective protection of investigation records; provides transparency on the possible use of investigation records; and aims to strike a balance between the objectives of the investigation and other public interests.

States are called upon to establish adequate provisions for the protection of investigation records within their national legal frameworks. Establishing the protections at this level is essential since information contained in these records, which includes information given voluntarily by persons interviewed during the course of an investigation, can be utilized for purposes other than aviation safety, inhibiting its continued availability.

This manual is intended to provide States with guidance material for the implementation of appropriate protection for investigation records with the aim of safeguarding accident investigation authorities' continued access to essential information during the course of an investigation.

Provisions for the protection and use of flight recorder recordings in routine operations (outside the scope of an Annex 13 investigation) are contained in Annex 6 and Annex 19.

Regular revision will ensure that the guidance remains both pertinent and accurate.

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# TABLE OF CONTENTS

	<i>Page</i>
Glossary .....	(ix)
List of acronyms .....	(xiii)
<b>Chapter 1. Overview of the manual.....</b>	<b>1-1</b>
1.1 Overview .....	1-1
<b>Chapter 2. Accident and incident investigation fundamentals.....</b>	<b>2-1</b>
2.1 Objective of the investigation.....	2-1
2.2 Main investigation responsibilities .....	2-1
2.3 Accident investigation authority .....	2-3
2.4 Types of records generated or obtained during an investigation .....	2-4
2.5 Reports.....	2-6
<b>Chapter 3. Protection and use of certain accident and incident investigation records .....</b>	<b>3-1</b>
3.1 Objective of protecting certain accident and incident investigation records.....	3-1
3.2 Records subject to protection .....	3-1
3.3 Scope, levels and limits of protection and use of the records.....	3-3
– Balancing test — general .....	3-3
– Designation of a competent authority .....	3-4
– Administration of the balancing test.....	3-5
– Effect of certain factors in the administration of the balancing test.....	3-11
3.4 Exchange of records between accident investigation authorities .....	3-14
3.5 Potential impact of the public disclosure of accident or incident investigation records or use of such records for other than safety-related purposes.....	3-15
3.6 Non-disclosure of audio and image recordings to the public .....	3-16
3.7 Implementation of international requirements on the protection of investigation records .....	3-17
<b>Chapter 4. Interactions of accident investigation authorities.....</b>	<b>4-1</b>
4.1 Interactions between the civil aviation authority and the accident investigation authority.....	4-1
4.2 Interactions between the judiciary and the accident investigation authority.....	4-1
4.3 Interactions between the media and the accident investigation authority .....	4-2
4.4 interactions between families of victims of accidents and the accident investigation authority.....	4-3



# GLOSSARY

When the following terms are used in this manual, they have the following meanings:

**Accident.** An occurrence associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down, in which:

a) a person is fatally or seriously injured as a result of:

- being in the aircraft, or
- direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
- direct exposure to jet blast,

*except* when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

b) the aircraft sustains damage or structural failure which:

- adversely affects the structural strength, performance or flight characteristics of the aircraft, and
- would normally require major repair or replacement of the affected component,

*except* for engine failure or damage, when the damage is limited to a single engine (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, fairings, panels, landing gear doors, windscreens, the aircraft skin (such as small dents or puncture holes), or for minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike (including holes in the radome); or

c) the aircraft is missing or is completely inaccessible.

*Note 1.— For statistical uniformity only, an injury resulting in death within thirty days of the date of the accident is classified, by ICAO, as a fatal injury.*

*Note 2.— An aircraft is considered to be missing when the official search has been terminated and the wreckage has not been located.*

*Note 3.— The type of unmanned aircraft system to be investigated is addressed in ICAO Annex 13, 5.1.*

*Note 4.— Guidance for the determination of aircraft damage can be found in ICAO Annex 13, Attachment E.*

**Accident investigation authority.** The authority designated by a State as responsible for aircraft accident and incident investigations within the context of Annex 13.

**Accredited representative.** A person designated by a State, on the basis of his or her qualifications, for the purpose of participating in an investigation conducted by another State. Where the State has established an investigation authority, the designed accredited representative would normally be from that authority.

**Administrative action.** Action taken by a regulatory body responsible for aviation safety that may involve the revocation or suspension of privileges under licences, AOCs and other types of certification. It may also include the use of demerit points in relation to any of these privileges.

**Adviser.** A person appointed by a State, on the basis of his or her qualifications, for the purpose of assisting its accredited representative in an investigation.

**Aircraft.** Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.

**Balancing test.** The determination whereby the competent authority(ies) assesses competing public interests and decides which interest should prevail leading to the determination referred to in Standard 5.12.

**Causes.** Actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident. The identification of causes does not imply the assignment of fault or the determination of administrative, civil or criminal liability.

**Competent authority.** The governmental entity(ies) that has the power and authority to administer the balancing test.

**Civil Aviation Authority.** The governmental entity or entities, however titled, that are directly responsible for the regulation of all aspects of civil air transport, technical (i.e. air navigation and aviation safety) and economic (i.e. the commercial aspects of air transport).

**Contributing factors.** Actions, omissions, events, conditions, or a combination thereof, which, if eliminated, avoided or absent, would have reduced the probability of the accident or incident occurring, or mitigated the severity of the consequences of the accident or incident. The identification of contributing factors does not imply the assignment of fault or the determination of administrative, civil or criminal liability.

**Disciplinary action.** Action taken by an employer in response to violations or breaches of rules and procedures by an employee. It may involve a withdrawal of employment entitlements and possible loss of income.

**Flight recorder.** Any type of recorder installed in the aircraft for the purpose of complementing accident/incident investigation.

*Note.— See Annex 6, Parts I, II, III, for specifications relating to flight recorders.*

**Incident.** An occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of the operation.

*Note.— The types of incidents which are of main interest to the International Civil Aviation Organization for accident prevention studies are listed in ICAO Annex 13, Attachment C.*

**Investigation.** A process conducted in agreement with Annex 13 for the purpose of accident prevention which includes the gathering and analysis of information, the drawing of conclusions, including the determination of causes and/or contributing factors and, when appropriate, the making of safety recommendations.

**Investigation records.** All records listed in 5.12 of Annex 13.

*Note.— Provisions on the use and protection of safety information and related sources other than accident and incident investigation records are included in Annex 19 — Safety Management.*

**Investigator-in-charge.** A person charged, on the basis of his or her qualifications, with the responsibility for the organization, conduct and control of an investigation.

*Note.— Nothing in the above definition is intended to preclude the functions of an investigator-in-charge being assigned to a commission or other body.*

**Judicial proceeding.** A proceeding before a judicial authority involving a determination, including criminal, labour or civil liability.

**Material fact in question.** A legal term used to refer to a fact that is significant or essential to the matter at hand; that one party alleges and that the other controverts; and is to be determined by the competent authority administering the balancing test.

**Occurrence.** Any accident or incident associated with the operation of an aircraft.

**Operator.** A person, organization or enterprise engaged in or offering to engage in an aircraft operation.

**Operational personnel.** Personnel involved in aviation activities who are in a position to report safety information.

*Note.— Such personnel include, but are not limited to: flight crews; air traffic controllers; aeronautical station operators; maintenance technicians; personnel of aircraft design and manufacturing organizations; cabin crews; flight dispatchers; apron personnel; and ground handling personnel.*

**Original Source.** The entity or person that generated a record during the conduct of an investigation instituted in accordance with Annex 13.

**Preliminary report.** The communication used for the prompt dissemination of data obtained during the early stages of the investigation.

**Safety recommendation.** A proposal of an accident investigation authority based on information derived from an investigation made with the intention of preventing accidents or incidents and which in no case has the purpose of creating a presumption of blame or liability for an accident or incident. In addition to safety recommendations arising from accident and incident investigations, safety recommendations may result from diverse sources, including safety studies.

**Serious incident.** An incident involving circumstances indicating that there was a high probability of an accident and associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down.

*Note 1.— The difference between an accident and a serious incident lies only in the result.*

*Note 2.— Examples of serious incidents can be found in ICAO Annex 13, Attachment C.*

**State of Design.** The State having jurisdiction over the organization responsible for the type design.

**State of Manufacture.** The State having jurisdiction over the organization responsible for the final assembly of the aircraft.

**State of Occurrence.** The State in the territory of which an accident or incident occurs.

**State of the Operator.** The State in which the operator's principal place of business is located or, if there is no such place of business, the operator's permanent residence.

**State of Registry.** The State on whose register the aircraft is entered.

*Note.— In the case of the registration of aircraft of an international operating agency on other than a national basis, the States constituting the agency are jointly and severally bound to assume the obligations which, under the Chicago Convention, attach to a State of Registry. See, in this regard, the Council Resolution of 14 December 1967 on Nationality and Registration of Aircraft Operated by International Operating Agencies which can be found in Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587).*

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## LIST OF ACRONYMS

ADREP	Accident/incident data reporting
AIA	Accident Investigation Authority
AIG/08	Accident Investigation and Prevention (AIG) Divisional Meeting (2008)
AIR	Airborne image recorder
ATC	Air traffic control
ATS	Air traffic services
CAA	Civil Aviation Authority
CVR	Cockpit voice recorder
FAA	Federal Aviation Administration
FDR	Flight data recorder
GEPAIR	Group of Experts on Protection of Accident and Incident Records
IIC	Investigator-in-charge
NOTAM	Notice to Airmen
RAIO	Regional accident and incident investigation organization
SARPs	Standards and Recommended Practices
SIP TF	Safety Information Protection Task Force





# Chapter 1

## OVERVIEW OF THE MANUAL

### 1.1 OVERVIEW

1.1.1 This manual provides guidance on the protection of certain records pertaining to accident or incident investigations conducted in accordance with Annex 13, including the following subjects: accident and incident investigation fundamentals: objectives, scope, levels, limits and means to protect and use investigation records; cooperation between States regarding the protection of investigation records in case of exchange of information; administration of the *balancing test* and designation of the competent authority(ies); interactions among accident investigation authorities with other authorities, such as the civil aviation authority and the judicial authority.

1.1.2 **Chapter 2. Accident and incident investigation fundamentals**, addresses, inter alia, the main responsibilities and rights of States (e.g. State of Occurrence, State of the Operator, State of Design, State of Manufacture) with regard to their participation in the investigation process, and in particular the accident investigation authority. A table provides a list of records that are sensitive in nature and considerations on why some warrant protection. Due consideration is given to the necessary protections to be afforded to the Final Report in order to limit its use for purposes other than the prevention of accidents and incidents.

1.1.3 **Chapter 3. Protection and use of certain accident and incident investigation records**, covers the objective of protecting investigation records, the scope, levels and limits. The protection of investigation records attempts to ensure that, when their disclosure or use is sought for purposes other than aviation safety, the resulting impact on the prevention of accidents is balanced against other public interests. Focus is put on explaining how the *balancing test* works, including a framework consisting of a set of factors to be taken into account during the administration of the balancing test by the competent authority appointed by the relevant State. Thorough consideration is given to the potential impact of public disclosure or use of records for other than safety-related purposes. A table provides examples of legislative provisions in some States to protect investigation records.

1.1.4 **Chapter 4. Interactions of accident investigation authorities**, contains guidance and best practices to be used by the investigation authority when interacting with the judiciary, the media, families of victims of accidents, and the Civil Aviation Authority (CAA). With regard specifically to the latter, some records subject to protection may be needed by the CAA to improve or maintain safety; in such cases, the balancing test is to be applied. In all cases, due consideration is to be given on the disclosure and use of investigation records for other than safety-related purposes.



## **Chapter 2**

# **ACCIDENT AND INCIDENT INVESTIGATION FUNDAMENTALS**

### **2.1 OBJECTIVE OF THE INVESTIGATION**

2.1.1 This part of the manual focuses on explaining the objectives and methodologies of an aircraft accident or incident investigation, providing justifications on why it is an independent process that is critical to preserve.

2.1.2 The sole objective of an investigation conducted under the provisions of Annex 13 is the prevention of aircraft accidents and incidents and not the apportioning of blame or liability. Any judicial or administrative proceeding, which may involve apportion of blame or liability, must be separate from any investigation conducted under the provisions of Annex 13. The use of investigation records for purposes other than accident or incident investigation, including for disciplinary, civil, administrative and criminal proceedings against operational personnel and/or organizations may inhibit the future availability of such records and have an adverse effect on investigation activities.

2.1.3 An investigation is a systematic process whereby all possible causes and contributing factors are identified, evaluated and eliminated to avoid recurrences. An aircraft accident or incident also provides evidence of hazards or deficiencies within the aviation system. A well-conducted investigation identifies all immediate and underlying systemic causes and/or contributing factors of the accident or incident. The investigation may also reveal other hazards or deficiencies within the aviation system not directly connected with the causes of the accident or the incident. The emphasis of an investigation is on determining why the accident or incident happened and on recommending appropriate safety actions aimed at avoiding recurrences. A properly conducted investigation is essential for accident prevention.

2.1.4 An investigation also determines the facts, conditions and circumstances pertaining to the survival and non-survival aspects of the occupants of the aircraft, enabling recommendations to be made aimed at improving survivability. For example, recommendations for improvements to the crashworthiness of the aircraft are aimed at preventing or minimizing injuries to aircraft occupants in future accidents.

2.1.5 The Final Report, which is produced at the completion of an investigation, constitutes the official conclusions of the accident or incident investigation. The Final Report is the foundation for initiating the safety actions which are necessary to prevent further accidents with similar causes. Therefore, the Final Report contains not only the findings, causes and/or contributing factors, but also safety recommendations so that appropriate preventive measures can be taken.

2.1.6 Furthermore, data and information generated or obtained during an investigation are also collected, analysed and exchanged with the aim of maintaining or improving safety. Safeguarding the investigation records becomes critical to ensure that investigators have unrestricted access to evidence necessary to determine the causes and/or contributing factors of aircraft accidents and incidents, allowing preventive actions to be taken.

### **2.2 MAIN INVESTIGATION RESPONSIBILITIES**

2.2.1 In conformity with Article 26 of the Convention on International Civil Aviation, the State in which an aircraft accident occurs has the obligation to institute an inquiry into the circumstances of the accident. To fulfil this requirement,

States enact appropriate legislation to establish an accident investigation authority for the investigation of aircraft accidents and incidents.

2.2.2 The accident investigation authority must be strictly objective and totally impartial and must also be perceived to be so. The authority must be established in such a way that it can withstand political or other interference or pressure. Many States have achieved this objective by setting up their accident investigation authority as an independent statutory body or by establishing an accident investigation organization that is separate from the CAA. In these States, the accident investigation authority reports directly to Congress, Parliament or a ministerial level of governments.

2.2.3 The accident investigation authority is required to determine the causes and/or contributing factors of an accident or incident and to make safety recommendations. However, responsibility for the implementation of safety recommendations normally rests with the CAA. This division of responsibility is appropriate since the CAA has overall responsibility for the regulatory framework of aviation and its development.

2.2.4 In accordance with Chapter 5 of Annex 13, the State of Occurrence is responsible for instituting an investigation into the circumstances of the accident or serious incident and for the conduct of the investigation. However, when the accident or serious incident has occurred in the territory of a non-Contracting State which does not intend to conduct an investigation, the State of Registry, or failing that, the State of the Operator, the State of Design or State of Manufacture should endeavour to institute and conduct an investigation. Moreover, when the location of the accident or serious incident cannot definitely be established as being in the territory of any State, the State of Registry must institute and conduct any necessary investigation.

2.2.5 Annex 13, Chapter 5 also states that the State conducting the investigation has the responsibility of designating the investigator-in-charge (IIC) of the investigation and initiating the investigation immediately. During the investigation, flight recorders must be effectively secured while being used. The State conducting the investigation must arrange for their read-out without delay. The IIC must have unhampered access to the wreckage and all relevant material, including flight recorders and air traffic services (ATS) records and their transcripts, and must have unrestricted control over the material to ensure that a detailed examination can be made without delay. In addition, the State conducting the investigation must recognize the need for coordination between the IIC and the judicial authorities, and give particular attention to evidence which requires prompt recording and analysis for the investigation to be successful, such as the read-outs of flight recorder recordings. Possible conflicts regarding the custody of the flight recorders and their recordings may be resolved by an official of the judicial authority carrying the recordings to the place of read-out, thus maintaining custody.

2.2.6 The State of Registry, the State of the Operator, the State of Design, the State of Manufacture and other States concerned are entitled to appoint an accredited representative and advisers to participate in the investigation. Involvement in the investigation confers entitlement to participate in all aspects of the investigation, under the control of the IIC, in particular to, inter alia, examine the wreckage, obtain witness information and suggest areas of questioning, receive copies of all pertinent documents and participate in read-outs of recorded media. At the same time, accredited representatives and their advisers are expected to provide the State conducting the investigation with all relevant information available to them and must not divulge information on the progress and the findings of the investigation without the express consent of the State conducting the investigation.

2.2.7 A State which has a special interest in an accident by virtue of fatalities or serious injuries to its citizens is also entitled to appoint an expert who is entitled to visit the scene of the accident; to have access to the relevant factual information which is approved for public release by the State conducting the investigation, as well as to information on the progress of the investigation; and to receive a copy of the Final Report.

2.2.8 The State of Occurrence, responsible for instituting an investigation, may delegate the whole or any part of the conduct of such investigation to another State or a regional accident and incident investigation organization (RAIO) by mutual arrangement and consent. When the whole investigation is delegated to another State or an RAIO, such a State/organization is expected to be responsible for the conduct of the investigation, including the issuance of the Final

Report and the Accident/Incident Data Report (ADREP). When a part of the investigation is delegated, the State making the delegation usually retains the responsibility for the conduct of the investigation, which entails the protection of the records and issuance of the Final Report of the investigation. In any event, the State making the delegation must use every means to facilitate the investigation.

2.2.9 Detailed information on the organization, planning, procedures and reporting of an aircraft accident or incident investigation can be found in the *Manual of Aircraft Accident and Incident Investigation* (Doc 9756).

## 2.3 ACCIDENT INVESTIGATION AUTHORITY

2.3.1 The rights and responsibilities of the accident investigation authority are defined in appropriate legislation, which should include immediate and unrestricted access to all relevant evidence without requiring prior consent from judicial bodies or other authorities. Investigators should be aware that aircraft accidents may be subject not only to a technical investigation but also to some form of judicial, regulatory, administrative, and/or disciplinary inquiry. However, investigation procedures should not be constrained by these types of processes, and national legislation and regulations should specify the priorities and procedures to be followed in order to keep the technical investigation separate from judicial or administrative proceedings. The legislation must make it clear that accident prevention is the sole objective of the investigation and must emphasize that it is not the role of the accident investigation authority to apportion blame or liability.

2.3.2 Throughout the conduct of an investigation, the accident investigation authority must have independence and unrestricted authority over its conduct. In all cases, the State conducting the investigation must ensure the protection of the investigation records generated or obtained during its conduct.

2.3.3 An adequate legal framework should include provisions for the appropriate use and protection of the investigation records, including how to deal with public disclosure. The requirement to protect the investigation records is contained in Standard 5.12 of Annex 13. This Standard calls for States not to make available or allow the use of the records for purposes other than accident or incident investigation, unless the competent authority designated by that State determines that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations. States are also encouraged to determine the benefit of affording protection to any other records obtained or generated by the accident investigation authority, as a part of an investigation. Details on the records subject to protection are contained in Chapter 3 of this manual.

2.3.4 The records are included in the Final Report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records that are not relevant to the analysis are not disclosed. It is essential that information contained in sensitive records, which includes information given by persons interviewed during the investigation, is utilized only for safety purposes and not against them in subsequent disciplinary, civil, administrative and criminal proceedings. Otherwise, such individuals would, in the future, be reluctant to openly disclose information to investigators, which would impede the investigation process and adversely affect aviation safety.

2.3.5 The environment in which an accident investigation authority conducts its functions has specific challenges and has evolved over time. Multiple parties are involved with different interests and perspectives. The rising expectations from the families of accident victims, the media pressure and public expectations have impacted the role of accident investigation authorities around the world. Media outlets may share the news of aviation occurrences sometimes before the site of the accident has been properly secured. Parties involved in legal proceedings aimed at obtaining compensation for victims of accidents and/or their families increasingly look to accident investigators as witnesses or sources of information. Complexity of aircraft and aviation systems along with new business models and globalization in general have affected the investigation environment. This new environment has raised the need to craft and enhance the framework for the protection of accident and incident records with a view to usefully and realistically safeguard accident investigation authorities' access to critical evidence during an investigation.

## 2.4 TYPES OF RECORDS GENERATED OR OBTAINED DURING AN INVESTIGATION

2.4.1 During the course of an investigation, the accident investigation authority collects, records and analyses data to determine the causes and/or contributory factors and to develop its Final Report. The records that an investigation collects and produces includes, but are not limited to: accident particulars such as date, time, location, departure point, cruising altitude, destination and intermediate stops; weather reports; technical particulars such as aircraft operator's documentation associated with the aircraft, flight crew and the flight operation, weather reports, fuel samples, manufacturing and maintenance records, on-board data collection devices and flight recorders, radar records, laboratory analysis of aircraft components, air traffic services communication recordings, interviews with operational personnel, crew training records, duty and rest time records, medical records, aerodrome operator records, NOTAMs, etc. The protection of records only applies to those records that are sensitive in nature and that their use for purposes other than maintaining or improving safety may inhibit its future availability (see section 3, Chapter 3 for more details).

2.4.2 The table below includes a list of records that are sensitive in nature and considerations on why some of them may warrant protection. See section 3 for additional details on records subject to protection.

CVRs/AIRs and transcripts	Considered highly sensitive as they are ambient workplace recordings, perceived as constituting an invasion of privacy for operational personnel and their next of kin if disclosed or used for purposes other than the investigation of an accident or incident in the context of Annex 13. Further, these records are considered highly sensitive because they are critical to the investigation. The lack of operational personnel's trust on the protections in place for these records may result in unwillingness to freely communicate while conducting operations.
Statements	Considered a highly sensitive form of information because persons may have divulged the information to the accident/incident investigators with the expectation and/or commitment from the investigation authority that it would not be disclosed and used against them.
All communications between persons involved in the operation of an aircraft (e.g. dispatch)	Considered a highly sensitive form of information because communications may be inhibited, thereby affecting safety, if persons are concerned that what they say can/will be used against them.
Medical and private information	Considered sensitive because of the right to privacy and the need to protect personal and medical information so that individuals can access essential health and other services without fearing the information will be used against them. These records may be further protected by other national laws.
ATC communications — where publicly broadcasted	These records are not protected as they are broadcasted, thus, are publicly available. Generally there should be limits on getting such records from the accident investigation authority. If those records are available from another source, then they should be obtained from that source.
ATC — intrafacility	Considered highly sensitive as they are ambient workplace recordings perceived as constituting an invasion of privacy for operational personnel and their next of kin if disclosed or used for purposes other than those for which the recordings were made. The lack of operational personnel's trust on the protections in place for these records may result in unwillingness to freely communicate while conducting operations. States may consider applying similar levels of protection afforded to CVRs and AIRs.

Opinions and analysis generated by the accident investigation authority and accredited representatives in investigations	Investigations conducted in accordance with Annex 13 shall be separate from proceedings to apportion blame or liability. The use of the analysis, conclusions and safety recommendations generated through an investigation as evidence in these proceedings are against the purposes for which the investigation was undertaken. The protective framework set up does not prevent the use of factual information. Investigation personnel should not be compelled to give an opinion in proceedings aiming to apportion blame or liability to preserve the objective of the investigation. If the opinions and analysis of investigators are used in such proceedings, people involved in an accident may be less willing to cooperate with the investigation.
All information recorded in FDRs and ADRS	These types of records are not protected in the case of an investigation instituted within the context of Annex 13. However, these records may be considered sensitive in day-to-day operations, and therefore Annex 6 and Annex 19 provide provisions for the protection and use of such records.
Information exchanged among States or institutions during investigations	The information subject to exchange might include sensitive information protected in the State providing the information. Considered sensitive as States' relations may be damaged if the information is disclosed for purposes other than those agreed upon, or may not even be exchanged if the receiving State does not afford the same levels of protection granted by the State providing the information. It may also damage individuals and organizations referred to in the information.
Information provided by stakeholders involved in the investigation, including industry proprietary information	Considered sensitive as it may damage reputations and commercial confidence as well as result in undue financial damage. These records may be protected by other national laws (e.g. IP rights).
Information obtained using statutory powers of compulsion by the accident investigator (only when applicable, i.e. when enabled by existing legislation)	Considered highly sensitive as the information is obtained coercively and may be in contravention of other rights, e.g. the right not to self-incriminate.
Draft Final Report	Considered highly sensitive as the disclosure or use of these drafts can be misleading. Drafts are subject to change following the consultation process with States involved in the investigation. Furthermore, primary evidence used to develop the report can usually be obtained from the original source.
Final Report	The Final Report is publicly available in the interest of accident prevention and is not subject to protection under 5.12 of Annex 13. However, the use of portions of the Final Report, in particular the analysis, conclusions and safety recommendations, as evidence before courts with a view to apportioning blame or determining liability is against the purposes for which the investigation was undertaken. Further, accident/incident investigators may rely on hypotheses to render their conclusions and recommendations.

## 2.5 REPORTS

2.5.1 The Final Report of an investigation is the foundation for initiating the safety actions which are necessary to prevent recurrences that may arise from similar causes. The Final Report establishes in detail what happened, how it happened and why it happened. The findings, causes and/or contributing factors contained in the Final Report should lead to safety recommendations so that appropriate preventive measures can be taken.

2.5.2 The Final Report provides:

- a) a record of all the relevant facts;
- b) an analysis of the relevant facts;
- c) conclusions in the form of findings, causes and/or contributing factors; and
- d) safety recommendations.

2.5.3 Chapter 6 of Annex 13 contains provisions on the processing and publication of Final Reports as well as actions to be taken on safety recommendations, while Annex 13, Appendix 1 provides a format to be used in Final Reports. It is recognized that the Final Report format may be adapted to the circumstances of the accident or incident. The report should cover in detail all relevant aspects of the investigation.

2.5.4 States must not circulate, release or give access to a draft Final Report or any part thereof, or any other investigation documentation obtained during an investigation, without the express consent of the State which conducted the investigation, unless such reports or documents have already been published or released by that latter State.

2.5.5 The State conducting the investigation must make the Final Report publicly available in the shortest possible time and, if possible, within twelve months of the date of the occurrence. If the report cannot be made publicly available within twelve months, the State conducting the investigation must release an interim statement detailing the progress of the investigation and any safety issues raised.

2.5.6 The Final Report is publicly available in the interest of accident prevention and is not subject to protection under 5.12 of Annex 13. However, the use of portions of the Final Report, in particular the analysis, conclusions and safety recommendations, as evidence before courts is against the purposes for which the investigation was undertaken. Further, the accident investigation authorities sometimes have to rely on hypotheses to render their conclusions and recommendations, and these hypotheses cannot be considered as evidence in such proceedings. It must be stressed that the term “causal factors”, used in the context of some investigations, are quite different from legally significant causes in litigation. The protective framework set up for the investigation records does not prevent the use of factual information contained in Final Reports.

2.5.7 In order to limit the use of a Final Report for purposes other than the prevention of accidents and incidents, Appendix 3 of Annex 13 recommends that States consider the actions mentioned below. These actions will foster the independence of the accident investigation and the use of such report for the objectives for which it was created:

- a) instituting a separate investigation for those other purposes; or
- b) differentiating between the parts of the Final Report in order to allow the use of factual information contained therein while preventing the use of the analysis, conclusions and safety recommendations for apportioning blame or liability; or
- c) preventing the use of the Final Report as evidence in proceedings to apportion blame or liability.



2.5.8 Items a) and c) should be implemented through the enactment of relevant legislation. Examples of implementing legislation are contained in the section 3.7 of this manual. It has been observed that in certain jurisdictions, the adoption of legislation could have promoted the limited use of Final Reports in judicial proceedings with the aim of apportioning blame or liability (see *Rogers & Anor v Hoyle [2013] EWHC 1409 (QB)* available at:

[www.icao.int/safety/airnavigation/AIG/Database2Docs/Rogers%20v%20Hoyle%202013.pdf](http://www.icao.int/safety/airnavigation/AIG/Database2Docs/Rogers%20v%20Hoyle%202013.pdf).

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## **Chapter 3**

# **PROTECTION AND USE OF CERTAIN ACCIDENT AND INCIDENT INVESTIGATION RECORDS**

### **3.1 OBJECTIVE OF PROTECTING CERTAIN ACCIDENT AND INCIDENT INVESTIGATION RECORDS**

3.1.1 The objective of protecting certain accident and incident investigation records is to improve aviation safety by safeguarding accident investigation authorities' continued access to essential information during the course of an investigation; it is not aimed at restricting interested parties or the general public's access to information, nor to prevent the administration of justice.

3.1.2 It is recognized that disclosing or using certain records, which have been collected for the purpose of an investigation, for other purposes can have adverse consequences for the persons or organizations that have provided those records. The disclosure or use of records listed in Standard 5.12 of Annex 13 in criminal, civil, administrative or disciplinary proceedings, or their public disclosure, may therefore cause persons or organizations to refuse to provide information or be reluctant to cooperate with accident investigation authorities (see section 3.7 for more details).

3.1.3 The protection of investigation records attempts to ensure that, when their disclosure or use is sought for purposes other than aviation safety, the resulting impact on the prevention of accidents is balanced against other public interests at stake (see section 3.3 for more details).

3.1.4 In addition, and in agreement with Standard 5.12.5 of Annex 13, the public disclosure of highly sensitive accident and incident investigation records, such as audio content of cockpit voice recordings and image and audio content of airborne image recordings, must be prevented. The objective of preventing the public disclosure of those records is not only for safety enhancement but also to prevent privacy violation of persons involved and ensuring moral dignity (see section 3.5 for more details).

3.1.5 Decisions regarding the disclosure or use of the records and the application of a balancing test may be particularly complex and require special consideration when the circumstances of the event or the record(s) in question is/are in some way unique. Investigators routinely review a similar set of records during investigations, such as data, voice, and/or image recordings; training and medical records; maintenance records; engineering documents; and witness statements. Investigation authorities may therefore anticipate the need to protect certain sensitive records from public disclosure, while also recognizing the limits of their ability to protect them due to national practices such as the existence of generic freedom of information laws.

### **3.2 RECORDS SUBJECT TO PROTECTION**

3.2.1 Standard 5.12 of Annex 13 states that the following records shall not be made available for purposes other than accident or incident investigation, unless the competent authority designated by the State conducting the investigation determines, in accordance with national laws and subject to Appendix 2 and Standard 5.12.5 of Annex 13, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:

- a) cockpit voice recordings and airborne image recordings and any transcripts from such recordings; and
- b) records in the custody or control of the accident investigation authority being:
  - 1) all statements taken from persons by the accident investigation authority in the course of their investigation;
  - 2) all communications between persons having been involved in the operation of the aircraft;
  - 3) medical or private information regarding persons involved in the accident or incident;
  - 4) recordings and transcripts of recordings from air traffic control units;
  - 5) analysis of and opinions about information, including flight recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and
  - 6) the draft Final Report of an accident or incident investigation.

3.2.2 The requirement contained in Standard 5.12 of Annex 13 prioritizes the level of protection to those records that are more sensitive in nature. Cockpit voice recorder (CVR) recordings and airborne image recorder (AIR) recordings and any transcripts from such recordings are subject to protection from the time an accident or incident occurs regardless of who has custody of the recordings or transcripts. For other records listed in 5.12, protections are afforded only when they are in the custody or control of the accident investigation authority. This differentiation recognizes that other legitimate forms of investigation may need to access information concerning the records, notably from the original source. It is noted that the disclosure or use of a draft Final Report can be misleading because they are not finalized documents and are subject to change following the consultation process with States involved in the investigation.

3.2.3 States are encouraged to determine whether any other records obtained or generated by the accident investigation authority, as a part of an accident or incident investigation, need to be protected in the same way as the records listed in 3.2.1 above.

3.2.4 As mentioned above, the level of protection given to records listed in Standard 5.12 diverges depending on the nature of the record. When an investigation has been instituted in accordance with Annex 13, the disclosure or use of cockpit voice recordings and airborne image recordings and any transcripts from such recordings is subject to the administration of the balancing test. This requirement applies from the time an accident or incident occurs and continues after the publication of the Final Report. It applies to the entire recording of the CVR and AIR. Furthermore, it is applicable in any situation, whether the records are in the custody or control of the accident investigation authority or of any other entity.

3.2.5 In addition, and in accordance with Standard 5.12.5 of Annex 13, audio content of cockpit voice recordings and image and audio content of airborne image recordings are prevented from disclosure to the public. This is not applicable to transcripts of cockpit voice recordings and written descriptions of the content of airborne image recordings which may be included in the Final Report when pertinent to the analysis of the accident or incident.

### 3.3 SCOPE, LEVELS AND LIMITS OF PROTECTION AND USE OF THE RECORDS

#### Balancing Test — General

3.3.1 The preservation of investigation records for investigation purposes is a public interest which is the improvement or maintenance of aviation safety. Aviation safety is directly related to the “good order and functioning of the community and government affairs for the well-being of citizens”. Safety in air transportation is essential for people within States and across the world to connect and for the stability and growth of the global economy. In order to enhance aviation safety, it is necessary to learn from accidents and incidents when they occur. To identify all safety issues from which lessons can be learnt, the accident investigator requires access to as much critical safety information as possible. Anything that compromises this access is likely to compromise aviation safety.

3.3.2 While Annex 13 recognizes the preservation of these records as part of the public interest in aviation safety, this Annex also acknowledges the potential for the investigation records to be sought for other purposes. To this end, Standard 5.12 of Annex 13 places a limitation on the disclosure and use of investigation records for purposes other than an investigation conducted by the accident investigation authority. The limitation is only lifted if the competent authority determines, in accordance with national laws, that the purpose of the proposed disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations through a *balancing test*.

3.3.3 The balancing test requires that the factors in favour of providing the investigation record for purposes other than an investigation need to be weighed against the factors in favour of retaining the protections for the record and not allowing it to be disclosed or used for the stated purpose. The other purposes for which a record might be sought are not specified and may be diverse. A judicial authority might want an air traffic control recording as evidence in a case, the next of kin might want to listen to the cockpit voice recording, or the regulator might want a witness statement to inform a safety audit process. A record could be of interest to an array of different people and organizations.

3.3.4 This part of the manual focuses on explaining how the balancing test works where the purpose proposed for the disclosure or use of the record is a public interest. The reason for this approach is that the need to protect records for investigation purposes is identified as a contributor to the public interest of aviation safety. Internationally, a high standard has been set for the protection of investigation records clearly recognizing this protection as a public interest for the enhancement of safety.

3.3.5 Other interests recognized by a State might include public interests in the administration of justice, security, defence and public health, upholding international obligations and recognized rights of access to government information; or even private interests such as commercial interests including protecting trade secrets. The list of public interests is not closed. To be a public interest, the considerations associated with it need to be generally common to all members of, or a substantial segment of, the community, as distinct from matters that concern private or personal interests. However, some public interest considerations can apply for the benefit of an individual (for example, the right of an individual to access information under Freedom of Information laws where they exist).

3.3.6 While there are a range of potential public interests that may be involved in the use of the balancing test, this manual addresses three public interests that most commonly challenge the disclosure and use of records for purposes other than accident or incident investigations:

- a) the administration of justice;
- b) access to government information; and
- c) regulation of aviation safety.

3.3.7 After an accident or incident there may be prosecutions, litigation, administrative and disciplinary proceedings that may solicit access to the records for justice, regulatory and disciplinary purposes. The public will be concerned to know how the accident or incident happened, and the media and private individuals may seek access to information to assure themselves that the occurrence is properly understood. The regulator may need to become involved in the management of safety risks through surveillance or enforcement actions, and seek access to information for these purposes. The relevance of these different public interests is expanded upon further in this part of the manual.

3.3.8 The prima facie position in Standard 5.12 of Annex 13 is that the investigation records must not be disclosed or used for purposes other than investigations. However, where another recognized public interest demands that consideration be given to whether or not a record should be disclosed or used for purposes associated with that public interest, Standard 5.12 sets out a decision-making framework. The public interest in aviation safety, through accident and incident investigation, must be weighed against the other public interest requiring the disclosure or use of the investigation record.

3.3.9 Before elaborating further on what needs to be taken into account in the balancing test, it is necessary to give attention to the designation of a competent authority, who is the body in charge of administering the balancing test.

### **Designation of a Competent Authority**

3.3.10 Section 3 of Appendix 2 to Annex 13 states that “In accordance with Standard 5.12, each State shall designate a competent authority or competent authorities appropriate to the task of administering the balancing test.”

3.3.11 There are two matters to be considered under this provision. The first involves whether more than one competent authority can be designated. It is acknowledged that the balancing test may need to be administered for a range of different purposes with respect to the disclosure and use of investigation records in Standard 5.12 and that the “competent authority” may not be the same for every purpose. The second matter involves how the State designates a competent authority to the task of administering the balancing test.

3.3.12 Addressing the first issue, it is likely that a State will need to appoint more than one competent authority to facilitate the use of the balancing test in the range of different contexts which Standard 5.12 contemplates. For example, in cases where disclosure or use of a record is sought by the media pursuant to a freedom of information or “sunshine” law, an administrative body may be considered an appropriate authority. Alternatively, if the proposed disclosure or use of the record is sought for the administration of justice or if the question of the disclosure or use of the record in itself becomes the subject of litigation brought under the same freedom of information or “sunshine” law, then a court could be the competent authority to administer the balancing test. Similarly, if the purpose of the disclosure or use is for safety action to be taken by the regulator, then the balancing test may be administered by the accident investigation authority having custody or control of the record.<sup>1</sup> The determination of the competent authority for each specific purpose remains at the discretion of each State, depending on their specifications and national context.

3.3.13 Competent authorities other than the courts should be considered for appropriate contexts; otherwise, the courts could be overburdened. Most States already have laws which designate administrative bodies other than the courts for the purpose of making decisions about the disclosure and use of government information. Often the government agency which has custody or control of certain information will have a role to play in the decision-making process if it is not the decision-maker itself. This was taken into consideration in the new protective framework for investigation records which calls for accident investigation authorities to retain, where possible, only copies of records,

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1. It is important that the accident investigation authority be independent (Standard 3.2 in Annex 13, refers) to administer the balancing test if the purpose of the disclosure or use is for safety action to be taken by the regulator. If the accident investigation authority is not independent from the regulator, a conflict of interest might exist or be perceived during the administration of the balancing test in this case.

so that the original could remain available from the source. This is intended to facilitate direct requests for information to the original source.

3.3.14 It is acknowledged that in most States, judicial authorities will often be seen as appropriate to the task of administering the balancing test where matters concerning the administration of justice are concerned. There may be risks with interfering in the role of the judicial authorities by handing the decision-making power to an administrative body. However, that does not mean the power should always be vested in the courts. Some States enact legislation that determines access to evidence in courts, and administrative bodies may have a role to play in withholding national security information. While dependent on national laws, an administrative body could have a role to play in deciding whether or not records could be disclosed to or used by a judicial authority. It is important that the entity entrusted be the one best able to consider the factors to be weighed in the balancing test which are associated with the administration of justice.

3.3.15 In all contexts, the entity designated as the competent authority will need to be capable of balancing the competing interests in the balancing test. One of these interests will always be the preservation of the protection of the record for investigation purposes and the continued access of vital information to investigators. The other interests will depend on the context of the proposed disclosure or use of the record. The competent authority will need to be experienced enough in the competing interests (freedom of information, regulation of aviation safety, etc.) or have available to it the relevant expertise in order for the public to have confidence in its decision-making capabilities.

3.3.16 States should designate competent authorities appropriate to the task of administering the balancing test for the different purposes that may come under consideration. Permanent designation will allow expediency in the decision-making process. There will also be certainty in the competent authority's standing and ability to deal with the matter with the competent authority gaining more experience. It is critical that the competent authority have in place rules and processes governing the decision-making process. These rules and processes should flow from national laws. This can only be achieved if the designation of the competent authority in a particular area remains constant.

3.3.17 There are States where the competent authority for one or several purposes will be the legislator. In such cases, the balancing test will be administered by the competent authority, i.e. the legislator, during the legislation or rule-making process and as part of the *travaux préparatoires* (preparatory works). As such, the administration of the balancing test can be done once for a certain category of records and the result incorporated into national laws and regulations.

3.3.18 The material set out below provides guidance to States that are developing national laws, rules (regulations and policies) and processes for a competent authority to administer the balancing test. A number of States already are familiar with the balancing test and have in place frameworks for its conduct. Nonetheless, the guidance on the steps to give effect to the different elements of the balancing test (as set out in Standard 5.12 of Annex 13 and Appendix 2) may assist with reviewing the existing approach. The guidance is also intended to facilitate the progress of States towards a uniform understanding and approach about the way in which the balancing test is applied.

### Administration of the balancing test

#### Step 1 — Identify the competing public interest

3.3.19 In order to administer the balancing test, it is first necessary to identify the proposed purpose of the disclosure or use of the investigation record, which may constitute the competing public interest. It could be to meet a public interest associated with the administration of justice, such as a court proceeding between two parties involved in the accident or incident. It could be associated with a recognized right to access information such as under a Freedom of Information law. It could be for another aviation safety purpose, as in an administrative safety action being taken by the regulator.

3.3.20 The purpose for which the investigation record is proposed to be disclosed or used needs to be contextualized as representing a particular interest in order to be able to identify the appropriate competent authority to conduct the balancing test. Depending on the matter to be decided, national laws should determine the competent authority to make the determination.

## **Step 2 — Confirm the status of the record**

3.3.21 Standard 5.12 of Annex 13 does not protect every record associated with an accident or incident investigation. So, there is a need to confirm the status of the record to determine its level of protection. For instance, CVRs and AIRs recordings as well as their transcripts, contemplated in Standard 5.12, a), are protected no matter who has possession of the recording or transcript. The protection afforded to CVRs and AIRs is based on the fact that these records are extremely sensitive and critical for the investigation. In fact, these types of recordings were installed on-board originally for accident and incident investigation purposes. The recordings usually contain some of the most critical information which help investigators understand how an accident or incident occurred. Any action that jeopardizes the future availability of this information jeopardizes aviation safety.

3.3.22 The records in Standard 5.12, b) are treated differently and the protections only apply when these records are in the custody or control of the accident investigation authority.

## **Step 3 — Directing to the original source**

3.3.23 Standard 5.12.4 of Annex 13 provides that “States shall ensure that requests for records in the custody or control of the accident investigation authority are directed to the original source of the information, where available.”

3.3.24 The purpose of this Standard is to preserve the independence of the investigation as well as prevent or limit the potential for the investigation to become associated with blame or liability proceedings (which are not the purpose of Annex 13-type investigations). Acknowledging that Standard 5.12, b) limits protections for records so that they only apply when the records are in the custody or control of the accident investigation authority, other forms of investigation should be able to obtain the same records from the original source without concerns about the Standard 5.12 protections. These other forms of investigation should be directed to the original source of the record in the first instance. If they can obtain the record from the original source, there would be no need to involve the accident investigation authority.

### *Custody or control of the records by the accident investigation authority*

3.3.25 Standard 5.12, b) affords protection for certain records when they are in the custody or control of the accident investigation authority. In this context, “custody” means that the record is actually in the physical possession of the accident investigation authority. “Control” means that the accident investigation authority has power over the record in order to be able to take physical possession of it (e.g. the accident investigation authority obtained or created the record but has an expert contractor inspecting it for the purpose of the investigation).

3.3.26 The custody or control of records by the accident investigation authority during the course of investigations may be detailed in procedures and policies. Further, these procedures and policies should contemplate that requests can be directed to the original source of the information. When the investigator only retains copies of records (in accordance with recommendation 5.12.4.1), it means that the original record will still be available from the original source for purposes other than the accident and incident investigation. For example, medical records of persons involved in an accident or incident should still be available from the person's doctor, and air traffic control recordings should still be available from the air traffic control provider.



*Information available from another source*

3.3.27 If the information required from the investigation record can be obtained from sources other than the record, the competent authority might decide against allowing access to the record until all alternative avenues to acquire the information have been exhausted. Other avenues for information might exist for witness statements if another organization has conducted an investigation. Similarly, analysis and opinions might be available from other investigations or through experts conducting their own tests. The accident investigation authority is unlikely to be the sole organization through which information about the accident can be acquired.

3.3.28 Likewise, Standard 5.12.4 of Annex 13, mentioned above, recognizes that the original source of the information in the investigation record may still exist.

**Step 4 — Determining that there is a material fact in question**

3.3.29 If the public interest identified in Step 1 relates to the administration of justice, then 4.1 of Appendix 2 would likely apply: “Where the request is for a record to be disclosed or used in a criminal, civil, administrative or disciplinary proceedings, the competent authority shall be satisfied that a material fact in question in the proceedings cannot be determined without that record, before administering the balancing test.”

3.3.30 As regards the term “material fact in question”, the Note to 4.1 provides that “***A material fact in question is a legal term used to refer to a fact that is significant or essential to the matter at hand; that one party alleges and that the other controverts; and is to be determined by the competent authority administering the balancing test.***”

3.3.31 *A material fact in question* is a fact that is crucial to the determination of the issue at hand. To consider whether or not a record should be disclosed for a criminal, civil or administrative or disciplinary proceeding, the competent authority must be satisfied that the content of the record is required to decide a material fact in question in the proceeding. If an adjudicative fact can be established without referring to the investigation record (for example, if the fact is stipulated to by the parties to the proceeding or settled by judicial notice), then the competent authority must give the greatest weight to preserving the protection of the record for investigation purposes only. There is little impetus to allow for a process that may prejudice the investigation when the significant fact or facts in the proceedings can be established without the investigation record.

3.3.32 This material fact requirement recognizes the adverse consequences that might flow from the disclosure or use of the content of records for purposes other than accident or incident investigation, such as the refusal of aviation operational personnel to willingly cooperate with investigators. If the fact in question is peripheral, such that there is no connection between the contents of the record and a material fact at issue in the proceedings, and thus determining the existence of the fact will not affect the outcome, then current and future investigations should not be jeopardized by making the investigation record available.

3.3.33 The extent to which an investigation record will assist the fact-finder in deciding a material fact in question in a criminal, civil, administrative or disciplinary proceeding is to be addressed as a factor in conducting the balancing test.

**Step 5 — Application of the balancing test**

3.3.34 If the competent authority has determined that there is a competing public interest for the use or release of the investigation record, which needs to be weighed against the public interest in protecting the record, then the competent authority will proceed to apply the balancing test in Standard 5.12. In order to determine whether to allow the disclosure or use of the subject investigation record for purposes other than accident or incident investigation, the competent authority must identify and weigh the competing considerations raised by the particular circumstances of the case.

3.3.35 Without limiting the competent authority's considerations, Appendix 2 to Annex 13, 4.2, sets out a number of factors to be taken into account, as follows:

- a) the purpose for which the record was created or generated;
- b) the requester's intended use of that record;
- c) whether the rights or interests of a person or organization will be adversely affected by the disclosure or use of that record;
- d) whether the person or organization to whom that record relates has consented to make that record available;
- e) whether suitable safeguards are in place to limit the further disclosure or use of that record;
- f) whether that record has been or can be de-identified, summarized or aggregated;
- g) whether there is an urgent need to access that record to prevent a serious risk to health or life;
- h) whether that record is of a sensitive or restrictive nature; and
- i) whether that record reasonably indicates that the accident or incident may have been caused by an act or omission considered, in accordance with national laws and regulations, to be gross negligence, wilful misconduct, or done with criminal intent.

3.3.36 Depending on the circumstances, the above factors can assist the competent authority in applying the balancing test. However, not all the factors are relevant in every situation and there may be other factors that need to be taken into account. The competent authority will need to identify all the relevant factors associated with the matter at hand and weigh them. The guidance set out below is intended to assist the competent authority, even in cases where such authority is judicial or administrative which may be familiar with the process of balancing competing public interests. The guidance addresses some particulars relevant to the application of the balancing test in Standard 5.12 and the supporting material in Part 4 of Appendix 2 to Annex 13.

3.3.37 To apply the balancing test referred in Standard 5.12, it is recommended that the competent authority follow this process:

#### **A — Identify the factors advocated for the disclosure or use of the investigation record for purposes other than the investigation**

3.3.37.1 There can be many factors which may be advocated for the disclosure or use of an investigation record for purposes other than investigations. If the proposed disclosure or use relates to the "administration of justice", then the factors raised might involve the "right to a fair trial" and the "public's confidence in the judicial system". The extent to which these factors would be affected one way or another by the disclosure or use of the record in the judicial proceeding will depend on how critical the record is as evidence in the proceedings. Paragraph 4.1 of Appendix 2 already requires a judgement to be made about this by asking the competent authority to consider the extent to which the records would assist with determining a material fact in question.

3.3.37.2 Where the public disclosure or use relates to a public interest connected with Freedom of Information laws, the factors involved might relate to transparency and openness in government. In an aviation safety context, another factor to consider might be the public's concern to understand any safety issues that might affect them as participants in the industry or as travellers.

3.3.37.3 It is likely that requests will be made for investigation records to be disclosed or used by the regulator to facilitate a safety action. The public interest involved in these circumstances will relate to maintaining or improving safety. The competent authority will need to understand how safety will be impacted with and without the investigation record being made available to make its determination.

3.3.37.4 There may be requests for investigation records where there are no substantive factors to justify the release of the information. Public curiosity is an example. Public curiosity about information contained in an investigation record generally does not justify its release. A fascination with seeing what is in a witness statement does not establish a right to the information. It is difficult to state that the disclosure or use of the investigation record in this context is for the “good order and functioning of the community and government affairs for the well-being of its citizens”.

## **B — Set out the factors favouring protection of the investigation record**

3.3.37.5 The factors favouring retaining the protection applicable to the investigation record can be derived from examining Standard 5.12. This Standard denotes that the purpose of the protection is to prevent the likely adverse domestic and international impact that disclosure or use for purposes other than accident or incident investigation may have on the investigation to which the record relates or any future investigations.

3.3.37.6 Based on the circumstances, the competent authority will need to set out the factors that could result in an adverse impact on the current investigation or future investigations. An important factor to be taken into account is the potential for the disclosure or use of the investigation record to result in a failure of persons to cooperate with the current or future investigations. The question to be asked is, “Is there a reasonable possibility of safety information becoming unavailable?”

3.3.37.7 The ICAO Assembly has stated that “the protection of certain accident and incident records from inappropriate use is essential to ensure the continued availability of all relevant information to accident investigators in future investigations;” and “that the use of information, derived from accident investigations, for disciplinary, civil, administrative and criminal proceedings is generally not a means to maintain or improve aviation safety”<sup>2</sup>. Furthermore, the Note to Standard 5.12.2 of Annex 13 clarifies that “The disclosure or use of such information for purposes where the disclosure or use is not necessary in the interest of safety may mean that, in the future, the information will no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect aviation safety.”

3.3.37.8 The competent authority may be able to refer to precedents that demonstrate the adverse impact the disclosure or use of an investigation record has had on investigations in the past. The competent authority may also be able to refer to statements from persons involved in the industry about their concerns if an investigation record is used for purposes other than the investigation.

3.3.37.9 Principally, the competent authority needs to be able to form a view about how the disclosure or use of the investigation record might impact cooperation with investigations. If the proposed purpose of the disclosure is for civil, criminal, administrative or disciplinary proceedings, then the person who is the original source or person to whom the investigation record relates may fear the record being used against them. The competent authority needs to consider the extent to which these people and others may not readily provide assistance in accident and incident investigations consequent upon such disclosure.

3.3.37.10 Similarly, if the proposed purpose of the disclosure or use of the investigation record is to publish the information, the competent authority should consider the potential detriment to anyone. Detriment may be contextualized in a number of forms, including embarrassment and loss of livelihood resulting from the information being made publicly

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2. ICAO Assembly Resolution A38-3: Protection of certain accident and incident records.

available. If aviation operational personnel or other persons involved are fearful that their interests might be prejudiced in this manner, then it is conceivable that they, and people in a similar class, will be concerned about the record being made available to the accident investigation authority.

3.3.37.11 If the proposed disclosure or use of an investigation record is for the purposes of the regulator, in respect of aviation safety, there may still be factors to consider related to potential adverse impacts on current and future investigations. The purpose of the disclosure may be for safety purposes. However, such disclosure may still have an adverse impact on investigations if the safety outcomes involve action that may be perceived as detrimental to the persons who are the subject of the action. People and organizations may be concerned about suspension or revocation of authorizations and licences.

3.3.37.12 The fact that organizations or people involved in an accident or incident might be concerned about action taken against them by the regulator does not mean the action is not in the interests of safety. In that case, there are two aspects of the same public interest which are competing. A safety action may be required in order to address an unacceptable risk; that an organization or person may have concerns about the action must still be taken into account in the administration of the balancing test, if it is proposed to disclose the record for the purpose of the regulator taking the action. The balancing test becomes a process of weighing two safety interests against each other. Where the issue is balancing safety outcomes from investigations against safety outcomes from regulatory processes, consideration should be given to the long-term needs of both processes and the necessity of enacting an immediate safety outcome. Given that the outcome – safety – is the same, the conduct of the balancing test might be a difficult exercise. There may be no simple answer and each case must stand on its own merits.

### **C — Assess the weight of the competing factors and decide whether the proposed purpose of the disclosure or use outweighs the interest in retaining Standard 5.12 protections for the investigation records**

3.3.37.13 Having identified the factors for or against the public interest advocated for the proposed disclosure or use of the record, and for or against the public interest in non-disclosure of the record, the competent authority must weigh the factors on both sides to determine which interest is to prevail. If the factors associated with the public interest in non-disclosure of the record are considered to carry more weight, then the protections in Standard 5.12 must be preserved. The record should only be disclosed or used for purposes other than accident and incident investigation when the factors associated with the public interest for disclosure carry more weight.

3.3.37.14 There is no easy formula for deciding which interest will be stronger in any particular case. Each case needs to be carefully considered on its merits. Different circumstances will require different weightings to be given to similar factors. The issue of how critical an investigation record is when deciding a material fact in question in a criminal, civil administrative or disciplinary proceeding is an example. If the investigation record does not assist with deciding a material fact in question, it lends little weight to a case for the disclosure or use of the record in the proceedings. Alternatively, if the record is relevant to the determination of a material fact in question, and the proceeding also concerns a serious matter, the expectation might be that a strong case would need to be made to withhold the record. The competent authority might require a substantive argument to be made that there will be adverse impacts on current and future investigations, likely to result in risks to safety.

3.3.37.15 Similarly, if a competent authority is asked to decide whether a record should be disclosed to the public, perhaps via a request from the media, the competent authority would most likely want to know how important it is that the public knows the contents of the record. For instance, the competent authority might ask a question like, “without knowing the contents of the record, would the public have a proper understanding of the occurrence, or would the event have safety consequences for the travelling public?” Being able to substantiate a view that the public’s knowledge would be compromised without access to the record might give weight to an argument for the record’s disclosure. However, the record would not have to be disclosed just because these grounds were established. If the disclosure of the record would seriously compromise an investigation currently being undertaken, or would likely discourage witnesses to future occurrences from being forthcoming with information, the decision may not necessarily be in favour of disclosure.

3.3.37.16 When the competent authority has to decide whether to allow a regulator access to a record, the competent authority should consider if a case can be made that a serious risk to aviation safety will arise without the regulator accessing the record. However, before deciding in favour of allowing the regulator to access the record, the competent authority will need to inform itself of how sensitive the record is in the context of the investigation. The competent authority will further need to understand the repercussions for persons or organizations who are the subject of the record and how such persons and organizations might cooperate with accident investigation authorities in the future if they knew similar records could be disclosed to the regulator.

### **Effect of certain factors in the administration of the balancing test**

#### *Awareness and consent*

3.3.37.17 Paragraph 4.2 of Appendix 2 lists potential factors that could affect the weightings to be applied during the administration of the balancing test. There is likely to be little risk of adverse effects on current and future investigations if all persons to whom the record relates have consented to its disclosure or use for purposes other than investigations. The opportunity to seek consent can be present at a number of different stages during the investigation process. Consent can be sought at the time the record is made or when the need arises to make a decision about the disclosure or use of the record for purposes other than investigations.

3.3.37.18 Ensuring a person is aware, before the record is created, of the purposes for which it may be disclosed might be a similar factor that the competent authority should take into account in its decision-making. A person being “aware” will not be given the same weight as the person giving their “consent”, but it is a factor that might help the competent authority assess the extent to which persons would object to the disclosure or use of the record for purposes other than investigations.

3.3.37.19 Conversely, if a person has been given assurances of confidentiality and then the record is disclosed in a manner that conflicts with those assurances, it is foreseeable that there will be adverse impacts on current and future investigations. Persons and organizations involved in accidents and incidents are likely to be less trusting of the investigators and less forthcoming with information. It is important that investigators accurately inform persons and organizations involved in the investigation process as to how records can be disclosed and used in order to avoid acting in conflict with expectations.

#### *Threats to health or life*

3.3.37.20 The competent authority may give greater weight to factors in favour of disclosure or use of the record for purposes other than accident and incident investigations where the purpose of the disclosure is to lessen or prevent threats to the life or health of a person. However, in apportioning such weight in favour of the disclosure or use, the competent authority should be reasonably assured that the record is going to be necessary to achieve this outcome. There is a risk involved in the decisions in which the competent authority is called on to make a determination based on an anticipated outcome that may not eventuate.

#### *Safeguards for protection, confidentiality and de-identification*

3.3.37.21 Paragraph 4.2 of Appendix 2 does include some factors that may mitigate the negative consequences associated with the disclosure or use of records for purposes other than investigations. It might be possible to limit any potential damage from the proposed disclosure or use by putting in place safeguards to further limit the disclosure or use of the record. A State may include in its national legislation, under which the balancing test is administered, the power for the competent authority to impose requirements for the record to be kept confidential following a decision to allow access.

3.3.37.22 States, and accident investigation authorities in particular, may also establish legislation, regulations, policies and procedures for the handling of typical investigation records. For example, investigations of accidents and incidents involving transport category aircraft routinely include cockpit voice recordings that are widely recognized as being particularly sensitive. States may, therefore, establish national laws that restrict the release and/or use of those recordings for purposes other than investigations. Similarly, many States have national laws and regulations pertaining to the handling of privacy, medical or proprietary information in recognition of the potential damages caused by the release of those records. In these States, the equivalent of a balancing test has effectively been conducted and the results have been incorporated into national laws and regulations to establish the State's approach to future situations involving the protection or release of such information.

3.3.37.23 De-identification of the record is another safeguard that may be used before the record is disclosed or used for purposes other than investigations. However, de-identification may be difficult given that people involved in an accident or incident may be well known, particularly in a State with a limited aviation community, and depending on the profile of the occurrence. In such cases, the forum in which the record is proposed to be disclosed or used, and the nature of the information, would be of utmost importance.

3.3.37.24 If the record is proposed to be disclosed or used in a forum where knowledge of the persons connected to the record is limited, then the competent authority might be confident that de-identification of the record would safeguard the identities of the sources of the record. Similarly, if the nature of the information is primarily technical, then there may not be much identifying information in the record that needs to be removed, making the task more easily achievable. The competent authority should also consider whether the forum of the proposed disclosure or use of the record and the nature of the information contained in the record, will affect the degree to which the source of the information in the record can be identified, and whether removing identifying information would be enough. If the proposed disclosure or use may adversely affect a company or organization, such as an aircraft operator, then the competent authority should decide whether de-identification of the record would provide reasonable protection which the company or operator would have obtained if the disclosure or use had not been allowed.

3.3.37.25 If the competent authority considers that the de-identification of the records may prevent the intended use of a record, the de-identification would not be possible. Therefore, States may opt to implement different safeguards to allow limited disclosure for a specific purpose and prevent wider use or public disclosure of the records. Protective orders, closed proceedings, in-camera review and summaries are examples of such safeguards.

3.3.37.26 Accident investigation authorities may also adopt best practices such as ensuring that the environment in which information is collected, stored, processed, and transmitted is sufficiently secure, and that controls over access and authorization are sufficient to protect the records. Investigators may limit collection of sensitive records to only those required to the investigation, and retain records only as long as necessary to fulfill the purposes for which they were collected. In accordance with 5.12.4.1 of Annex 13, investigators should retain only copies of investigation records so that the original record(s) remain(s) available from the original source for purposes other than investigations if subsequently required, or if the results of a balancing test warrant subsequent release of those records by a different competent authority. In that way, the accident investigation authority is neither a convenient source for the disclosure of investigation records nor an obstruction to other potential public interests.

## **Step 6 — Record the decision**

3.3.38 Section 5 of Appendix 2 to Annex 13 includes the following recommendation: "The competent authority should record the reasons for its determination when administering the balancing test. The reasons should be made available and referred to as necessary for subsequent decisions."

3.3.39 This recommendation advocates the recording of decisions made in accordance with Standard 5.12 of Annex 13 so that the decision may form part of a series of precedents, which can be used to guide the competent authority in future decision-making processes with an analogous set of facts. Reliance upon precedent provides predictability.

3.3.40 A reasonable level of predictability is important where the disclosure or use of information is subject to the administration of a balancing test. When a record is created, the people and organizations associated with the record will need to understand how the record could be disclosed and used after its creation. If they are uncertain, they may be hesitant about fully cooperating in its creation.

3.3.41 A greater level of certainty about how records will be disclosed and used will assist the accident investigation authority to work with people and organizations affected by accidents and incidents and to provide them with assurances. These assurances are necessary if the accident investigation authority is to promote an atmosphere of trust and cooperation in the investigation process.

3.3.42 In a number of States, where the competent authority administering the balancing test in accordance with Standard 5.12 of Annex 13 is a judicial authority, it is likely that the authority will be familiar with the concept of a precedent and have a series of legal rules that form the basis for establishing one and using it as a reference. Competent authorities who are not familiar with the process of recording decisions in order to establish precedents, may benefit from developing processes and guidelines for doing so. The processes and guidelines should include the circumstances in which precedents would be referenced.

#### *Benefits of recording decisions*

3.3.43 Apart from the value of providing documentation referenced for a precedent, the benefits for competent authorities to record the reasons of their decisions are as follows:

- Recording reasons of a decision helps with making and enhancing the operation of the decision. An obligation to give reasons imposes a discipline on the decision-maker to address the task with intellectual rigour. It is likely that decision-makers who understand that they may be called upon to explain their decision, will make a better decision than decision-makers who do not have this understanding.
- Reasons benefit the people affected by the decision. The decision needs to be based on reason and that can only be seen if the decision-maker states its reasons. A person affected by a decision, even if the decision is unfavourable, is likely to have much greater confidence that the decision was made fairly and properly if the reasons are recorded.
- Reasons enable the question to be asked as to whether there was any error in the decision, including whether certain factors should have been accounted for or not. Reasons can facilitate a review if one is necessary. Often, decisions as to whether or not investigation records should be disclosed have significant consequences; it is imperative that assurances are given that the correct decision has been made.
- Recording the decisions also promotes consistency, transparency and standardization at national and global levels. The access to these documents will facilitate authorities to analyse cases decided by other authorities in different States. This will likely foster a homogeneous implementation of the protective framework for the investigation records.

#### *Draft the reasons in clear and unambiguous language before the decision is finalized*

3.3.44 As a matter of practice, the reasons given in a record of a decision should be stated in clear and unambiguous language. The competent authority should explain the reasons in terms that can be readily understood. Where possible, reasons should also be drafted prior to the decision being made. If reasons are drafted after a decision is made, it becomes too easy to draft them in a manner to suit the final decision rather than to accurately reflect the factors that were taken into consideration in the decision-making process.

### Submission to ICAO

3.3.45 The note to the recommendation in section 5 of Appendix 2 to Annex 13 encourages States to submit records of decisions to ICAO in one of the working languages of the Organization to be archived in a public database. The value in having a central repository for the decisions taken internationally is to enable a more comprehensive understanding of how difficult decisions were handled and the factors taken into consideration. It affords the opportunity to develop some international consistency in the administration of the balancing test, which is important given the global nature of the aviation industry. Participants in the industry work within a number of different jurisdictions. They will make the transition between jurisdictions more easily where there is standardization.

3.3.46 Understandably, the full record of a decision may not always be available to be shared. It is acknowledged that there may be sensitivities and that providing the full record of every decision might expose the content of a record which is meant to be protected from disclosure. However, there will be certain decisions where a public record of the decisions is available, including judicial decisions in many States. The international community would benefit from these decisions being consolidated.

3.3.47 A collection of decisions dealing with the protection, use and disclosure of information can be accessed at [www.icao.int/safety/airnavigation/AIG/Pages/Database.aspx](http://www.icao.int/safety/airnavigation/AIG/Pages/Database.aspx).

## 3.4 EXCHANGE OF RECORDS BETWEEN ACCIDENT INVESTIGATION AUTHORITIES

3.4.1 States affected by an accident or incident investigation, such as the State of Registry, the State of the Operator, the State of Design or the State of Manufacture, have international duties in accordance with Annex 6, Annex 8 — *Airworthiness of Aircraft* and Annex 13. In order to fulfill these duties, they need access to the investigation records. The State responsible for conducting the investigation is therefore obligated to provide the accredited representative(s) from the other State(s) access to all available material, as cited in Standard 5.25 of Annex 13. Those accredited representatives and their advisers are likewise obligated by Standard 5.26 of Annex 13 to provide the State conducting the investigation with all relevant information available to them. Further, accredited representatives and their advisers must not release any information about the progress and findings of the investigation without the express consent of the State conducting the investigation. Chapter 6 of Annex 13 includes a similar obligation for the State conducting an investigation to circulate the draft Final Report to participating States for review and comments, and likewise prohibits States from releasing draft Final Reports or any documents obtained during an investigation without the express consent of the State which conducted the investigation.

3.4.2 The provisions in Annex 13 were crafted in recognition of, and with a desire to accommodate, different legal systems, protection methodologies and diverging States' practices in implementing effective protection of investigation records. Standard 5.12 and Appendix 2, by defining key principles applicable to the protection of certain accident and incident investigation records, aim to ensure a harmonized framework across the States and therefore facilitate the exchange of information between States. However, these differences may pose a challenge to the free exchange of information when the national laws and regulations of States affected by an accident or incident investigation do not provide similar protections for investigation records. For example, one State's Freedom of Information laws requiring release of certain records may conflict with another State's national laws or regulations prohibiting release of those same records. In recognition of these potential conflicts, *Recommendation 5.14.1 of Annex 13* provides that: *States should cooperate to determine the limitations on disclosure or use that will apply to information before it is exchanged between them for the purposes of an accident or incident investigation.*

3.4.3 In general, States that receive investigation records from other States should manage those records according to their sensitive nature or proprietary status, within the bounds of the protections afforded by the State(s) providing those records. However, recognizing that this may not always be practical or possible, it may be necessary to establish additional procedures for the sharing of information between States. For example, a State may elect to review de-identified, summarized or aggregated data or information rather than original records, or may refrain from taking



possession of sensitive records for which it will be unable to afford protections similar to those afforded by the State providing those records. In some cases, States may include specific provisions in their national laws or regulations to support sharing of safety information and/or draft investigation reports between States. Advance arrangements with regards to limitations on disclosure or use may also be agreed by States before the information is exchanged. States are encouraged to agree on reciprocal protections where possible.

### **3.5 POTENTIAL IMPACT OF THE PUBLIC DISCLOSURE OF ACCIDENT OR INCIDENT INVESTIGATION RECORDS OR USE OF SUCH RECORDS FOR OTHER THAN SAFETY-RELATED PURPOSES**

3.5.1 The public has an interest in the information obtained and generated in the course of an accident or incident investigation. The public's interest is in openness, transparency and accountability so that it can be assured that everything necessary to address safety is being done. Specific individuals or interest groups, in addition to family members and survivors of aircraft accidents, may also have an interest in the information for reasons other than those related to safety. Whether or not it is appropriate to disclose any investigation record publicly, depends on the nature of the record and the strength of public interest in having access to it. In this regard, if information is disclosed publicly, it would not usually be possible to limit how the information would be used. Certainly openness and transparency should be encouraged but, at the same time, the right of those involved in the occurrence and the need to protect them from inappropriate damage to their reputation must be taken into account.

3.5.2 Failure to properly assess the competing claims made for access to records of an accident or incident investigation can impact current and future investigations in two ways. Public disclosure of certain information can be perceived as a violation of the privacy of individuals associated with the occurrence and/or investigation. Use of certain information as part of an argument supporting sanctions against involved individuals can be seen to violate basic principles of fairness. Future investigations may be impacted by the predictable human behaviour of withholding information that results from anticipating a perceived threat from its disclosure or incriminating use.

3.5.3 There is a right to privacy for the individuals involved in the event or in the subsequent investigation. This right is explicitly stated in Article 12 of the Universal Declaration of Human Rights<sup>3</sup>: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." This human right has been adopted by States in their legislative frameworks, often at a constitutional level.

3.5.4 Public disclosure of audio content of CVRs as well as image and audio content of AIRs may interfere with an individual's privacy. Where strict guidelines do not exist for a balancing of public disclosure and confidentiality, the individuals providing information or testimony to investigators will have no way of determining if their privacy is at risk.

3.5.5 The simplest example of the use of records for other than safety-related purposes is the general right against self-incrimination found in the laws of many States. "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."<sup>4</sup> In view of the many and varied uses to which accident and incident investigation information can be applied, there will be circumstances where the right against self-incrimination may not be absolute. Without specific guidelines for determining appropriate use, individuals will have no way of determining the personal consequences of providing information to investigators.

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3. United Nations General Assembly, Resolution 217 A (III) of 10 December 1948.

4. Canadian Charter of Rights and Freedoms; Article 13, Constitution Act 1982.

3.5.6 Cooperation with investigators should be a voluntary act. Even where cooperation is compelled by law, the quality and quantity of information will be within the control of the individual providing the information. Where an individual is exposed to actions associated with an occurrence, he/she will seek to limit the amount of information available for use in criminal, civil, administrative or disciplinary actions.

3.5.7 There may be a carryover effect into future investigations for using such information against an individual. There is a “law” in psychology which codifies a typical response in such a situation. The *Law of effect* basically states that “responses that produce a satisfying effect in a particular situation become more likely to occur again in that situation, and responses that produce a discomforting effect become less likely to occur again in that situation.”<sup>5</sup> This applies equally to the impact on groups. It has been recognized that there is a “reluctance to implicate self or colleague if it might threaten their wellbeing; retribution by colleagues; disloyalty to colleagues.”<sup>6</sup> The importance of this consequence should be recognized by the aviation community as “Accurate and timely reporting of relevant information related to hazards, incidents or accidents is a fundamental activity of safety management.”<sup>7</sup>, for the enhancement of aviation safety.

3.5.8 Annex 13, Standard 5.12 and Appendix 2 provide for the application of balancing tests in accordance with national legislation to resolve issues of disclosure and use. It is encouraged that the outcomes of such balancing tests are fully disclosed and ensured to be in compliance with the underlying requirements. By strict adherence to such processes, the persons providing information will be able to properly assess any request for information by investigators, resulting in increased willingness to fully disclose information thought to be relevant to the investigation.

### 3.6 NON-DISCLOSURE OF AUDIO AND IMAGE RECORDINGS TO THE PUBLIC

3.6.1 It is acknowledged that the disclosure to the public of the audio and image recordings of the flight crew would violate their privacy or the privacy of their next of kin. The original deliberations addressing the installation of voice recorders clearly involved the issue of publication. It is important to recall these deliberations, given the relation they have with the necessary protections accorded to these recordings.

3.6.2 CVRs were first required by ICAO Annex 6 in 1985.<sup>8</sup> However, the first requirement for CVR carriage at the national level is found in the United States Federal Aviation Regulations dated 2 September 1964<sup>9</sup>. Comments given in response to the proposed rule stressed that such recordings were only to be used for accident investigation purposes, would not be used in any civil penalty or certificate action and would not be disclosed publicly. The Federal Aviation Administration (FAA) agreed that the sole purpose of the recordings was for accident investigation and committed to the principle that CVR information was not to be used in any civil penalty or certificate action<sup>10</sup>. The FAA noted that it could not bind the courts by regulation nor could it specify who could audition the tapes.

3.6.3 The issue of public disclosure in the United States was addressed by the United States Congress by requiring that the National Transportation Safety Board (NTSB) not disclose publicly any part of a cockpit voice recorder or video recorder recording<sup>11</sup>. Publication of relevant portions of the transcript of the recording is allowed in accordance

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5. Gray, Peter. “Psychology”, Worth, NY. 6th ed. pp 108–109.

6. Rachael Gordon, Eurocontrol Experimental Centre; A Review of Just Culture in ATM and other industries, GAIN Working Group E Meeting: Task E1. London, Gatwick 4-5 March, 2004.

7. ICAO Doc 9859 — *Safety Management Manual (SMM)* 3<sup>rd</sup> edition 2013, para 2.10.1.

8. ICAO Annex 6, Part 1, Section 6.3.2.1.5 – All turbine-engined aeroplanes, for which the individual certificate of airworthiness was first issued before 1 January 1987, with a maximum certificated take-off mass of over 27 000 kg that are of types of which the prototype was certificated by the appropriate national authority after 30 September 1969 shall be equipped with a CVR.

9. FAR Part 91.35.

10. FAR Part 40.212e; Part 121.359e.

11. 49 USC 1114 (3)(c).

with NTSB rules. The use of the recording in a judicial proceeding was addressed by Congress by requiring strict procedural safeguards, including the requirement of a protective order prohibiting publication<sup>12</sup>. The combination of these two laws effectively prohibits public disclosure of the content of the recordings themselves under any circumstances. A balance has been struck by the legislature that allows the public to understand the contents of the recording without the violation of privacy that publication of the recordings would imply. This formulation seems to have found favour with those States which believe that it is appropriate public policy to withhold such private recordings from the public view.

3.6.4 As the example above illustrates, it has been recognized that States may achieve the non-disclosure of audio content of cockpit voice recordings as well as image and audio content of airborne image recordings to the public, with different preventive actions. Appendix 2 to Annex 13 lists three options to achieve the prevention of public disclosure prescribed in Standard 5.12.5 that have proven to be effective:

- a) prevention of disclosure through the adoption of national laws, regulations and policies; or
- b) adoption of authoritative safeguards such as protective orders, closed proceedings or in-camera review; or
- c) prevention of disclosure of recordings, through technical means such as encrypting or overwriting, before returning the cockpit voice recorders or airborne image recorders to the owners.

### **3.7 IMPLEMENTATION OF INTERNATIONAL REQUIREMENTS ON THE PROTECTION OF INVESTIGATION RECORDS**

3.7.1 This protective framework includes the need to incorporate into national laws the protections for the records listed in Standard 5.12 of Annex 13. This element is necessary to ensure that the determination made by the competent authority has legal standing and facilitates the administration of the balancing test, particularly where general laws in a State govern the disclosure or use of the information through Freedom of Information laws. This notion will facilitate the ranking of two sets of laws at the same level while allowing the implementation of the principle *lex specialis* (where two laws govern the same factual situation, a law governing a specific subject matter overrides a law which only governs general matters).

3.7.2 A number of States have already implemented legislation concerning the protection of accident and incident records. The table below shows some examples of legislative provisions that can serve as reference for implementation in States. It is noted that the examples given serve only as illustrations and are not intended to suggest that they offer the best formulation. Such provisions may not be applicable in the case of proceedings before a coroner. A collection of existing legislations, regulations and policies that can assist States in implementing the international requirements for the use and protection of investigation records is available at:

[www.icao.int/safety/airnavigation/AIG/Pages/Database.aspx](http://www.icao.int/safety/airnavigation/AIG/Pages/Database.aspx).

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12. 49 USC 1154

<i>Issue</i>	<i>Examples of legislation for the protection of investigation records</i>
Disciplinary action	A person is not entitled to take any disciplinary action against an employee of the person on the basis of on-board recording information.
Disclosure	<p>Subject to [to specify], a person who is or has been an inspector, a member of the staff of the [investigation authority], or an adviser, or who has or has had access to any restricted information, shall not disclose or make available any restricted information to any other person or a court, unless the competent authority designated by the State determines that the benefits resulting from the disclosure outweigh the adverse domestic and international impact that the disclosure may have on that or any future investigation.</p> <p><i>Note.—“restricted information” in this normative extract means the records subjected to protection mentioned in Standard 5.12 of Annex 13.</i></p> <p>If the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure.</p>
Compelling an investigator to appear in proceedings	<p>An investigator or a member of the investigation authority is not compellable to appear as a witness in any proceedings unless the court or other person or body before whom the proceedings are conducted so orders for special cause.</p> <p>An investigator or a member of the investigation authority is not compellable to give an expert opinion in any civil or criminal proceedings in relation to a matter related to transport safety.</p> <p>A person who is or has been an investigator of the investigation authority or consultant is not obliged to comply with a subpoena or similar direction of a court to attend and answer questions relating to an investigable matter.</p>
Non-admissibility of evidence	<p>An opinion of a member of an investigation board or an investigator is not admissible in evidence in any legal, disciplinary or other proceedings.</p> <p>On-board recording information, and any information or thing obtained as a direct or indirect result of the use of on-board recording information, is not admissible in evidence in criminal proceedings against a crew member (other than proceedings for an offence against this Act).</p> <p>If a person is prohibited by [this section] from disclosing any restricted information, then the person cannot be required by any court to disclose the information, and any information disclosed by the person in contravention of [this section] shall not be admissible in any civil proceedings or any criminal proceedings (other than proceedings against the person under [this section]).</p>
Final Report	<p>A Final Report is not admissible in evidence in any civil or criminal proceedings.</p> <p>Or</p> <p>Opinions, analysis and safety recommendations contained in Final Reports are not admissible in evidence in any civil or criminal proceedings.</p>

<i>Issue</i>	<i>Examples of legislation for the protection of investigation records</i>
Draft Final Report	A draft Final Report is not admissible in evidence in any civil or criminal proceedings.
	<i>Note.— In this normative sample, the disclosure or use of such drafts can be misleading because they are not finalized documents and are subject to change following the consultation process with States involved in the investigation.</i>
	No person shall communicate or use the draft Final Report, or permit its communication or use, for any purpose, other than the taking of remedial measures, not strictly necessary to the study of, and preparation of, representations concerning the draft Final Report.

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## **Chapter 4**

### **INTERACTIONS OF ACCIDENT INVESTIGATION AUTHORITIES**

#### **4.1 INTERACTIONS BETWEEN THE CIVIL AVIATION AUTHORITY AND THE ACCIDENT INVESTIGATION AUTHORITY**

4.1.1 States' responsibilities under the ICAO Convention on International Civil Aviation and its Annexes include the licensing of operational personnel; certification of aircraft airworthiness, air operators, and aerodromes; the control and supervision of licensed personnel, certified products, and approved organizations; the provision of air navigation services (inclusive of meteorological services, aeronautical telecommunications, search and rescue services, charts and the distribution of information); and aircraft accident and incident investigation. These activities are implemented by States typically through a Civil Aviation Authority (CAA) and other aviation-related authorities.

4.1.2 As previously mentioned, a fundamental reason for the protection of investigation records is to address existing challenges faced by accident investigation authorities in having continued access to essential information during the course of an investigation, including the multiplicity of parties, interests and agendas involved in an investigation. The new provisions are intended, among others, to facilitate a more practical and effective means of protecting records in the custody or control of the accident investigation authority. Thus, consistent with the provisions on the protection of investigation records, in particular Standard 5.12.4 of Annex 13, CAA's requests for investigation records should be directed to the original source of the information whenever possible, instead of to the accident investigation authority which is not the original source of the information. This action will facilitate the conduct of the investigation with a positive impact in the improvement of aviation safety.

4.1.3 It may be the case that some records subject to protection are needed by the CAA to improve or maintain safety. In these cases, the balancing test must be applied which may result in the use of such records for administrative action, including revocation or suspension of privileges under licences, AOCs and other types of certification. The predominant purpose of this action may not be to act punitively, but rather to protect individuals, organizations and the public from an unacceptable exposure to safety risks which cannot otherwise be reasonably managed. Administrative action taken by a regulatory authority is different from the outcomes of a judicial proceeding.

#### **4.2 INTERACTIONS BETWEEN THE JUDICIARY AND THE ACCIDENT INVESTIGATION AUTHORITY**

4.2.1 The discussion of the role of the judiciary in the investigation process is very much determined by the unique characteristics of the legal system of a particular State. While there may be an optimum relationship between the judiciary and the accident investigation authority from the latter's point of view, the view of the legal system may be quite different. Anticipating and resolving any difficulties should take place before the happening of an accident or incident. Once an investigation is under way the requirements of the particular judicial system will usually take precedence over the requirements of the investigation.

4.2.2 Where there is cause to suspect that the event was the result of criminal activity, the judiciary or law enforcement authority will control the investigation in almost all States. Criminal activity is usually considered to be an intent to commit an action prohibited by law or an indifferent disregard to the rights of others causing injury. The accident investigation authority may get involved in the judicial investigation but only in providing assistance to the police and/or

the prosecutor. In cases where the event was the result of an act or omission considered to be conduct constituting gross negligence or willful misconduct or based solely on the happening of an event, and without a criminal intent, the prosecution investigation may be instituted in parallel to the Annex 13 investigation. Consistent with 4.2 of Appendix 2 to Annex 13, based on national laws and regulations, if investigation records are sought to be used for these types of proceedings, the authority administering the balancing test is expected to consider such factors and determine the use of the records.

4.2.3 Difficulties may arise from parallel investigations carried out simultaneously by a technical team and a judicial or law enforcement team, who do not coordinate with each other, and who may not have a clear allocation of rights and responsibilities under the relevant laws of the State. Questions of custody and control of the physical evidence and the examination of witnesses can have a profound impact on the progress of the investigation, the protection and use of records, as well as the analysis, conclusions and recommendations to be found in the Final Report.

4.2.4 Judicial processes may address the issues presented by reference to the facts of the event. The accident investigation authority having established a complete factual record and having engaged in analysis of records for the purpose of safety improvement in the Final Report may be seen as a source of information. While factual records may be used by States conducting any judicial proceeding related to the event, analysis, conclusions and recommendations are better kept out of these types of proceedings. This is due to the fact that the latter elements of Final Reports aim to identify as many contributing factors and causes to an occurrence as possible to enable corrective or preventive actions to be taken.

4.2.5 Another element to address refers to the participation of investigation personnel in proceedings other than the accident or incident investigation. The Annex 13 investigation is conducted for the sole purpose of preventing future accidents and incidents. Members of the accident investigation authority may be asked to provide factual information about the event. Interpretation for non-safety-related purposes is best left to others. Accident or incident investigators asked to provide evidence in criminal and civil proceedings may associate the Annex 13 investigation with blame or liability processes, and often the facts presented will be in dispute in court proceedings. These investigators should focus on establishing causes and contributing factors to an occurrence and not supporting determinations of blame and liability. For these reasons, and in agreement with section 7 of Appendix 2 to Annex 13, States are recommended to consider making accident and incident investigation personnel non-compellable to give an opinion on matters of blame or liability in civil, criminal, administrative or disciplinary proceedings.

### **4.3 INTERACTIONS BETWEEN THE MEDIA AND THE ACCIDENT INVESTIGATION AUTHORITY**

4.3.1 The discussion of the role of the media is necessarily limited by consideration of the newsworthiness of the accident or incident under investigation. The factors that determine newsworthiness are generally beyond the control of the accident investigation authority, or of the government in general. Typically, these investigations generate some interest in the media at the departure, arrival and accident/incident site locations for twenty-four to forty-eight hours following the event. When there is a significant number of casualties from the aircraft or on the ground, or where a casualty is well known to the public, the level of media interest often grows disproportionately.

4.3.2 The local level of media interest associated with a “routine” investigation presents few challenges for the investigators. However, when the occurrence triggers a higher level of interest, the challenge to the investigators will be significant. Experience has shown that two factors will determine the outcome of the media coverage. First, there must be a “media plan” put in place by the accident investigation authority prior to any investigation efforts. The plan must have sufficient flexibility to allow response to any level of media interest. Second, there must be regulations and policies in place which govern the timing and content of the release of any information. These regulations must be sufficiently robust to withstand significant media pressure.



4.3.3 Media reports will be primarily concerned with a rapid analysis of what happened. This analysis is normally conducted with whatever information is available at the time, and by persons not involved in the investigation and frequently without qualification for such analysis. The right of the public to be informed is coloured by the need of the public to be informed of something quickly.

4.3.4 The best way to ensure accurate reporting may be the disclosure of as much information as possible and as quickly as possible, with due consideration of the provisions of Annex 13 concerning confidentiality. Such a policy seeks to ensure that the media coverage of the event is at least factually correct. The assumption is that a more complete factual record will control the analysis performed by “media experts”.

4.3.5 Proper care must be taken to avoid release of facts which are incomplete or which may be taken out of context. Such release may well defeat the objective of improved media analysis. Where a fact or facts are incomplete or in question, release should be delayed. Where a partial release of facts could bias the media coverage towards a conclusion which may not be warranted by the investigation, it may be prudent to withhold release until a more complete factual setting is possible. Accordingly, the disclosure policy should provide for an internal contextual review prior to release to the public.

4.3.6 The role of a spokesperson is critically important in contextualizing the facts which are released. Ideally, the spokesperson should be a member of the accident investigation authority, technically competent and trained in media interaction. There should only be one spokesperson for any given event. The spokesperson should be fully briefed by the investigation team including the content of the media briefing prior to briefing the media. Where a media briefing will be provided by someone not directly connected to the investigation, every effort should be made to restrict the briefing to facts considered appropriate for release and to provide the briefer with context. Policy for this eventuality would be very helpful and should be considered as a part of the overall policy on media relations and disclosure of facts.

4.3.7 It is of utmost importance that the content of CVRs and AIRs are protected from public disclosure through the media. As previously indicated, the content of such recordings is critical for the investigation of aircraft accidents and incidents and needs to be accorded the highest level of protection.

#### **4.4 INTERACTIONS BETWEEN FAMILIES OF VICTIMS OF ACCIDENTS AND THE ACCIDENT INVESTIGATION AUTHORITY**

*Note.— Guidance on assistance to accident victims and their families is included in the Manual on Assistance to Aircraft Accident Victims and their Families (Doc 9973) and the ICAO Policy on Assistance to Aircraft Accident Victims and their Families (Doc 9998).*

4.4.1 An aircraft accident is an unexpected and usually a catastrophic event. Although the objective of an aircraft accident investigation is separate from the provision of family assistance, the accident investigation authority has a responsibility to provide relevant, timely and validated information to the families and the accident survivors regarding the progress of the investigation, provided that it does not compromise the objective of the investigation. This responsibility arises out of concern for persons who have suffered distress and loss as a result of an aircraft accident and has led to increased efforts by the aviation industry and ICAO to establish policies, practices and procedures which address the needs of victims and their families.

4.4.2 In cases where the State of Occurrence delegates the accident investigation to another State, the delegated State should accept the responsibility to provide information about the progress of the investigation to family members and survivors. Moreover, it should be noted that Annex 13, Chapter 5, Standard 5.27, provides that a State that suffered fatalities or serious injuries to its citizens has the right to appoint an expert to participate in the investigation, who shall be entitled to: visit the scene of the accident; have access to the relevant factual information which is approved for public release by the State conducting the investigation, and information on the progress of the investigation; and receive a copy of the Final Report. The former State also has the right to assist in the identification of victims and to meet with its citizens who survived the accident.

4.4.3 As the accident investigation authority conducts the investigation, family members and survivors should be provided, through periodic advisories, with updated, validated information on the progress of the investigation, and of the conclusion of the investigation before the Final Report is released to the public. To the extent appropriate, the families should be invited to attend public meetings related to the accident and should be provided with copies of media releases and reports before or as they are issued to the media through the accident investigation authority's normal process. Families should also be notified of the upcoming release of such reports and the scheduling of meetings in order to plan accordingly. Care should be taken when providing information in multiple languages to ensure that translations are accurate.

4.4.4 In some cases, families and survivors may also consider that they should be entitled to listen to and/or view the CVRs and/or AIRs, and to have access to a transcript of these recorders. The disclosure or use of these types of ambient workplace recordings for purposes other than those for which the recordings were made may be perceived as constituting an invasion of privacy for operational personnel. For that reason, States are required to ensure the non-disclosure of these sensitive records to the public. Families and survivors may benefit from an explanation in this regard. Requests for these records should be referred to the competent authority designated by the State for the administration of the balancing test, in accordance with Standard 5.12 of Annex 13 (see Chapter 3 for more details). It will also be beneficial for family and survivors' groups to understand the technicalities of Final Reports, which should indicate that such documents are not intended to be used in proceedings to apportion blame or liability.

4.4.5 To ensure the timeliness of the release of validated information to accident victims and their families, the accident investigation authority should consider appointing one person as a liaison or focal point to ensure effective communication with other providers of family assistance, and to coordinate visits to the accident site by the families and survivors when required. The liaison should maintain close contact with the IIC in order to provide him/her with information on any inquiries that are being received. The liaison should be aware of what information can be released, to ensure that the information will not hamper the progress or compromise the objective of the investigation.

— END —



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