



ACCIDENT INVESTIGATION AND PREVENTION (AIG) DIVISIONAL MEETING (2008)

Montréal, 13 to 18 October 2008

Agenda Item 1: Annex 13

1.7: Attachment E to Annex 13

PROTECTION OF SAFETY INFORMATION

(Presented by the Secretariat)

REVISION NO. 1

SUMMARY

This paper provides a brief review on the protection of safety information from inappropriate use and discusses the level of implementation of paragraph 5.12 of Annex 13 in relation to the application of Attachment E therein.

Action by the meeting is in paragraph 6.

1. INTRODUCTION

1.1 The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. This fact was recognized by the 35th ICAO Assembly, which noted that existing national laws and regulations in many States may not adequately address the manner in which safety information is protected from inappropriate use.

1.2 Considering that a balance needed to be struck between the need for the protection of safety information and the need for the proper administration of justice, the 35th Assembly instructed the Council to develop appropriate legal guidance that would assist States to enact laws and regulations to protect all safety data collection and processing systems (SDCPS), while allowing for the proper administration of justice in the State.

1.3 Accordingly, legal guidance for the protection of information from SDCPS was developed by ICAO and incorporated as Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation* on 23 November 2006, and is included in the Appendix to this paper for ease of reference.

1.4 SDCPS refers, inter alia, to certain accident and incident records as set forth in paragraph 5.12 of Annex 13.

2. DISCUSSION

2.1 Assembly Resolution A36-8: *Non-disclosure of certain accident and incident records* urges Contracting States to examine and if necessary adjust their laws, regulations and policies to protect certain accident and incident records in compliance with paragraph 5.12 of Annex 13, in order to mitigate impediments to accident and incident investigations, in consideration of the legal guidance for the protection of information from safety data collection and processing systems issued by ICAO, as set out in Attachment E to Annex 13. In addition, Assembly Resolution A36-8 instructs the Council to provide a progress report on this matter to the next Ordinary Session of the Assembly, envisaged for 2010.

2.2 During the 36th ICAO Assembly (Montréal, 18 to 28 September 2007), following some concerns expressed by a State and an international organization regarding the need for future work on the implementation of the provisions in Attachment E to Annex 13, it was agreed that AIG/08 would be the right forum to address the subject.

2.3 Accordingly, the Secretariat sent out State letter AN 6/1-08/40, dated 9 May 2008, seeking States' comments on the level of implementation of paragraph 5.12 of Annex 13, in consideration of the legal guidance set out in Attachment E to Annex 13. Replies by States were due by 8 August 2008.

3. REPLIES FROM STATES

3.1 By 8 August 2008, thirty-eight replies were received from States and three others indicated that their replies would be forthcoming. By 16 September 2008, a total of fifty-three replies were received from Contracting States, while one other State indicated that its reply would be delayed.

3.2 Forty-one States, representing over 77% of the fifty-three respondents, indicated that Attachment E to Annex 13 had assisted them in the development and/or implementation of means to protect certain accident and incident records as set forth in paragraph 5.12 of Annex 13.

3.3 Twelve States indicated that Attachment E to Annex 13 had not been of assistance to them in protecting certain accident and incident records as set forth in paragraph 5.12 of Annex 13.

4. ANALYSIS

4.1 States which have benefited from the guidance in Attachment E to Annex 13, have indicated that the guidance concerned was, in general, of significant assistance in matters regarding the protection of accident and incident records. In some States, Attachment E was (or will be) used as the basis from which relevant legislation was drafted, including domestic civil aviation laws, while in others, the guidance was used to adjust civil aviation regulations.

4.2 The Secretariat is pleased to acknowledge that Attachment E to Annex 13 has assisted numerous States to the fullest in respect of the protection of certain accident and incident records from inappropriate use.

4.3 As for the twelve States which did not benefit from the guidance in Attachment E to Annex 13, the following summary of justifications is presented based on States' replies.

4.3.1 In four of those States, relevant legislation/regulation to protect accident and incident records had either already been established before the issuance of Attachment E, or because laws and regulations were still being developed.

4.3.2 In another five States, laws and regulations in force did not allow, in general, for the implementation of the guidance material in Attachment E.

4.3.3 In two of these States, there was still no provision in their legislation to duly protect accident and incident records.

4.3.4 In another State, laws and regulations designed to provide protection of records regarding voluntary-provided safety information, personal and medical privacy, and proprietary information had already been promulgated, prior to the issuance of Attachment E. In addition, relevant laws and regulations in force already reflect the maximum protection that can be afforded to records specified in paragraph 5.12 of Annex 13.

5. CONCLUSION

5.1 With basis on the aforementioned, it is noted that the guidance in Attachment E to Annex 13 has been of assistance to numerous States in the development and/or implementation of legislation to protect certain accident and incident records, as set forth in paragraph 5.12 of Annex 13.

5.2 In some States, Attachment E to Annex 13 has not been of assistance towards the protection of records mentioned in 5.1 above, mainly due to impediments in their national laws and regulations.

5.3 The Secretariat is, therefore, of the view that Attachment E to Annex 13 is reaching its goal in guiding the majority of States to protect certain accident and incident records from inappropriate use and, as a consequence, deems that the guidance concerned merits no reassessment at this time.

6. ACTION PROPOSED

6.1 The meeting is invited to consider the aforementioned and agree that Attachment E to Annex 13 needs no reassessment at this time.

APPENDIX

ATTACHMENT E: LEGAL GUIDANCE FOR THE PROTECTION OF INFORMATION FROM SAFETY DATA COLLECTION AND PROCESSING SYSTEMS

1. INTRODUCTION

1.1 The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. This fact was recognized by the 35th Assembly of ICAO, which noted that existing national laws and regulations in many States may not adequately address the manner in which safety information is protected from inappropriate use.

1.2 The guidance contained in this Attachment is therefore aimed at assisting States enact national laws and regulations to protect information gathered from safety data collection and processing systems (SDCPS), while allowing for the proper administration of justice. The objective is to prevent the inappropriate use of information collected solely for the purpose of improving aviation safety.

1.3 Because of the different legal systems in States, the legal guidance must allow States the flexibility to draft their laws and regulations in accordance with their national policies and practices.

1.4 The guidance contained in this Attachment, therefore, takes the form of a series of principles that have been distilled from examples of national laws and regulations provided by States. The concepts described in these principles could be adapted or modified to meet the particular needs of the State enacting laws and regulations to protect safety information.

1.5 Throughout this Attachment:

- a) *safety information* refers to information contained in SDCPS established for the sole purpose of improving aviation safety, and qualified for protection under specified conditions in accordance with 3.1 below;
- b) *operational personnel* refers to personnel involved in aviation operations who are in a position to report safety information to SDCPS. Such personnel include, but are not limited to, flight crews, air traffic controllers, aeronautical station operators, maintenance technicians, cabin crews, flight dispatchers and apron personnel;
- c) *inappropriate use* refers to the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public;
- d) SDCPS refers to processing and reporting systems, databases, schemes for exchange of information, and recorded information and include:
 - 1) records pertaining to accident and incident investigations, as described in Chapter 5;

- 2) mandatory incident reporting systems, as described in Chapter 8;
- 3) voluntary incident reporting systems, as described in Chapter 8; and
- 4) self-disclosure reporting systems, including automatic data capture systems, as described in Annex 6, Part I, Chapter 3, as well as manual data capture systems.

Note.— Information on safety data collection and processing systems can be found in the Safety Management Manual (SMM) (Doc 9859).

2. GENERAL PRINCIPLES

2.1 The sole purpose of protecting safety information from inappropriate use is to ensure its continued availability so that proper and timely preventive actions can be taken and aviation safety improved.

2.2 It is not the purpose of protecting safety information to interfere with the proper administration of justice in States.

2.3 National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice.

2.4 National laws and regulations protecting safety information should prevent its inappropriate use.

2.5 Providing protection to qualified safety information under specified conditions is part of a State's safety responsibilities.

3. PRINCIPLES OF PROTECTION

3.1 Safety information should qualify for protection from inappropriate use according to specified conditions that should include, but not necessarily be limited to: the collection of information was for explicit safety purposes and the disclosure of the information would inhibit its continued availability.

3.2 The protection should be specific for each SDCPS, based upon the nature of the safety information it contains.

3.3 A formal procedure should be established to provide protection to qualified safety information, in accordance with specified conditions.

3.4 Safety information should not be used in a way different from the purposes for which it was collected.

3.5 The use of safety information in disciplinary, civil, administrative and criminal proceedings should be carried out only under suitable safeguards provided by national law.

4. PRINCIPLES OF EXCEPTION

Exceptions to the protection of safety information should only be granted by national laws and regulations when:

- a) there is evidence that the occurrence was caused by an act considered, in accordance with the law, to be conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct;
- b) an appropriate authority considers that circumstances reasonably indicate that the occurrence may have been caused by conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct; or
- c) a review by an appropriate authority determines that the release of the safety information is necessary for the proper administration of justice, and that its release outweighs the adverse domestic and international impact such release may have on the future availability of safety information.

5. PUBLIC DISCLOSURE

5.1 Subject to the principles of protection and exception outlined above, any person seeking disclosure of safety information should justify its release.

5.2 Formal criteria for disclosure of safety information should be established and should include, but not necessarily be limited to, the following:

- a) disclosure of the safety information is necessary to correct conditions that compromise safety and/or to change policies and regulations;
- b) disclosure of the safety information does not inhibit its future availability in order to improve safety;
- c) disclosure of relevant personal information included in the safety information complies with applicable privacy laws; and
- d) disclosure of the safety information is made in a de-identified, summarized or aggregate form.

6. RESPONSIBILITY OF THE CUSTODIAN OF SAFETY INFORMATION

Each SDCPS should have a designated custodian. It is the responsibility of the custodian of safety information to apply all possible protection regarding the disclosure of the information, unless:

- a) the custodian of the safety information has the consent of the originator of the information for disclosure; or
- b) the custodian of the safety information is satisfied that the release of the safety information is in accordance with the principles of exception.

7. PROTECTION OF RECORDED INFORMATION

Considering that ambient workplace recordings required by legislation, such as cockpit voice recorders (CVRs), may be perceived as constituting an invasion of privacy for operational personnel that other professions are not exposed to:

- a) subject to the principles of protection and exception above, national laws and regulations should consider ambient workplace recordings required by legislation as privileged protected information, i.e. information deserving enhanced protection; and
- b) national laws and regulations should provide specific measures of protection to such recordings as to their confidentiality and access by the public. Such specific measures of protection of workplace recordings required by legislation may include the issuance of orders of non-public disclosure.

— END —