



DAS Instruction—02/2017

Limitations on the Use of Safety Information

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Approver	Director of Aviation Safety
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1. Purpose and scope

- 1.1 The purpose of this Instruction is to spell out how and when safety information that comes to the attention of the Civil Aviation Safety Authority (CASA) may be used by CASA in the interest of safety and for other related purposes.
- 1.2 To the extent the use of safety information collected or held by operators and other service providers is governed by requirements specified by or under the *Civil Aviation Act 1988*, the *Civil Aviation Regulations 1988* or the *Civil Aviation Safety Regulations 1998*, CASA will assess relevant aspects of their compliance with those requirements in the light of the principles set out in this Instruction.
- 1.3 In keeping with CASA's Regulatory Philosophy, and the Regulatory Policy and Practice framework within which the Philosophy was developed, this Instruction extends the application of CASA rational approach to 'just culture' to include safety information obtained or derived from sources other than reporting programs of the kind to which 'just culture' protocols normally apply, to cover the full range of information acquired in the normal course of CASA's surveillance and audit processes.
- 1.4 The application and operation of this Instruction is consistent with the protective principles governing the appropriate use of safety information as set out in:
 - Annex 19, *Safety Management* to the Convention on International Civil Aviation (including Amendment 1 to Annex 19);
 - the guidance material appearing in the 4th edition of the *Safety Management Manual* to support the application of Annex 19;
 - the relevant provisions of Regulation (EU) No. 376 of 2014 (on the reporting, analysis and follow-up of occurrences in civil aviation), which came into force in November 2016;
 - the guidance material published in December 2015 in support of Regulation (EU) No. 376 of 2014; and
 - international best practice related to the use and protection of safety information more generally, as reflected in the approach to these issues by other leading aviation countries.

Meaning of 'Safety Information' and 'Service Provider'

For the purposes of this Instruction:

safety information means any and all data and information, in any form, generated within, or captured, collected or held by and within:

- an operator's or other service provider's Safety Management System (SMS), including Flight Data Analysis Programs (FDAPs) and other kinds of Safety Data Collection and Processing Systems (SDCPSs), inclusive of any personal information relating to individuals; and
- CASA's records and record-keeping systems, as that information pertains to any person (individual or corporate), aircraft, aerodrome, air traffic management or navigation systems, maintenance and manufacturing activities, training and testing activities, and other aviation-related activities and operations in respect of which CASA has regulatory functions and powers. It includes, but is not limited to, information obtained, derived or generated in the course of CASA's normal audit and surveillance activities (scheduled and unscheduled).

service provider has the same meaning used in the current edition of the ICAO *Safety Management Manual*, namely, 'any organization providing aviation products and/ or services. The term thus encompasses approved training organizations . . . , aircraft operators, approved maintenance organizations, organizations responsible for type design and/or manufacture of aircraft, engines or propellers, air traffic service providers and certified aerodromes'.

2. Limitations on the use of safety information by CASA in connection with administrative and related action

- 2.1 Except in situations involving serious and imminent risks to air safety, **safety information will not be used** for, or in support of, administrative action to vary, suspend or cancel a civil aviation authorisation, to refuse to issue a civil aviation authorisation, or the issuance of a direction to a particular person under or pursuant to a provision of the civil aviation legislation, if:
- 2.1.1 the person whose interests would be affected by such action has satisfied CASA that all necessary and appropriate steps have been, or are being, taken to:
 - 2.1.1.1 ensure that preventive, corrective and remedial actions have been, or will timely be, taken to rectify identified deficiencies or shortcomings and/or to eliminate or effectively mitigate the risk of a recurrence of the conduct in question; and
 - 2.1.1.2 eliminate or effectively mitigate the risk of harm, injury or damage to persons or property pending the successful completion of the actions contemplated by paragraph 2.1.1.1 above; and
 - 2.1.2 CASA is satisfied that necessary and appropriate arrangements are in place whereby CASA is able to ascertain, on an ongoing basis, whether the actions contemplated by 2.1.1.1 and 2.1.1.2 will be, are being, and/or have been effectively taken.
- 2.2 Notwithstanding the limitations set out in 2.1 above, **CASA may use safety information** for, or in support of, administrative action to vary, suspend or cancel a civil aviation authorisation, a decision to refuse to issue a civil aviation authorisation, or the issuance of a direction of any kind under or pursuant to a provision of the civil aviation legislation, if the conduct involved is reasonably seen:
- 2.2.1 to involve a wilful, deliberate or reckless contravention of the civil aviation legislation, including the breach of a duty; or
 - 2.2.2 to be part of a pattern of repetitive contraventions of the same or substantially similar regulatory requirement(s), or breaches of the same or substantially similar duty(ies) over a recent period of time.

3. Limitations on the use of safety information by CASA in connection with a possible criminal prosecution or the issuance of an infringement notice

CASA will not use safety information for, or in connection with the pursuit of, a criminal prosecution or the issuance of an infringement notice, **except where**:

- 3.1 the conduct involved is reasonably seen to constitute a wilful, deliberate or reckless contravention of the civil aviation legislation;¹ or

¹This limitation is intended to apply even if the offence involved is one of strict liability.

- 3.2 the person has, on one or more occasions within the preceding three (3) years, been issued with an infringement notice for a breach of the civil aviation regulations and involving the same or substantially similar conduct; or
- 3.3 the person has, on one or more occasions within the preceding three (3) years, been counselled by CASA for engaging in the same or substantially similar conduct; or
- 3.4 the person has, on one or more occasions within the preceding three (3) years been convicted or found guilty of an offence under the civil aviation legislation on the basis of the same or substantially similar conduct; or
- 3.5 CASA reasonably forms the view that the person has, on one or more occasions within the preceding three (3) years done any of the things mentioned in section 30DB of the *Civil Aviation Act 1988*² or in paragraphs 269(1)(a) through (e) of the *Civil Aviation Regulations 1988*,³ even if action under section 30DC of the *Civil Aviation Act* to suspend a civil aviation authorisation, or action under subregulation 269(1) of the *Civil Aviation Regulations* to vary, suspend or cancel a civil aviation authorisation, may not have been taken in any of those instances.

4. Ascertaining compliance with, and identifying misuse of, safety management systems

To avoid doubt, subject to the limitations on the use of safety information described above, such information is available for examination, consideration and use by CASA for the purposes of:

- 4.1 monitoring, auditing and determining compliance with, and the effective operation of, a Safety Management System, any element of a Safety Management System or other safety-related quality control or assurance process required by or under the civil aviation legislation; and
- 4.2 ascertaining whether a Safety Management System, any element of a Safety Management System or other safety-related quality control or assurance process required by or under the civil aviation legislation, has been circumvented, manipulated, compromised or otherwise misused for the apparent purpose of:

² Section 30DB provides as follows: 'The holder of a civil aviation authorisation must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety'.

³ In pertinent part, paragraphs 269(1)(a)-(e) provide as follows:

- (a) the holder of the authorisation has contravened, a provision of the Act or these Regulations, including these regulations as in force by virtue of a law of a State;
- (b) the holder of the authorisation fails to satisfy, or to continue to satisfy, any requirement prescribed by, or specified under, these Regulations in relation to the obtaining or holding of such an authorisation;
- (c) the holder of the authorisation has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft;
- (d) the holder of the authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such an authorisation;
- (e) the holder of the authorisation has contravened, a direction or instruction with respect to a matter affecting the safe navigation and operation of an aircraft, being a direction or instruction that is contained in Civil Aviation Orders.

- 4.2.1 concealing wilful, deliberate or reckless contraventions of the civil aviation legislation; or
- 4.2.2 avoiding compliance with obligations or duties under a Safety Management System, any element of a Safety Management System, or other safety-related quality control process that is required by or under the civil aviation legislation.

5. The use of safety information by operators and other service providers

- 5.1 Having particular regard to the safety management provisions set out in the Civil Aviation Orders (CAOs) for certain air operators,⁴ and such corresponding provisions as are or may be specified in the civil aviation legislation for other service providers, the following actions, when taken by an operator or service provider, **will not be regarded by CASA as 'punitive' or 'disciplinary' action**:
 - 5.1.1 any reasonable corrective or remedial intervention designed to rectify shortcomings or deficiencies in an individual's aviation-related skills, knowledge, ability or competence;
 - 5.1.2 any reasonable action taken to eliminate or minimise the risk of harm, injury or damage to persons or property pending satisfactory demonstration of necessary skill, knowledge, ability or competence by an individual in respect of whom the operator or service provider has taken action of the kind contemplated by 5.1.1 above;
 - 5.1.3 any lawful action taken on the basis of repetitive contraventions by an individual of the same or substantially similar regulatory requirement(s), or breaches of the same or substantially similar duty(ies), over a recent period of time.
- 5.2 Operators and other service providers should not be prevented from using safety information of the kind contemplated by the legislation mentioned in 5.1 above in support of otherwise lawful punitive or disciplinary action in response to wilful, deliberate or reckless conduct by an individual involving the contravention of requirements specified in or under the civil aviation legislation.

6. Limitations on the use of cockpit voice recording information

Nothing in this Instruction is intended to affect the operation of the limitations governing the use of Cockpit Voice Recording (CVR) information specified in Part IIIB of the *Civil Aviation Act 1988*.

7. Challenging the inappropriate use of safety information

- 7.1 A person who believes their interests have been or are likely to be adversely affected by CASA's use of safety information in a manner that is inconsistent with the terms of this Instruction, may challenge CASA's use of that information. Such a challenge may be made:
 - 7.1.1 **before CASA takes action** to vary, suspend or cancel a civil aviation authorisation, to refuse to issue a civil aviation authorisation, to issue a direction under the civil aviation

⁴ See subparagraphs 2A.3(d)(ii) of CAO 82.3 and CAO 82.5.

legislation or to issue an infringement notice—by writing to CASA and specifying in sufficient detail:

- the particular safety information involved (including, if known, the source of that information, and the means by which the person believes CASA obtained or acquired the information); and
- the particular provision(s) of the Instruction with which the person believes CASA's use of the information involved is or would be inconsistent; or

7.1.2 **after CASA has initiated action** to vary, suspend or cancel a civil aviation authorisation, to refuse to issue a civil aviation authorisation, to issue a direction under the civil aviation legislation or to issue an infringement notice—by raising that claim, including the information mentioned in 7.1.1 above, in:

- the person's response to a show cause notice, or to a notice given for similar purposes; or
- submissions in support of an appeal of CASA's decision in the Administrative Appeals Tribunal or an application for review in the Federal Court; or
- a request that an infringement notice be withdrawn in accordance with the provisions of Part 17, Division 3 of the *Civil Aviation Regulations 1988*.

7.2 In claiming that CASA intends to use, or has used, safety information in a way that is inconsistent with this Instruction, the person making that claim will be expected to provide sufficient information to suggest at least a reasonable possibility that the alleged misuse actually occurred.⁵

7.3 If the person's claim meets the evidentiary requirements in 7.2, the onus will shift to CASA to show that the use to which the information has been, or will be, put is consistent with the relevant provisions of this Instruction.

8. Application consistent with other laws

CASA will apply the principles reflected in this Instruction liberally, subject to the requirements of the *Privacy Act 1988*, the *Freedom of Information Act 1982* and other Commonwealth legislation governing the use and protection of information acquired, obtained or held by CASA in the performance of its functions and the exercise of its powers.

Signed

Shane Carmody
Chief Executive Officer and
Director of Aviation Safety

Date: 21 August 2017

⁵ This is known as the *evidential burden* of proof, which is defined in the section 13.3 of the *Criminal Code Act 1995* as: '... the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.