



WORKING PAPER

**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 United States)

SUMMARY

This paper reviews the recommendations of Attachment E to Annex 13 and suggests ways in which the current approach can be improved.

Action by the meeting in is paragraph 3.

1. INTRODUCTION

1.1 In order to conduct effective and independent safety investigations, sustain public and industry confidence in the findings from government accident investigations, and ensure that fragile safety-sensitive information sources remain available for the prevention of accidents, States must strike an appropriate balance among many important investigative and societal considerations. Although the United States supports in principle the effort sought to be achieved by Attachment E to Annex 13—that is, the implementation by the various States of disclosure procedures and appropriate protections for certain safety sensitive information and records, to ensure its continued availability as a tool for improving safety, the specific language of the guidance could be improved to more effectively achieve this stated goal. Moreover, the language in Attachment E does not sufficiently distinguish or define qualified safety information as a special subset of information and records that should be carefully protected, and, therefore, risks over application of the principles of non-disclosure or inappropriate use articulated in the guidance. Failure to strike an appropriate balance threatens desirable transparency in public investigations, and will likely create a competitive, rather than a cooperative, atmosphere in which safety investigations are secondary to other inquiries, ultimately delaying safety investigations and interfering with investigators' ability to make appropriate safety recommendations.

1.2 Several laws pertaining to the role of the National Transportation Safety Board (NTSB) in the United States help to strike the balance that is necessary to allow safety investigators to conduct full and independent investigations. See, e.g., 49 U.S.C. § 1114(b)(3) (voluntarily provided safety information is protected from disclosure if the NTSB determines that disclosure would inhibit the future availability of such information and the disclosure is not related to the NTSB's investigation authority); § 1131(a)(2)(A) (an accident investigation by the NTSB has priority over any other investigation, but must allow appropriate participation in the fact-finding phase of the investigation by other authorities);

§ 1131(a)(2)(B) (although the Federal Bureau of Investigation may be granted priority in an investigation if the highest law enforcement authority determines that the circumstances of the accident indicate that the accident may have been caused by an intentional criminal act, the NTSB must be allowed to continue its independent investigation of the probable cause of the accident); § 1131(a)(3) (the investigative priority of the NTSB does not prohibit other authorities from independently obtaining information from parties and witnesses to an accident). Other laws protect against disclosure or inappropriate use of specific records, such as aural cockpit voice recorder or cockpit video recordings, voluntary air crew safety reporting programs, and so forth.

1.3 While we appreciate that the United States is fortunate in that there is not usually a judicial rush to prosecute individuals involved in routine accidents, we refer to these U.S. laws to illustrate a system that, despite many differences with the approach reflected in Attachment E, has largely achieved what Attachment E sets out to achieve. We acknowledge that the current guidance could be beneficial to some States where the criminalization of accidents is the norm; however, a rigid framework intended to prevent use of much of the information or records collected in the course of an accident investigation will, ultimately, likely have a counterproductive effect on most States that seek to elevate the priority of safety-related accident investigations.

2. DISCUSSION

2.1 Introduction and General Principles

2.1.1 We agree that States must consider how to conduct safety investigations in a way that ensures the continued availability of the information upon which their investigations rely. However, simply mandating the “protection of safety information from inappropriate use” is not an adequate or long-term solution to the fundamental conflict in many States between safety investigations and judicial or other administrative inquiries. Moreover, as discussed below, we cannot support the broad definition of “inappropriate use” contained in paragraph 1.5(c) of Attachment E, and suspect that its broad application to most accident investigation information and records will not be accepted by most judicial authorities, employers, or regulators in many other States. Without this acceptance, the guidance will be of less utility to States seeking to bolster the priorities given to safety investigations.

2.1.2 With respect to paragraphs 1.3 and 1.4 of Attachment E, it is precisely because States must be given flexibility in the administration of their legal systems that Attachment E, whose policies and recommendations would have implications and ramifications in State legal systems far beyond the independent investigation of aviation accidents and incidents, should be reconsidered. The sweeping scope of the definitions in paragraph 1.5, particularly the definitions of “SDCPS” and “inappropriate use,” leave little room for States to “adap[t]” or “modif[y]” the concepts described in Attachment E.

2.1.3 The sheer breadth of the information sources encompassed by the definition of “SDCPS” would result in the same level of protection being applied to almost all information, without flexibility to make rational distinctions between qualified safety information that could disappear in the future if unprotected and other, less sensitive, records and information. In this regard, Attachment E is too broad and not sufficiently flexible. A better course would be to acknowledge differences among various types of safety information and seek to account for those differences in the level of protection the information receives.

2.1.4 In both the definition of “SDCPS” and the definition of “inappropriate use,” Attachment E fails to sufficiently differentiate among different types of safety information that may be relevant to a safety investigation. Instead, despite the enumerated “Principles of Exception,” the Attachment creates a strong bias against disclosure rather than for transparency, and such a policy does not serve the mission

or long-term interests of safety investigators. Moreover, it is dangerous to overly favour non-disclosure of information, or to encourage summaries of information rather than disclosure of actual information, unless a clear showing can be made that the particular information must be protected to encourage its continued availability. This latter circumstance, over time, could lead to decreased confidence by the public and, importantly, industry operators and government regulators, in the credibility and competence of the results of any safety investigation.

2.1.5 It is important to “ensure [the] continued availability” of safety information, and we agree that such availability is necessary to allow “proper and timely preventative actions” and the improvement of aviation safety. However, the overly broad definition of “SDCPS” encourages blanket restrictions that will instead lead to more delays in investigations through more resistance from those involved in the “proper administration of justice” as authorities are forced to compete over limited information resources. A better approach would be to encourage restrictions that are more specifically and narrowly tailored, based on actual need, to the general principle of transparency in government safety investigations.

2.1.6 The information gathered by safety investigations should not be summarily disqualified from the uses deemed “inappropriate” by paragraph 1.5(c) of Attachment E. As fact finders, the primary goal of safety investigators should be to determine the facts surrounding an accident or incident in order to aid the “prevention of accidents and incidents,” as outlined in paragraph 3.1 of Annex 13. However, those same facts may be relevant to an inquiry conducted by those concerned with the “proper administration of justice.” Therefore, a general prohibition on the external use of any information gathered in the course of an investigation does not serve the goal of balancing the “need for the protection of safety information” and the “need for the proper administration of justice.” And, the real danger in attempting to define overly restrictive “inappropriate use” of safety investigative information is that it creates a disincentive for judicial authorities to permit safety investigations to proceed expeditiously to completion.

2.2 Principles of Protection and Principles of Exception

2.2.1 Paragraph 3.1 of the Attachment highlights some of the difficulties with the current definition of “safety information.” Although paragraph 3.1 suggests that the “protections” recommended by Attachment E would be limited to qualifying “safety information,” neither the definition of “safety information” nor the criteria advanced in paragraph 3.1 suffice to narrow the broad range of information and data swept up into Attachment E’s provisions.

2.2.2 We emphatically agree that the kind of protections contemplated in Attachment E must be applied with due consideration for the particular information and reporting system involved. For example, voluntarily provided safety reports, whose availability relies primarily on the trust of the reporter that such information will be used only to improve safety, and routine records, whose provision is widely mandated by law, should not be afforded identical protections.

2.2.3 By creating an atmosphere in which factual information is a limited resource, not to be used by those who did not collect it, Attachment E has a dangerous potential to create competition between safety investigations and other inquiries; when serious accidents of national interest occur, judicial and other authorities are unlikely to allow such competition to interfere with their own inquiries. Therefore, refusing to allow the factual information gathered by safety investigators to be “used in a way different from the purposes for which it was collected” creates a strong incentive among other authorities to refuse to allow safety investigators access to accident sites, wreckage, or other records until their own investigations are complete. A better course would be to carefully consider the specific types of information that must be protected from such uses in order to ensure continued availability and to narrowly tailor legal protections to that particular information.

2.2.4 We agree that proper legal safeguards should be in place to help maintain a balance between safety investigations and other inquiries; several U.S. laws are in place precisely to help maintain such a balance. Such safeguards must account for the particular information at issue in an investigation and not seek to apply a single standard to a wide variety of different information types and sources.

2.2.5 The direction in paragraph 4.1 of the Attachment that, “[e]xceptions to the protection of safety information should *only* be granted by national laws and regulations” under the limited circumstances laid out in paragraph 4.1 is incongruous with the recognition in paragraph 1.3 that, “the legal guidance [of Attachment E] must allow States the flexibility to draft their laws and regulations in accordance with their national policies and practices.” National legislatures should be encouraged to determine, with appropriate guidance from qualified aviation safety officials, the level of protection to be given to specific types of information or records. Such national legal standards should be specific and provide appropriate guidance as to what uses are inappropriate, lest safety-related decisions about use or protection be left to judicial authorities in accordance with the general provisions of Annex 13.

2.3 Public Disclosure and Recorded Information

2.3.1 Public understanding of major safety investigations is necessary to engage lawmakers, regulators, and members of the aviation industry in the safety process and, importantly, to facilitate meaningful safety corrections in the aftermath of an accident. Transparency in safety investigations is therefore vital; observers and participants must be assured that safety investigations and recommendations are based on thorough and independent review of relevant information, or safety investigations lose credibility and authority. A policy that takes as its starting point a position against the public availability of the information relied upon by safety investigators is therefore counterproductive. Instead, investigators must seek to maintain open communication of relevant safety information, while providing only the limited protections necessary to ensure the continued availability of the limited subset of information or records that need special use or disclosure restrictions to ensure their continued availability.

2.3.2 While we agree that the factors set out in paragraph 5.2 of Attachment E are important considerations in the handling of any information gathered during a safety investigation, it is important to reiterate that a policy that expects nondisclosure rather than public disclosure will frequently be counterproductive in the long-term. Moreover, as previously discussed, disclosure of safety information in a “de-identified, summarized or aggregate form” as required by 5.2(d) will frequently not serve the public interest, because it will often not allow for sufficient review of safety investigation findings by industry and lawmakers, or for safety investigators to properly use relevant information to support investigative findings and maintain the credibility and confidence in government safety investigations.

2.3.3 We agree that, “ambient workplace recordings” such as cockpit voice recorders (CVRs) present a special problem in the context of disclosure of relevant safety information; U.S. law prohibits the disclosure of such aural recordings, along with images from video recorders if installed. See 49 U.S.C. § 1114(c). However, the information contained in such recordings, including transcripts or written depictions where appropriate, is often highly relevant to the conclusions drawn by safety investigators and must therefore be available to support the investigative findings of safety investigators.

3. ACTION PROPOSED

3.1 The meeting is invited to recommend that ICAO revise Attachment E, taking into account the proper balance between transparency and, where necessary to protect specific information sources, confidentiality, to better serve aviation safety and the global accident investigation community.