Scottish Courts and Tribunals

OUTER HOUSE, COURT OF SESSION

1. **[2015] CSOH 80**

   P628/14

   OPINION OF LORD JONES

   In the cause

   FRANK MULHOLLAND QC, THE LORD ADVOCATE

   Petitioner;

   for

   An order in terms of regulation 18 of The Civil Aviation

   (Investigation of Air Accidents and Incidents) Regulations 1996

2. **Petitioner: Brown QC, Ross;Scottish Government Legal Directorate**

3. **Interested Parties: O'Neill QC, Macintosh;Balfour + Manson LLP**

19 June 2015

Introduction

[1] On 23 August 2013, an AS332 Super Puma helicopter took off from the Borgsten Dolphin semi-submersible drilling platform, with two flight crew and 16 passengers on board. One hour and five minutes later, the aircraft, G-WNSB, crashed into the sea whilst on approach to Sumburgh Airport in the

Shetland Islands. Four of the passengers did not survive. The Air Accidents Investigation Branch of the Department for Transport ("AAIB") began an immediate investigation into the accident. That investigation has not been concluded.

[2] As required by the terms of article 37 and Schedule 4 of the Air Navigation Order 2009, the aircraft was carrying a combined voice and flight data recorder ("CVFDR"), and that device was recovered by the AAIB. The recorded data were downloaded, and comprise 78 hours of flight data and two hours of audio recording. The audio record consists of communications between the commander and co-pilot, radio transmissions and passenger announcements. Such recordings also capture other ambient sounds which may be important in the investigation of an accident or serious incident, such as a change in engine note.

[3] The AAIB has issued three bulletins concerning the accident. In the second of these, published in October 2013, the AAIB reported that the wreckage examination and analysis of recorded data had not revealed any evidence of a technical fault "that could have been causal to the accident", although some work remained to be completed. The helicopter manufacturer had also analysed the recorded flight data and concluded that, in the last 30 minutes of flight prior to impact with the sea, the helicopter had behaved as expected based on the recorded control inputs, and no pre-impact malfunction was evident. That analysis also showed that the combination of nose-high attitude, a high rate of descent and high-power had placed the helicopter in a "vortex-ring" state. It is explained in the bulletin that, in a vortex-ring condition, the effectiveness of the main rotor is significantly reduced because of the associated airflow characteristics. The manufacturer's modelling indicated that, in that condition, the reduced helicopter performance, together with the limited height available, meant that the impact with the sea was unavoidable. The third bulletin was published in January 2014, to highlight a safety concern relating to pre-flight safety briefings given to passengers, on the

functionality of emergency equipment provided to them for UK North Sea offshore helicopter flights. Nothing was said in that bulletin about the cause or causes of the accident.

The present proceedings

[4] The Lord Advocate has petitioned the court to pronounce an order, in terms of The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 ("the 1996 Regulations"), to ordain the Secretary of State for Transport to make the CVFDR available to him and Police Scotland. The petition was served on the Advocate General as the representative of the Secretary of State, and on CHC Scotia Limited ("CHC"), the operator of the aircraft, but neither has entered appearance. The British Airline Pilots Association ("BALPA"), the aircraft commander and the co-pilot have joined the process as interested parties, to oppose the application. The case came before the court for a hearing on 19 May 2015.

The Lord Advocate's averments of fact

[5] It is averred on behalf of the Lord Advocate that the accident is being investigated by Police Scotland, under the direction of the Procurator Fiscal on behalf of the Lord Advocate, and in conjunction with the Safety and Regulation Group ("SARG") of the Civil Aviation Authority ("CAA"). In the apparent absence of any technical fault, Police Scotland has asked SARG to provide an expert opinion on the performance of the flight crew of G-WNSB during the accident flight. The Lord Advocate avers that such an opinion requires to be based upon as accurate as possible an understanding of events in the minutes leading up to the crash, including any observations made by the flight crew. The CVFDR is a reliable and accurate source of such information, and the Procurator Fiscal has been advised that, in order that any expert opinion may be "of value", "the expert must have access to information including" the CVFDR. In support

of that averment, the Lord Advocate has produced a letter, dated 19 February 2014, from the group director of SARG.

[6] The Procurator Fiscal has formally requested that the AAIB make available the CVFDR for use in his investigation. The AAIB has refused to do so in the absence of an order from the court, under reference to the provisions of paragraphs 1 and 2 of article 14 of Regulation EU 996/2010 on the Investigation and Prevention of Accidents and Incidents in Civil Aviation ("the EU Regulation"). On 18 and 19 September 2013, the aircraft operator sent data, which had been recovered from the flight data recorder, to Police Scotland. The AAIB has subsequently advised the operator and Police Scotland that, in its view, such disclosure was contrary to the EU Regulation.

The answers for the interested parties

[7] The central ground of the interested parties' opposition to the Lord Advocate's disclosure request rests on the application of certain legislative provisions, which are discussed next in this opinion.

The flight safety framework

Investigations

[8] The Convention on International Civil Aviation was done at Chicago on 7 December 1944 ("the Chicago Convention"). The contracting States agreed, among other things, that they would collaborate in securing:

> "the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft… in all matters in which such uniformity will facilitate and improve air navigation."

To that end, it was also agreed that the International Civil Aviation Organisation ("ICAO") would adopt, and amend as necessary, international standards and recommended practices and procedures, dealing with the investigation of accidents. (Article 37)

[9] On 11 April 1951, Annex 13 to the Chicago Convention was adopted by ICAO under the provisions of article 37. The ninth and latest edition of Annex 13, entitled "Aircraft Accident and Incident Investigation", became applicable on 1 November 2001. When first adopted in 1951, the Annex contained standards and recommended practices for aircraft accident inquiries. (Foreword) It appears that, some years later, provision was introduced to Annex 13 for the investigation of incidents. (Table A) So far as is relevant in this case, an "accident" is defined as an occurrence associated with the operation of an aircraft, in which a person suffers a fatal or serious injury. An "incident" means an occurrence, other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operation. (Chapter 1) Chapter 3.1 of the Annex provides that:

> "The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability."

[10] Chapter 5 concerns the investigation of accidents and incidents. In terms of chapter 5.12, the State conducting such investigation shall not make certain records, including cockpit voice recordings and transcripts from such recordings, available for purposes other than the accident or incident investigation:

> "unless the appropriate authority for the administration of justice in that State determines that disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations."

[11] Under the heading "Accident Prevention Measures", chapter 8 requires States to establish a "mandatory incident reporting system to facilitate collection of information on actual or potential safety deficiencies." (Chapter 8.1) It is recommended in chapter 8.2 that States should establish a "voluntary incident reporting system". It is also recommended that such a system "shall be non-punitive and afford protection to the sources of the information." (Chapter 8.3) In two notes to the last of these recommendations, the view is expressed that a non-punitive environment is fundamental to voluntary reporting, and encouragement is given to States to facilitate and promote the voluntary reporting of events that could affect aviation safety "by adjusting the applicable laws, regulations and policies, as necessary." (The purpose of "notes" as used in the Annex is to give factual information or references bearing on the standards or recommended practices in question, but they do not constitute part of the standards or recommended practices.) (Foreword, "Status of Annex components", paragraph 2(c).)

[12] On that overview of Annex 13, it can be seen that it is concerned with the regulation of three separate matters: (i) the investigation of accidents and serious incidents; (ii) mandatory incident reporting (otherwise known as mandatory occurrence reporting ("MOR"); and (iii) voluntary incident reporting. It is noteworthy that only the last of these is expressly recommended to be the subject of a "non-punitive" system.

[13] The 1996 Regulations re-enact the Civil Aviation (Investigation of Air Accidents) Regulations 1989, with amendments. They give effect to amendments made to Annex 13 of the Chicago Convention and they implement:

> "Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents."

The regulations apply only in the context of civil aviation. (Regulation 3) So far as is relevant in this case, an "accident" is defined in, essentially, the same terms as in the Chicago Convention, as is an "incident".

[14] It is the responsibility of the Secretary of State to appoint inspectors of air accidents, for the purpose of carrying out investigations into accidents and serious incidents which occur in or over the United Kingdom. The body of inspectors is known as the Air Accidents Investigation Branch of the Department of Transport. (Regulation 8) The sole objective of the investigation of an accident or incident is the prevention of accidents and incidents. It is not the purpose of such an investigation to apportion blame or liability. (Regulation 4)

[15] Subject to certain qualifications, no "relevant record" is to be made available by the Secretary of State (including inspectors of air accidents) to any person for purposes other than accident or incident investigation. (Regulation 18(1)) The expression "relevant record" includes cockpit voice recordings and transcripts from such recordings. (Regulation 18(3) and paragraph 5.12 of Annex 13 to the Chicago Convention as amended on 23 March 1994.) The Court of Session may, however, order the Secretary of State to make a relevant record available to any person, but no such order may be made unless the court is satisfied that the interests of justice:

> "outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom".

[16] Article 14(1) of the EU Regulation provides that cockpit voice recordings and their transcripts shall not be made available or used for purposes other than safety investigation. Article 14(3), however, provides that, "notwithstanding" paragraph 1, the court:

> "may decide that the benefits of… disclosure… for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation."

Article 14(4) requires that only the data "strictly necessary" for the purposes referred to in paragraph 3 should be disclosed.

Cockpit voice and flight data recordings

[17] The CVFDR which was carried in G-WNSB was mandatory equipment for flight, as provided for by the Air Navigation Order 2009/3015 ("ANO"). (ANO, article 37 and schedule 4) Such recorders "must always be in use from the time the rotors first turn for the purpose of taking off until the rotors are next stopped." (ANO, article 152) The operator of a helicopter required to carry a CVFDR must, at all times, preserve a length of recording as specified in article 155 of the ANO. It is an offence for any person to contravene the foregoing provisions of the ANO. (ANO, article 241)

Flight data monitoring

[18] As will be seen later in this opinion, the interested parties refer to the existence and operation of a Flight Data Monitoring programme in support of their opposition to disclosure. It is convenient to explain what that is at this stage.

[19] Flight Data Monitoring ("FDM") is the "systematic pro-active and non-punitive use of digital flight data from routine operations to improve aviation safety." (CAA publication, CAP 739, 29 August 2003, chapter 1) In the introduction to chapter 1 of CAP 739, FDM programmes are said to assist an operator to identify, quantify, assess and address operational risks. An FDM system "allows an operator to compare their Standard Operating Procedures with those actually achieved in everyday flights." (Chapter 2) It is clear that the FDM regime, the oversight and regulation of

which fall within the province of the CAA, is entirely separate from the AAIB's area of responsibility in the investigation of accidents and serious incidents.

The issue for determination

[20] The central issue which falls to be determined in this case is whether the public interest in the disclosure of the CVFDR that was being carried in G-WNSB at the time of the accident outweighs any adverse domestic and international impact that such action may have on this or any future safety investigation. The court must, therefore, carry out a balancing exercise.

The evidence

[21] As is noted in paragraph [4] of this opinion, the Advocate General has not entered this process. By letter, dated 18 September 2014, from the Head of Litigation Division, Office of the Advocate General, the author advises the Deputy Principal Clerk of Session that the Secretary of State for Transport does not wish to participate as a respondent in these proceedings, but has instructed the author to set out the position of the Secretary of State and the AAIB. Reference is made to a memorandum of understanding which exists among the AAIB and Crown Office, and others, to ensure effective liaison, communication and cooperation between these parties, so that air accidents and related criminal incidents and deaths can be independently investigated by each party in parallel with each other, whilst also ensuring that legitimate public expectations are met. In practice, writes the author, this will mean that, where possible, parties may exchange factual information about the details of an accident or incident in a timely manner, as their respective investigations proceed in parallel. Reference is made to articles 12(2) and 14(1) of the EU Regulation and regulation 9(1) of the 1996 Regulations.

[22] The Head of Litigation notes that there are two fundamental purposes in an AAIB investigation: to determine the circumstances and causes of the accident with a

view to the preservation of life and the prevention of accidents in the future; it is not to apportion blame or liability. Reference is made to regulation 4 of the 1996 Regulations. The Secretary of State is required by domestic law, European law and international obligations to ensure the independence of the AAIB so as to safeguard the integrity of past and future air accident investigations. Once the AAIB has carried out its investigation, the relevant inspector is required to prepare a report relating to the accident or incident with safety recommendations where appropriate. That report is made public, if possible within 12 months of the accident. The published report is a public document but the records of the investigation are not. The author comments that that is an important distinction which Parliament has made, the significance of which must be "carefully considered".

[23] The Head of Litigation then rehearses the terms of regulation 18 of the 1996 Regulations, paragraph 2 of article 14 of the EU Regulation, and article 37 and paragraph 5.12 of Annex 13 to the Chicago Convention. The author draws to the reader's attention the note to paragraph 5.12, which is in the following terms:

> "Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilised inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety."

Reference is also made to attachment E to Annex 13 of the Chicago Convention, which provides legal guidance on the protection of information from safety data collection and processing systems. It provides that:

> "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."

[24] The author comments that the provisions of the note to paragraph 5.12 and guidance in attachment E:

> "clearly reflect the considerable public interest accorded to the State being able to investigate air accidents in an impartial and confidential manner for the purposes of ensuring public safety is maintained by the prevention of future accidents."

She reports that it is the Secretary of State's view that, if air accident investigators are required to disclose relevant records such as the CVR:

> "there will be a serious and adverse impact on the ability of the AAIB to effectively investigate future accidents and incidents and will impede the AAIB's effectiveness and contribution to aviation safety."

[25] The point is made that the CVR is a "vital investigative tool for accident investigators". It is said that the recording often contains information and discussions which the pilot and crew would not wish to be made public. Such discussions:

> "may be about internal politics or other matters which are not pertinent to the cause of the accident or incident under investigation".

The international aviation community understands and relies on the fact that the CVR will only be used for an accident investigation and will not be disclosed to third parties for litigation or disciplinary purposes. It is in that climate, says the author, that "aircrew operate unconcerned by the presence of the CVR in the workplace."

[26] The author notes that CVRs are fitted with a mechanism which enables the flight crew to erase the voice recording "extremely quickly upon completion of a flight". In addition, it is said, the CVR can be disabled by the flight crew who have "complete control of all electrical equipment on board the aircraft." It is said that, in the event that investigators were "routinely compelled to disclose the contents of the CVR it is likely that pilots would on occasions be tempted to disable the CVR if they were aware that the final comments before probable death in the event of an accident were to be made public." The Head of Litigation expresses the view that it is also likely that, were recordings to be made public, pilots would develop a habit of erasing the CVR record after incidents, to ensure that their words and comments do not become publicly known and so are not used by third parties seeking to apportion blame or liability.

[27] The letter concludes with the proposition that, if disclosure of voice records is regularly ordered, that would undermine the aviation community's faith in the confidentiality and purpose of the voice recording. It is noted that the assured independence of the AAIB encourages full and frank cooperation on the part of all those able to assist ongoing investigations and that the information obtained is kept confidential for the same reasons. The view is expressed that, undermining either of these aspects, "is likely to adversely impact on AAIB's ability to investigate future incidents."

[28] Four affidavits were placed before the court. Two, by Robert Bishton, and one by Keith Conradi were lodged by the Lord Advocate. Mr Conradi's affidavit was

obtained at the request of the court. The purpose of the second affidavit by Mr Bishton was to correct a technical error contained in the first. The fourth affidavit, by Nicholas Norman, was lodged on behalf of the interested parties.

[29] Mr Bishton is the Head of Flight Operations within SARG. To set the context for his evidence, Mr Bishton says that there is a presumption that, at the time of the accident involving G-WNSB, the operator was conducting its operations in accordance with the relevant requirements under the ANO. Further, the operator was the holder of a UK Air Operator's certificate, which required additional compliance with the Joint Aviation Requirements, Commercial Air Transportation (Helicopter) ("JAR-OPS 3"), as the means by which commercial helicopter operators comply with the ANO.

[30] For the purposes of his affidavit, Mr Bishton was asked to comment on the suggestion that pilots may be tempted to disable the CVR "if they were aware that their final comments were to be made public." Mr Bishton expresses the view that the CAA expects all flight crew to operate equipment in accordance with the company operations manual, which should be compliant with the relevant legislative requirements. He is not aware of any research or other evidence that would indicate that a pilot might disable the CVR if he or she believed that its contents would be disclosed for any purpose other than accident investigation. In that context, he refers to articles 152 and 155 of the ANO, the terms of which are recorded at paragraph [17] of this opinion, and notes that a breach of either article is a criminal offence.

[31] Mr Bishton depones that G-WNSB was fitted with a CVFDR to record data suitable for occurrence investigation, not for the purpose of FDM, explaining that there is no current regulatory requirement for a helicopter operator to conduct an FDM programme, although the operator has a discretion to do so as recommended by the CAA, (as has been done by CHC). The FDR equipment records the parameters "required to determine accurately the helicopter flight path, speed, attitude, engine power, configuration and operation." The same data may be recorded separately as

part of an FDM programme, if adopted by the operator. CVR data are not used for FDM purposes.

[32] The MOR scheme is not linked to the requirement for any recording equipment. Under that scheme, information is recorded on a report form by the reporter and sent to the CAA, which processes it in accordance with the required protocols. Article 226 of the ANO provides, among other things, that the objective of the article is to contribute to the improvement of air safety, by ensuring that relevant information on safety is reported, collected, stored, protected and disseminated. The sole objective of occurrence reporting is the prevention of accidents and incidents, and not to attribute blame or liability. The article applies to occurrences which endanger, or which, if not corrected, would endanger an aircraft, its occupants or any other person. Certain specified persons, including the operator and commanders of certain aircraft must report to the CAA any event which constitutes "an occurrence". The CAA is required to put in place a system of voluntary reporting to collect and analyse information on observed deficiencies in aviation which are not required to be reported under the MOR system.

[33] Mr Bishton expresses the view that a feature which is key to the successful implementation of safety regulation is to achieve an open and honest reporting environment within aviation organisations, regulators and investigation authorities. The effectiveness of that reporting culture depends on how organisations manage blame and punishment. Only a small proportion of human actions that are unsafe are deliberate and deserve sanctions of appropriate severity. A blanket amnesty on all unsafe acts, however, would lack credibility and could be seen as contrary to the interests of justice. What is required, suggests Mr Bishton is a system of "just culture", which creates an atmosphere of trust in which people are encouraged, or even rewarded for providing safety-related information, but in which they are also clear about where the line is to be drawn between acceptable and unacceptable behaviour.

[34] Keith Conradi is currently Chief Inspector of Air Accidents with the AAIB. The content of his affidavit is essentially the same as that of the letter from the Advocate General's Head of Litigation.

[35] Nicholas Norman is a retired civil helicopter pilot. He depones that he was involved in the development of the FDM programme for helicopters in the North Sea, which is described in CAP 739. Mr Norman reports that, when an FDM programme was first introduced by his then employers, Bristow Helicopters, there was some reluctance and suspicion from pilots. Mr Norman managed to dispel that by demonstrating that the programme was confidential and non-punitive. The company's management was denied access to any identified data in the absence of express permission in writing of the pilots. Mr Norman describes the development of the programme as a success.

[36] The weakness of the programme, according to Mr Norman, relates to the ability of the pilots, if they so wish, "to stymie it", in ways that he describes. That they do not, he suggests, is only because they can see the benefit of an FDM programme that is properly run. If there were a perception that the data were likely to be used in a punitive way, however, or used by incompetent people likely to misinterpret it:

> "it would be very difficult to prevent deliberate destruction of the data especially if they realised that they had come close to an accident, thus losing the potential for everyone to learn from the event."

On that analysis, Mr Norman concludes that it is very important to the furtherance of flight safety that the data so collected is used appropriately, that is to say, only for the purposes of promoting flight safety, and not for any punitive purposes.

[37] The point is made that the analysis of flight data is a specialist task, and Mr Norman expresses the view that Police Scotland are unlikely to be in a position to analyse these data correctly. A similar point is made about the analysis of recordings captured on the CVR. Further, although it is not the purpose of an AAIB investigation

to apportion blame, following the impartial analysis of events and publishing of the final report, "any blame normally becomes apparent".

[38] Mr Norman concludes his affidavit by expressing the view that the risk to flight safety created by disclosure would be considerable "due to its probable effect on the industry's FDM programmes and even its future accident and incident investigations, as outlined in the Advocate General's response" to the petition. He expresses the view that it is very hard to see how a criminal investigation that pre-empts the result of the AAIB's investigations and any recommendations that will be made by the AAIB could benefit flight safety.

Submissions for the Lord Advocate and interested parties

[39] The Lord Advocate and interested parties lodged written notes of argument. They are, respectively, appendix 1 and appendix 2 to this opinion.

[40] It is contended on behalf of the Lord Advocate that there is nothing to be put in the balance which will weigh against the public interest and the interests of justice in, and the benefits of, disclosure. (For the sake of brevity, I shall use the word "benefits" as a shorthand for what has to be weighed against the adverse domestic and international impact that such action may have on that or any future investigations.) The interested parties do not contend that the disclosure sought in this case would have any adverse domestic or international impact on the current investigation, but argue that the second leg of the test, the risk to future accident or incident investigations undertaken in the United Kingdom, is engaged.

[41] In support of their submissions, the interested parties rely on the averments for each of them, which are in identical terms, at answer 13. It is averred that the international civil aviation safety system provided for in the Chicago Convention and the international legislation flowing from it "derives its efficacy from the investigation and analysis of feedback and lessons learned from accidents and incidents." It is averred that the "high importance" of the public interest in maintaining the confidence of all those involved in the aviation industry operating worldwide requires full and

accurate reporting to and cooperation with the relevant regimes for the promotion of aircraft safety, and strict application of rules on confidentiality, in order to ensure the future availability of valuable sources of information. That, in turn, requires a "non-punitive environment facilitating a spontaneous reporting of occurrences and thereby advancing the principle of 'just culture'." It is essential that the crew of aircraft involved in incidents and accidents:

> "have the confidence to provide information during and after accidents and incidents without having concerns that information they provide will be used against them in a criminal investigation."

The interested parties aver that the disclosure of the recordings sought in this petition would have an adverse impact on future investigations into civil aviation accidents, incidents and occurrences in general.

Discussion and reasons

[42] In order to address the issue identified in paragraph [18] of this opinion, it is necessary first to determine whether it would be in the "interests of justice" to order disclosure. (Regulation 18(4) of the 1996 Regulations) That may or may not be a stricter test than whether the disclosure would bring "benefits". (Paragraph 3 of article 14 of the EU Regulation) Only if it were concluded that these tests were met would it be necessary to consider whether the benefits of disclosure outweighed any adverse impact of the type referred to earlier in this opinion.

[43] I do not understand it to be suggested by the interested parties that, as a matter of generality, that is, leaving aside the particular restraint on disclosure that is imposed by the Chicago Convention and the legislation flowing from it, it would be other than in the interests of justice that disclosure take place or that disclosure would not benefit the police enquiry. The matter is, however, to be determined by the court.

[44] The master of the instance in all prosecutions for the public interest in Scotland is the Lord Advocate:

> "It is for him to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which Court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings. Not only so, even when a verdict of guilt has been returned and recorded it still lies with the Lord Advocate whether to move the Court to pronounce sentence, and without that motion no sentence can be pronounced or imposed. In the exercise of these formidable responsibilities the Lord Advocate has at his disposal the fullest available machinery of inquiry and investigation." (*Boyle* v *HMA* (1976) JC 32)

Further, the Lord Advocate is responsible for the investigation of the circumstances of a death in Scotland which is sudden, suspicious or unexplained, has occurred in circumstances such as to give rise to serious public concern, or has resulted from an accident while the person who has died was in the course of his or her employment. (Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, section 1).

[45] In my judgment, there is no doubt that the Lord Advocate's investigation into the circumstances of the death of each of those who perished in this case is both in the public interest and in the interests of justice. The cockpit voice recording and the flight data recording which the Lord Advocate seeks to recover will provide relevant, accurate and reliable evidence which will enable SARG to provide an expert opinion of value to assist him in his investigation of the circumstances of the death of the four passengers whose lives were lost, and his decision whether and, if so, against whom to launch a prosecution. For that reason, the disclosure of the CVFDR will bring benefits for the purpose of the Lord Advocate's investigation. It is important to stress that the analysis of the recordings in the CVFDR for the purposes of its opinion will be carried out by personnel within SARG who have the expertise and experience necessary for the performance of these tasks. That consideration disposes of one of Mr Norman's concerns, recorded at paragraph [34] of this opinion.

[46] It is appropriate, at this point, to say that Mr Norman's concerns about any impact on the FDM system are not relevant to the balancing exercise which this court has to perform in the context of an application under the provisions of regulation 18 of the 1996 Regulations, which requires the court to have regard to any adverse impact which disclosure might have on future accident and incident investigations by the AAIB. In considering whether the benefits of disclosure outweigh the adverse domestic and international impact such action may have on any future investigations, it is important, in my view, to have in mind the differences that exist between the compulsory investigation by the AAIB of accidents and serious incidents, on one hand, and mandatory and voluntary occurrence reporting and FDM programmes on the other.

[47] Those aircraft which carry CVRs and FDRs or CVFDRs under the provisions of article 37 and Schedule 4 of the ANO do so for the purposes of accident and serious incident investigation. The equipment is to be operated as prescribed by articles 152 and 155 of the ANO, under pain of criminal sanction. By contrast, FDRs which may be carried for the purposes of FDM are separate from those carried the purposes of accident and serious incident investigation. Obstruction of the use of these FDRs is not subject to any criminal sanction. The effective operation of the FDM programme, therefore, relies on the cooperation of flight crew, among others. The MOR regime, whilst compulsory, also relies on the cooperation of flight crew, for its proper working in the interests of flight safety. The same is true of the voluntary incident reporting regime. It is not difficult to see why those systems, which rely on the cooperation of persons involved in aviation in order to function, seek to encourage that cooperation by fostering a non-punitive, just culture.

[48] These differences are made clear in the text of the regulatory impact assessment ("IA") published in October 2009 by the European Commission, in conjunction with the proposal for what became the EU Regulation. Chapter 2 of the IA is headed "Background - Air Safety and Accident Investigation". Chapter 2.2 sets out "the need for independent accident investigation and occurrence reporting." Independent

investigations of accidents are said to be essential in the drive to improve transport safety. Analysis of the circumstances of accidents leads to recommendations being made to prevent the reoccurrence of accidents. The point is made, however, that accidents rarely result from a single failure, but rather from a combination of events which make them difficult to analyse but provide "multiple opportunities to prevent them." The philosophy is that, if any link in the fatal chain is removed, the accident can be avoided. Consequently, beyond accident investigation, what the IA describes as "the crucial element in prevention of accidents" is:

> "open reporting and careful analysis of even the smallest incidents, failures and other occurrences in daily operations which may indicate the existence of serious safety hazards, and which if not corrected may lead to subsequent accidents."

[49] At chapter 2.2.2, the role of accident investigation is distinguished from the aim of occurrence reporting. The former is the improvement of safety through analysis of serious events; the latter is to improve safety by timely detection of operational hazards and system deficiencies, which, if not properly addressed, could escalate into future catastrophes. Occurrence reporting is described as "an essential tool in (the) promotion of organisational safety culture ('Just Culture')". Just culture is described:

> "as a working environment where front-line operators or others are not punished for actions, or missions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated."

The authors of the text express the view that just culture in general and occurrence reporting in particular "take a systemwide approach to accident prevention and recognise that moving beyond blame is essential in enhancing safety in a proactive way".

[50] On an analysis of the then current EU regulatory framework dealing with civil aviation accident investigation and occurrence reporting, Directive 94/56/EC, the authors of the report express the view that it "no longer meets the requirements of the Community and Member States." Among the "specific problem areas" which they identify are "(t)ensions between safety investigations and other proceedings." (Chapter 3.3) Whilst noting that the sole objective of accident investigation and occurrence reporting should be the prevention of accidents and incidents, without attributing blame or liability, the authors say that safety investigations or occurrence reporting "should not interfere with the proper administration of justice either." They continue:

> "… nothing should prevent the judicial or other authorities from carrying out their own investigations, under their own procedural rules and to collect evidence that could serve as a basis for establishing the eventual liability of the persons involved (in) the event. Through these parallel but independent procedures the common objective of protecting human life and delivering justice may be served jointly."

[51] In the context of their consideration of tensions between safety investigations and other proceedings, the authors discuss the protection of sensitive safety information. (Chapter 3.3.1.2) They note that evidence gathered in the course of a safety investigation may be of various types. Some information, for example, will be purely factual and should be freely shared among all the authorities involved in the investigation. By contrast, some information is recognised as being of a "much more sensitive nature" the protection of which from unauthorised disclosure or inappropriate use is of the utmost importance. That description is said to apply, in particular, "to evidence such as witness testimonies or other statements, accounts and notes taken or received by the national safety investigation authorities ("NSIA"). This text then follows:

> "Availability of such information is crucial in the disclosure of all circumstances of the event and of its causes. Inappropriate use of such evidence may compromise its future availability, as pilots or other aviation professionals may be reluctant to share it with the investigators without having certainty that it will not be later used to blame them. This is a sensitive issue, linked not only with safety considerations but also with the fundamental right of every citizen to a fair trial and prohibition of self-incrimination."

The authors go on to say that a similar philosophy underpins occurrence reporting systems under Directive 2003/42/EC, the sole objective of which is to detect the existence of safety hazards as early as possible, and prevent them from escalating into accidents. The underlying principle is that public safety is best served by sharing and analysing safety information and using it for accident prevention purposes only, not for punishing or prosecuting those who, in good faith, wish to share their mistakes.

[52] Two examples are given of the consequences of inappropriate use of sensitive safety information in the context of accident investigation and of occurrence reporting systems. In the first ("Case I"), two aircraft collided on the runway at Milan airport. One of those then impacted with the baggage handling building. All occupants of the two aircraft and four members of the ground staff suffered fatal injuries. Both safety and judicial enquiries were initiated. The NSIA was unable to take statements from witnesses, because they made themselves unavailable pending the outcome of the judicial enquiry. Recording equipment required by the NSIA for the purposes of its investigation had been seized by the magistrate for the purposes of the criminal enquiry, and was not made available to the NSIA.

[53] In the second ("Case II"), an aircraft aborted its take-off roll at Schiphol, when the flight crew observed another towed aircraft crossing the runway in front of them. It is apparent from the text of the IA that "aviation professionals" who had witnessed the incident had made statements in the framework of an occurrence reporting system. The incident investigation report concluded that the incident happened because the

controller misinterpreted the position of the tow-combination when radio contact was first established. Almost two years after the date of the accident, the prosecution authorities charged a number of individuals, including the controller, with a statutory offence. Three of the four accused were convicted. The authors of the IA report record that, over the years during which the legal proceedings continued, "the number of incident reports submitted by controllers dropped by 50%."

[54] The events narrated in Case I can be seen to have had two adverse impacts on the NSIA investigation into the particular accident that it was investigating. Individuals who feared prosecution did not cooperate with the NSIA. The investigation was further hampered because the judicial authority had deprived it of the opportunity to consider critical evidence. In Case II, the system of incident reporting was adversely affected, because individuals withdrew the cooperation on which the system relied for its effective functioning.

[55] It is not difficult to identify circumstances in which an application for disclosure in this country might be refused for fear of withdrawal of cooperation in future. For example, regulation 9(2) of the 1996 Regulations empowers an investigating inspector to take statements from all such persons as he thinks fit and to require such person to make and sign a declaration of the truth of the statement made by him or her. Whilst that provision involves an element of compulsion, it requires a degree of voluntary cooperation from the individual concerned to be fully effective. Such statements, however, are protected by the provisions of regulation 18. In the event of an application by the prosecuting authority for disclosure of a statement, the court might well be persuaded that the benefits would not outweigh any adverse impact on future investigations, in the form of reluctance on the part of witnesses to cooperate. The ultimate decision would, however, depend on the whole circumstances of the case.

[56] By contrast, the proper operation of the system of which the CVFDR plays a central part does not depend on the voluntary cooperation of flight crews. The installation of the equipment is the statutory responsibility of the aircraft operator. The

operation of the equipment is the statutory responsibility of the flight crew. Non-compliance with these responsibilities attracts criminal penalties. It is inherently unlikely, in my opinion, that flight crews who have gained the qualifications and accumulated the experience necessary to operate aircraft in which the installation of a CVFDR is mandatory will deliberately neglect their responsibilities in respect of that equipment.

[57] In Mr Conradi's affidavit, the assertion is made that:

> "if air accident investigators are routinely required to disclose relevant records such as the cockpit voice recorder, this will have a serious and adverse impact on our ability to effectively investigate future accidents and incidents."

The view is expressed that, if investigators were "routinely compelled" to disclose the contents of a cockpit voice recording, it is likely that pilots would, on occasions, be tempted to disable the CVR. Mr Conradi offers anecdotal evidence that, when CVRs were first introduced in the UK in the early 1970s:

> "pilots would routinely disable them but this became less frequent as the protections surrounding their use improved and flight crews understanding of and trust in those protections increased."

[58] Accident investigators cannot be required "routinely" to disclose cockpit voice recordings. They can only be ordered to do so in a particular case if the tests laid down by the 1996 Regulations and the EU regulation are met. Each case will turn on its own facts and circumstances. If these tests are met, it is the duty of the court to order disclosure. My decision in this case will create no precedent. Further, Mr Brown QC, representing the Lord Advocate, advised the court that this application is not made in accordance with any new Crown Office policy. It is made by the Lord Advocate in the circumstance of this case, where the AAIB has reported that it had found no evidence that the accident had been caused by any technical fault. Although some work

remained to be completed, 20 months have passed with no further bulletin having been issued suggesting that a technical fault may have been causally connected with the accident. As is pleaded in the petition, Police Scotland's investigation is being undertaken "in the apparent absence of any technical fault."

[59] During the hearing, the court was advised that, over the past 20 years, four fatal accidents had occurred in Scotland, involving aircraft fitted with cockpit voice recorders and flight data recorders. No attempt was made by the Lord Advocate to recover voice or data recordings from any of the aircraft involved. For the reasons given in this and the preceding paragraph, I do not anticipate that investigators will be "routinely compelled" to disclose cockpit voice recordings.

[60] Nor do I accept that, in the event of a decision in this case that the CVFDR should be disclosed, it is likely that flight crews "would on occasions be tempted to disable the CVR". As I have said, that is inherently unlikely. Mr Conradi's anecdotal evidence on what flight crews may or may not have done 40 years ago when CVRs were introduced is unimpressive. In any event, I accept Mr Norman's evidence that, although it is not the purpose of an AAIB investigation to apportion blame, "following the impartial analysis of events and publishing of the final report, any blame normally becomes apparent." It appears that, during the past 40 years, the possibility of being blamed for having caused an accident has not tempted flight crews to disable the CVR.

[61] I accept that SARG cannot provide an expert opinion for the assistance of Police Scotland and Crown Office "of value", without carrying out a flight operations specialist analysis of the data contained in the CVFDR. Accordingly, I hold that those data are strictly necessary for the purposes of the police investigation. I also hold that the benefits of disclosure outweigh the adverse domestic and international impact that disclosure may have on the current AAIB investigation and any future safety investigation. I put the matter in that way, because that is the test that I must apply. To put it more precisely, I am satisfied that, in the particular circumstances of this case, (i) disclosure will have the benefits that I have identified (see paragraph [42]) and (ii)

disclosure in this case will have no adverse domestic or international impact on the current investigation or on any future safety investigation.

[62] Mr O'Neill argues on behalf of the interested parties that, in the absence of positive averment by the Lord Advocate that the adverse domestic and international impact of disclosure of the CVFDR on any future safety investigation would not outweigh the benefits of disclosure, the prayer of the petition should be refused. I reject that argument. An averment in these terms is made at statement 14 of the petition. In any event, the issue was fully ventilated during the hearing on 19 May.

[63] In their written argument, counsel for the interested parties invite the court to seek the guidance of the Court of Justice of the European Union, by way of a preliminary reference, "under and in terms of article 267 TFEU as to the factors relevant to the application of the test set down in article 14(3)" of the European Regulation "on the need for disclosure to outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation." As I have said, in my judgment disclosure in this case will have no such impact. Applying the guidance given by the Master of the Rolls in *R* v *International Stock Exchange of the United Kingdom and the Republic of Ireland, ex parte Else* [1993] QB 534 at 545, which is set out at paragraph 13.5 of the interested parties' written argument, I am satisfied that no issue of EU law arises, such that a preliminary reference requires to be made.

[64] Finally, the third and fourth interested parties contend that the granting of the order sought by the Lord Advocate would constitute an interference with their fundamental rights, protected as a matter of EU law. The granting of the order must be justified, on the evidence, as "strictly necessary". They submit that the Lord Advocate has failed to provide the court with such evidence, and that the prayer of the petition should be refused for that reason. I reject that argument for the reasons given by the Lord Advocate in his note of argument at paragraphs 28 to 37.

[65] In the whole circumstances, I propose to grant an order in terms of regulation 18(3) of the 1996 Regulations, subject to conditions which are intended to

address concerns expressed by the Head of Litigation and Mr Conradi, and to comply with the terms of the EU Regulation. (See, for example, paragraphs [22] and [23] of this opinion, and article 14 of the EU Regulation, paragraph 1(g).) The conditions which I shall attach to disclosure are as follows:

(i) The CVFDR is to be made available to the Crown Office and Procurator Fiscal Service acting under the direction of the Lord Advocate ("COPFS") and Police Scotland for the purposes of downloading and analysis by avionics and flight operations specialists.

(ii) Following the granting of the order by the court, Police Scotland will take possession of the CVFDR and will retain overall control and responsibility for it until its return to AAIB.

(iii) Downloading of the CVFDR data will be undertaken by suitably-qualified parties selected by COPFS. Analysis of the data will be undertaken by the Safety and Airspace Regulation Group ("SARG") of the Civil Aviation Authority and suitably qualified experts appointed by the Lord Advocate on the advice of SARG.

(iv) The CVFDR is to be returned to Police Scotland once downloading and SARG's analysis is complete. It is to be returned to AAIB at the conclusion of any legal proceedings to follow.

(v) The results of the analysis and any subsequent expert opinion are to be treated by SARG and any other parties involved in the downloading and analysis as confidential and not disclosed to any third party other than COPFS and Police Scotland.

(vi) Once transmitted to COPFS and Police Scotland, the results of the analysis and the opinion are to be accorded the same level of confidentiality as a precognition, other than in compliance with the provisions of Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010.

(vii) In the event that it is decided that the cockpit voice recording or a transcript of the cockpit voice recording is to be produced in any criminal prosecution or in a fatal accident inquiry, it is to be redacted so as to ensure that information not relevant to the prosecution or inquiry, particularly information with a bearing on personal privacy, is not disclosed.

Appendix 1

IN THE COURT OF SESSION

P628/14

NOTE OF ARGUMENT FOR THE PETITIONER

in re

THE PETITION OF

FRANK MULHOLLAND QC, THE LORD ADVOCATE,

25 Chambers Street, Edinburgh, EH1 1 LA

for

An order in terms of regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996

Introduction and factual background

1. There is little or no dispute as to the factual background which is set out in the petition. In summary, on 23 August 2013, Eurocopter AS332 L2 Super Puma helicopter, registration G-WNSB, ("the helicopter") crashed in the North Sea approximately two miles west of Sumburgh Airport. The helicopter was owned and operated by CHC Scotia Limited ("CHC"). It was en route to Sumburgh Airport, having travelled from the Borgsten Dolphin platform approximately 240 miles east of Aberdeen. There were 18 individuals on board, all in the course of their employment. Four died. The pilot and co-pilot survived.

2. The helicopter was equipped with a combined cockpit voice recorder ("CVR") and flight data recorder ("FDR") located within the tail. The installation of a CVR and FDR was mandatory in terms of Article 37 and Schedule 4 of the Air Navigation Order 2009 ("ANO").

3. The circumstances of the crash are being investigated by the Air Accidents Investigation Branch ("AAIB") of the Department of Transport. The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (SI 1996/2798) ("the 1996 Regulations") give the AAIB a series of powers to enable it to carry out investigations. These include right of access to the accident site and to CVRs and FDRs. In the course of its investigations, the AAIB has recovered the combined CVR and FDR. The AAIB has yet to publish its report. It has released three Bulletins but to date has not identified any technical fault which could have caused or contributed to the crash. Special Bulletins S6/2013 of 5 September 2013, S7/2013 of 18 October 2013 and S1/2014 of 23 January 2014 have been lodged in process (petitioner's productions 4-6).

1. The crash is also being investigated by the Police Service of Scotland ("Police Scotland") working in conjunction with the Civil Aviation Authority ("CAA") and under the direction of the Procurator Fiscal on behalf of the petitioner. In the apparent absence of any technical fault, Police Scotland has been attempting to obtain an expert opinion on the performance of the flight crew during the flight which ended in the crash. Such an opinion requires to be based, *inter alia*, upon as accurate as possible an understanding of events leading up to the crash, including any observations made by the flight crew. The only irrefutable sources of such information are the CVR and FDR. The Procurator Fiscal has been advised that, in order for any expert opinion to be of value, the expert must have access to information including the CVR and FDR. A copy letter from the

CAA to the Crown Office and Procurator Fiscal Service dated 19 February 2014 has been lodged in process (petitioner's production 1).

2. The Procurator Fiscal has formally requested that the AAIB make available the CVR and FDR for use in the investigation. The AAIB has refused to do so in the absence of an order from the court. Copies of the Procurator Fiscal's letter of 1 April 2014 and the AAIB's reply dated 28 April 2014 have been lodged in process (petitioner's productions 2 and 3). The AAIB has stated that it is not in a position to provide the requested material voluntarily in view of the provisions of paragraphs 1 and 2 of Article 14 of Regulation EU 996/2010 on the Investigation and Prevention of Accidents and Incidents in Civil Aviation ("the EU Regulation"). These paragraphs provide that certain records, including CVRs, "shall not be made available or used for purposes other than safety investigation".

3. In these circumstances, the petitioner seeks an order for recovery from the Court. The petition was served on the Advocate General for Scotland, as representing the Secretary of State for Transport, and on CHC as an interested party. Neither the Advocate General nor CHC has entered appearance. The Office of the Advocate General has sent a letter to the Court dated 18 September 2014 setting out the position of the Secretary of State for Transport and the AAIB (number 9 of process). Three other parties have entered appearance and lodged Answers as interested parties. They are the British Airline Pilots Association ("BALPA") (second interested party), the commander of the helicopter and pilot flying at the time of the crash (Martin Miglans, third interested party) and the co-pilot of the helicopter (Alan Bell, fourth interested party). Each of the interested parties opposes the granting of the order. The third and fourth interested parties (whose Answers are in practically identical terms) raise some additional grounds of objection beyond those raised by the second interested party.

Legal framework

General

1. The petitioner seeks an order for disclosure in terms of the 1996 Regulations. By virtue of regulation 18(3), the Court of Session is the "relevant court" in respect of an application made in Scotland for such an order. There is no dispute that this Court has jurisdiction over the subject matter of the petition.

2. The 1996 Regulations implement obligations of the United Kingdom under Council Directive 94/56/EC of 21 November 1994 ("the Directive") and put into effect requirements of Annex 13 to the Convention on International Civil Aviation signed in Chicago on 7 December 1944 ("the Chicago Convention"). There is a substantial overlap between the 1996 Regulations and the EU Regulation.

3. The sole object of an AAIB investigation is the prevention of accidents and incidents. It is not the purpose of such an investigation to apportion blame or liability. That is not to say, however, that those charged with responsibility for the investigation of crime and sudden deaths are precluded from carrying out their own investigations into incidents such as the crash with which this petition is concerned. The relevant legislation envisages that safety and judicial investigations may run in parallel. The powers of the AAIB are, by virtue of regulation 9 of the 1996 Regulations, to be exercised "where appropriate in cooperation with the authorities responsible for the judicial inquiry" (see also Annex 13 to the Chicago Convention, §5.10). The AAIB and the Crown Office and Procurator Fiscal Service ("COPFS") have parallel investigative duties, as is recognised in the Memorandum of Understanding of 11 January 2008 between the AAIB, the Marine Accident Investigation Branch, COPFS and the Association of Chief Police Officers (Scotland), particularly §§19-24 and 48.

Regulation 18

4. The petitioner seeks an order for recovery under and in terms of regulation 18 of the 1996 Regulations, the provisions of which are therefore set out in full:

1. *Subject to paragraphs (2) and (4) to (6) below no relevant record shall be made available by the Secretary of State to any person for purposes other than accident or incident investigation.*

2. *Nothing in paragraph (1) above shall preclude the Secretary of State making a relevant record available to any person where-*

> *(a) in a case where that person is a party to or otherwise entitled to appear at judicial proceedings, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those proceedings, or*
>
> *(b) in any other circumstances, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those circumstances.*

1. *In this regulation-*

"judicial proceedings" includes any proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath,

"relevant court" in the case of judicial proceedings or an application for disclosure made in England and Wales means the High Court, in the case of judicial proceedings or an application for disclosure made in Scotland means the Court of Session and in the case of judicial proceedings or an application for disclosure made in Northern Ireland means the High Court, "relevant record" means any item in the possession, custody or power of the

Secretary of State which is of a kind referred to in sub -paragraphs (a) to (e) of paragraph 5.12 of the Annex; and

"Secretary of State" includes any officer of his.

2. *Subject to paragraph (6) below no order shall be made under paragraph (2) above unless the relevant court is satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom.*

3. *A relevant record or part thereof shall not be treated as having been made available contrary to paragraph (1) above in any case where that record or part is included in the final report (or the appendices to the final report) of the accident or incident.*

4. *The provisions of this regulation shall be without prejudice to any rule of law which authorises or requires the withholding of any relevant record or part thereof on the ground that the disclosure of it would be injurious to the public interest.*

1. The definition of "relevant record" includes a CVR. However, the Secretary of State is not precluded from making it available to the petitioner if, in terms of paragraph (2) this Court has ordered that it be made available. In deciding whether to make such an order, the Court must be satisfied that the requirements set out in paragraph (4) are met.

Application of regulation 18

Reasons for granting order

2. The petitioner is responsible for the Procurator Fiscal's investigations into potential criminality and prosecutions. He also has sole responsibility for directing the investigation of deaths in Scotland. In respect of every matter of fatality reported to

the Procurator Fiscal, the petitioner directs that the Fiscal must investigate the full circumstances of the death and must also consider if criminal proceedings are appropriate. Such investigations are in the public interest.

3. Given that the four people who died in the crash died in the course of their employment, the deaths will be the subject of a mandatory Fatal Accident Inquiry ("FAI") unless, in terms of section 1(2) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

   criminal proceedings have been concluded against any person in respect of the death or any accident from which the death resulted, and the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of such proceedings.

4. In view of the serious consequences of the crash, including the four fatalities, a thorough and effective investigation by the Procurator Fiscal and Police Scotland is in the public interest. The state's obligation to investigate deaths under Article 2 of the European Convention on Human Rights ("ECHR") is well established. The investigation is required to be independent, effective, reasonably prompt and involve a sufficient element of public scrutiny. The disclosure of the requested material is essential for such a thorough and effective investigation.

5. AAIB reports, which often contain conclusions drawn from examination of FDRs and CVRs, are made public (1996 Regulations, regulation 13). They are admissible in civil proceedings (*Rogers v Hoyle* [2015] QB 265, per Clarke UJ at §80). AAIB inspectors responsible for the production of such reports regularly give evidence of the results of their investigations in public at Coroners' Inquests where they may be questioned by those affected. Evidence was given about the AAIB report at the recent FAI into the deaths arising out of the crash of a Super Puma helicopter into the North Sea (Determination of Sheriff Pyle dated 13 March 2014).

6. If the order sought is not granted, there is a real risk that any criminal proceedings which might be taken and the fatal accident inquiry would not have available to them the best and most reliable evidence on issues central to the crash and resulting deaths. The third and fourth interested parties have chosen to give statements to the police. There is a risk that inaccurate, or incomplete, evidence would be given about critical matters on which the material sought could provide incontrovertible evidence. This is an important consideration in favour of granting the order sought (*Société Air France v Greater Toronto Airports Authority 2009 CanLII 69321; Société Air France v NA V Canada* 2010 ONCA 598; *Jetport Inc v Global Aerospace Underwriting Managers* 2014 ONSC 6860).

7. It is central to the concept of the administration of justice that the Crown be allowed to examine all the relevant and material evidence available to allow it to exercise its functions as the prosecutor of criminal acts in the public interest and in the investigation of deaths in Scotland. There is a need to maintain public confidence in the administration of justice. The withholding of relevant and potentially important material, unless justified by the strongest considerations of public interest, is apt to undermine public confidence in the judicial process (*Australian National Airlines Commission v Commonwealth of Australia and Canadian Pacific Airlines Ltd* (1975) 6 ALR 433, per Mason J at 443).

Objections to disclosure in terms of regulation 18

8. The interested parties aver that the effect of regulation 18, Article 14 of the EU Regulation and Article 5.12 of Annex 13 of the Chicago Convention is to require the Court to balance the public interest in the disclosure of the information sought against the adverse domestic and international impact on the AAIB investigation into the crash in particular and any future investigation into civil aviation accidents, incidents and occurrences in general. The petitioner agrees that that is, essentially, the task which the Court has to perform.

9. The interested parties argue that any public interest in disclosure of the information sought is outweighed by the adverse domestic and international impact which such an order would have on the investigation into the crash or any future accident or incident investigation undertaken in the United Kingdom. The essence of their argument appears to be contained in the following averments:

> *… the United Kingdom, European and International civil aviation safety system provided for in the 1996 Regulations, the EU Regulation and the Chicago Convention derives it[s] efficacy from the investigation and analysis of feedback and lessons learned from accidents and incidents. The high importance of the public interest in maintaining the confidence of all those involved in the aviation industry operating across the United Kingdom, European Union and worldwide requires full and accurate reporting to, and co-operation with, the relevant regimes for the promotion of aircraft safety system. The operation of the civil aviation system requires strict application of rules on confidentiality in order to ensure the future availability of valuable sources of information. The operation of the civil aviation system requires a non-punitive environment facilitating the spontaneous reporting of occurrences and thereby advancing the principle of 'just culture'. It is essential that the crew of aircraft involved in accidents and incidents have the confidence to provide information during and after accidents and incidents without having concerns that information they provide will be used against them in a criminal investigation. The public interest includes the prevention of future accidents and goes beyond the individual interests of the parties involved and beyond the specific event. The disclosure of the cockpit voice recordings and flight data recordings sought in the petition would have an adverse impact on future investigations into civil aviation accidents, incidents and occurrences in general.*

1. The petitioner offers the following observations about these averments.

> (1) Although the pleas-in-law for the interested parties refer to adverse impact which the order would have on the investigation into the crash, no explanation is offered as to how any such adverse impact would arise. The AAIB has had access to the material sought in terms of the petition. It has not suggested that granting the order sought would adversely affect its investigation which, it is understood, is nearing completion. Disclosure would not prejudice or inhibit the approach adopted by and required of the AAIB in the course of its safety investigations (*Rogers (supra)*, per Clarke LJ at §§89-90).

1. It is asserted that it is essential that crew of aircraft involved in accidents must have the confidence to provide information after accidents without having concerns that information they provide will be used against them in a criminal investigation. No such information is sought. The petitioner does not seek, for example, statements provided to the AAIB by the third and fourth interested parties or the conclusions reached by the AAIB investigators about discussions they may have had with the third and fourth interested parties.

2. Different considerations might arise in relation to voluntary reporting of incidents by crew of aircraft which might not otherwise come to attention. However, this is not such a case. Just Culture is not intended to be a culture in which those involved in civil aviation are free from scrutiny or investigation.

3. The suggestion that disclosure of the CVR and FDR "would have an adverse impact on future investigations into civil aviation accidents, incidents and occurrences in general" has no evidential basis and is nothing more than speculation (see, in this connection, *Société Air France v NAV Canada* 2010 ONCA 598, per *Goudge JA* at §29).

4. The material sought was not created for or in the course of the AAIB investigation. It was captured by equipment required to be installed by law. Such equipment must be used and the resulting records preserved (see Articles 152, 154, 155 and 241 of the ANO).

5. Given the terms of regulation 18 (and of Article 14 of the EU Regulation), crew of aircraft are aware that, in certain circumstances, the CVR and FDR may be disclosed to the Crown and, indeed to other parties. It therefore seems unlikely that the granting of the order sought in the particular circumstances of this case would have the negative effects claimed by the interested parties.

Letter from Office of the Advocate General

21. As noted above, the Advocate General has not entered appearance but Ms Fiona Robertson of his Office has written a letter to the Court dated 18 September 2014 to which the interested parties refer in their Answers. On the final page, Ms Robertson writes:

> *The CVR is a vital investigative tool for accident investigators when seeking to establish the cause of an accident so as to make safety recommendations that prevent future accidents. It often contains information and discussions which the pilot and crew would not wish to be made public for a variety of reasons.*
>
> *These discussions may be about internal politics or other matters which are not pertinent to the cause of the accident or incident under investigation. The international aviation community understands and relies on the fact that the CVR will only be used for an accident investigation and will not be disclosed to third parties for litigation or disciplinary purposes. It is in this climate that aircrew operate unconcerned by the presence of the CVR in the workplace.*

> *CVRs are however fitted with a mechanism which enables the flight crew to erase the voice record on the CVR extremely quickly upon completion of a flight. In addition the CVR can be disabled by the flight crew who have complete control of all electrical equipment on board the aircraft.*
>
> *In the event that investigators were routinely compelled to disclose the contents of a voice recorder it is likely that pilots would on occasions be tempted to disable the CVR if they were aware that their final comments before probable death in the event of an accident where [sic] to be made public. It is also likely that were recordings to be made public then pilots would develop a habit of erasing the CVR record after incidents to ensure that their words and comments do not become publicly known and so are not used by third parties seeking to apportion blame or liability.*

22. The petitioner offers the following observations about the passage quoted above:

1. The petitioner fully agrees that the CVR may be a "vital investigative tool for accident investigators when seeking to establish the cause of an accident …"

2. The suggestion that the CVR "often contains information and discussions which the pilot and crew would not wish to be made public for a variety of reasons" is somewhat unspecific. The only concrete example offered is "discussions … about internal politics". If pilots and crew choose to have discussions about internal politics, it may be true that they would prefer that those discussions not be made public. The granting of an application such as this would not result in such discussions being made public unless they turned out to be relevant to the cause of the accident. In any event, it is respectfully submitted that that is a minor matter when weighed against the public interest in support of granting the order sought, as set out above.

3. Certain concerns are raised about possible consequences "[i]n the event that investigators were routinely compelled to disclose the contents of a voice recorder …" The petitioner does not suggest that investigators should routinely be compelled to disclose the contents of a voice recorder. This is the first such order which the petitioner has sought. He seeks an order in the particular circumstances of this case on the basis that the statutory requirements governing such disclosure are satisfied.

4. It is, frankly, surprising to find it suggested that the effect of disclosure would be that pilots would be "tempted to disable the CVR" or "develop a habit of erasing the CVR record after incidents …" Such actions would be criminal offences (see ANO, Articles 152, 154, 155 and 241(6)). It is noteworthy that none of the interested parties avers that pilots would be likely to act in such a way. Such conduct would clearly be unprofessional. It would, in any event, be inappropriate for the Court to allow the balancing exercise it is required to perform to be influenced by the prospect of unlawful actions (*Australian National Airlines Commission (supra)* per Mason J at 443).

(5) The passage quoted – and the letter as a whole – does not take into account the detriment to the public interest in the proper administration of justice which would be occasioned by a refusal of the order sought.

Response to additional objections to disclosure

1. The interested parties raise a number of additional objections to disclosure of the material sought to which the petitioner responds as follows.

Flight Data Monitoring Programme and Agreement

2. Averments are made in the Answers for the interested parties about a Flight Data Monitoring Programme ("the FDM Programme") operated by CHC and a Flight Data

Monitoring Agreement ("the FDM Agreement") entered into between CHC and BALPA. It is averred that disclosure of the material sought in the petition would be contrary to the terms of the FDM Agreement and have an adverse effect on the functioning of the FDM Programme.

3. It is respectfully submitted that the FDM Programme and Agreement are of little or no relevance to the issues before the Court. The FDM Agreement may, as the interested parties aver, be binding in contract as between BALPA and CHC. However, it does not, and could not, preclude the granting of the order sought in terms of the petition if the Court is satisfied that the relevant statutory requirements are satisfied.

Article 14 of the EU Regulation

4. The interested parties aver that disclosure of the CVR and the FDR "would be contrary to Article 14 of the EU Regulation". Paragraph (3) of Article 14 provides:

> *Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Member States may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union …*

27. Article 14 recognises that it may be legitimate for the administration of justice or a competent authority to authorise disclosure of any such records for any purposes permitted by law. Regulation 18 of the 1996 Regulations provides a mechanism to authorise such disclosure. There is, accordingly, no substance to the contention that Article 14 prohibits the order sought if the Court is

satisfied that the requirements of regulation 18(4) of the 1996 Regulations are satisfied.

Charter of Fundamental Rights of the European Union

1. The Answers for the third and fourth interested parties each contain a fourth plea -i n - l aw to the effect that the granting of the order sought would be incompatible with respect for his fundamental rights. Reference is made in the Answers to Articles 7, 8, 48 and 52 of the Charter of Fundamental Rights of the European Union ("the Charter"). It is submitted that none of these provisions prevents the Court from granting the order sought if it is satisfied that the requirements of regulation 18(4) are met.

2. The Charter does not create new rights. It simply reaffirms rights and principles already recognised in EU law (see the Preamble and Article 51(2) of the Charter and Article 6(1) of the Treaty on European Union). Article 52(3) makes clear that a right in the Charter corresponding to a right guaranteed by the European Convention on Human Rights ("ECHR") has the same scope and meaning as the ECHR right.

Article 7

3. Under the heading "Respect for private and family life", Article 7 provides:

Everyone has the right to respect for his or her private and family life, home and communications.

4. Article 7 corresponds to Article 8 ECHR which, under the heading "Right to respect for private and family life", provides

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

32. The order sought by the petitioner does not interfere with the third and fourth interested parties' right to respect for their private and family life, correspondence and communications. The third and fourth interested parties could have no reasonable expectation of privacy in relation to material contained on the CVR and FDR. Article 7 is thus not engaged. *Esto* it is engaged, the right protected is not absolute. Any interference in this case is in accordance with the law and proportionate and is hence justified.

Article 8

33. Under the heading "Protection of personal data", Article 8 provides:

1. *Everyone has the right to the protection of personal data concerning him or her.*

2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*

3. *Compliance with these rules shall be subject to control by an independent authority.*

34. As noted above, the Charter does not create new rights. Article 8 is based on Article 286 of the EC Treaty and Directive 95/46 EC as well as on Article 8. Its object is essentially that of protecting personal data against arbitrary interference by institutions and bodies of the Union as well as by member

states when implementing EU law. There has been no such interference in this case.

35. The interested parties do not aver that the collection of the material contained on the CVR and FDR is itself a breach of the rights protected by Articles 7 and 8; nor do they aver that the access which the AAIB has already had to such material amounted to a breach. It is therefore not clear why it is contended that granting the order sought would breach the rights protected by either Article. It is noted in that connection that, in the event of the order sought being granted, the petitioner would remain bound to act compatibly with Articles 7 and 8 and other rights protected by the Charter and the ECHR.

Article 52

36. Under the heading "Scope of guaranteed rights", Article 52 provides:

> *1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

1. *Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.*

2. *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

1. *Esto* Articles 7 or 8 are engaged in the circumstances of this case (which is denied), any interference with the rights protected thereby is in accordance with law, proportionate and respects the essence of those rights.

Conclusion

2. For the reasons set out in the Petition and expanded upon in this Note, it is submitted that the interests of justice in the thorough and effective investigation of the crash by the Procurator Fiscal and Police Scotland outweigh any adverse domestic and international impact which disclosure may have on the investigation into this accident or any future accident or incident investigation undertaken in the United Kingdom. Such disclosure would be in the public interest. It is further submitted that none of the objections to recovery raised in the Answers lead to a different conclusion or preclude the Court from making the order sought. The petitioner therefore respectfully invites the Court to pronounce the order sought in terms of paragraph (i) of the prayer of the Petition, namely an order in terms of regulation 18(3) of the 1996 Regulations that the CVR and FDR be made available to the petitioner and Police Scotland.

Appendix 2

IN THE COURT OF SESSION

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STATEMENT OF ARGUMENT

for

(SECOND) THE BRITISH AIRLINE PILOTS ASSOCIATION ("BALPA"); (THIRD) ALAN JOHN KIRK BELL; and (FOURTH) MARTIN MIGLANS;

INTERESTED PARTIES

in the

PETITION

of

THE LORD ADVOCATE FRANK MULHOLLAND QC, Lord Advocate's Chambers 25 Chambers Street, Edinburgh EH1 1LA

PETITIONER

for

an order in terms of regulation 18 of The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 ("the 1996 Regulations")

- **2Introduction**

1. The second interested party, BALPA, are the professional association and registered trade union established to represent, promote and protect the interest of aircraft pilots in the UK.The third interested party is a qualified helicopter pilot holding an Airline Transport Pilot's Licence (Helicopters) and is an employee of CHC Scotia Limited (hereinafter referred to as "CHC") and a member of BALPA.The fourth interested party is a qualified helicopter pilot holding an Airline Transport Pilot's Licence (Helicopters) and is an employee of CHC Scotia Limited (hereinafter referred to as "CHC") and a member of BALPA.

2. This Statement of Argument sets out the legal submissions of the second, third and fourth interested parties (in the light of the affidavit and other evidence before the court) on the following issues:

    1. The relevant law applicable to the present application by the Lord Advocate

    2. The significance of the Agreement concluded between the BALPA and CHC of the Flight Data Monitoring Agreement dated 26 September 2006 (hereinafter referred to as "the FDM Agreement" and its manner of operation in accordance with the public interest

    3. The injury to the public interest which the disclosure of the information sought by the Lord Advocate would occasion; and

    4. The adverse domestic and international impact which disclosure of this information sought by the Lord Advocate may have on the investigation into the

Sumburgh accident as well as in relation to any future accident or incident investigation undertaken in the United Kingdom.

3. As is stated at paragraph 3.1, dealing with the investigation and the evidence forming part of the investigation,

   "The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose to apportion blame or liability."

4. The purpose of an Annex 13 investigation differs from a normal legal investigation, in that it is not intended to establish individual civil and or criminal liability, but simply to establish just what happened. The success of the accident investigation process is in effect identifying safety deficiencies. This is dependent upon investigators obtaining complete information from all parties directly involved in the conduct of the flight and accurate analysis of the recorded data, such as the Cockpit Voice Recorder (CVR) and information from the Cockpit Video View Recorder (CVVR), the Digital Flight Data Recorder (FDR) and electronically transmitted air safety reports.

5. The information obtained, together with all other relevant data, is used by the accident investigation committee to determine the probable cause of an aircraft accident and the findings as to what were the probable causes of the accident are then recorded in the official accident report.

6. Both the FDR and the CVR are important tools in the process of investigating an accident, as it is often impossible to obtain much of the information provided by these recorders by other means.

7. All aspects of pitch, yaw and roll can be determined from the FDR data and this then allows one to simulate the moments before the crash.

8. The CVR records the communication between the flight crew, the communication between the flight crew and the Air Traffic Control, the automated radio weather briefings, any conversation between the pilots and ground or cabin staff as well as any other sounds inside the cockpit. It consists of a “cockpit area microphone”, usually located on the overhead instrument panel between the two pilots, a data storage module and an underwater locator beacon (ULB). The microphone records all sounds in the cockpit, including engine noise, radio transmissions, explosions and voices. An investigator will listen for sounds such as engine noise, stall warnings, landing gear extension and retraction, and any other clicking or popping noises. From these sounds, parameters such as engine rpm, system failures, speed, and the time at which certain events occur, can often be determined.

9. Annex 13 Accident investigation plays a vital role in identifying mechanical defects that need to be corrected, operational procedures that need to be changed, and human factor issues that need to be addressed. The investigating officers have the responsibility to investigate aviation accidents and to try and determine the cause of the accident, by establishing a probable cause of the accident and to make safety recommendations. Doing this requires the gathering of information and the analysis of flight data, as well as interviewing many aviation employees. Inherent in the aviation safety industry is the culture to share information without fear of any reprisals or punishment in any form.

10. To allow this to happen paragraph 5.12(d) and (e) of Annex 13 refer to the recovery of data from the CVR and the digital FDR. Paragraph 5.2 provides that air accident investigators shall not make the information recovered by them available to the police or prosecution authorities or private individuals seeking to pursue a civil claim arising out of the accident:

"unless the appropriate authority for the administration of justice determines that their disclosure outweighs the adverse domestic and international impact such action may have on future investigations."

11. The reference to "sensitive safety information" in Article 14 clearly alludes to Attachment E of Annex 13 of the Chicago Convention which refers to safety information". Article 14(2) covers both CVR data and FDM data and provides an absolute prohibition of the use of this data for purposes other than those of a safety investigation. The Records sought under and in terms of the present petition are sensitive safety information.

12. Article 14(3) allows for a derogation from this general principle of non-disclosure sets out in Articles 14(1) and 14(2).Any provisions of EU law which allow for a derogation from the general principles have always to be interpreted narrowly and strictly according to their terms, as the Court of Justice confirmed in *Honyvem Informazioni Commerciali Srl v De Zotti*:

> [A]ccording to settled case-law, the terms used to establish exceptions to a general principle laid down by EU law ... are to be interpreted strictly (Case C-150/99 Stockholm Lindöpark [2001] ECR I-493, paragraph 25).[3]

13. It is to be noted that Article 14(3) requires that the domestic authorities to consider both the domestic *and* international impact of any decision to permit the disclosure of relevant records or sensitive safety information. But the Lord Advocate's averments on this point of the impact of the disclosure on current or future safety investigation are restricted to a blanket denial of the answers for the interested parties and a single averment that disclosure would not prejudice the approach adopted and required of the AAIB in the course of its safety investigations. The Lord Advocate has simply not

addressed the question of whether there would be an international impact to the granting of the Petition.

14. Further, Article 14(4) provides that only the data which is "strictly necessary" for the purposes referred to in Article 14(3) may be disclosed. This is a stringent test. It means that the Lord Advocate cannot be given unrestricted access to the data to conduct a fishing expedition even for the purpose of carrying out his functions of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions. The circumstances of this case must be shown to be so compelling and out of the ordinary that there is no alternative but to permit the Lord Advocate to have access to these records

15. The Lord Advocate has made no averments as to why he must be given access to these records as a matter of "strict necessity" and/or as to how the disclosure of the records might be restricted – for example by excerption or redaction or gisting - to comply with Article 14(4).He appears not have addressed his mind to these issues. In the absence of averments (let alone actual evidence) as to how and the disclosure of some or all of the data sought is strictly in the interests of justice this Court must refuse the petition as the test set out in Article 14(4) is not made out

16. Regulation (EU) 996/2010 highlights the important public interest in maintaining the confidence of those involved in the aviation industry so as to ensure full and accurate reporting to, and co-operation with, the relevant regimes for the promotion of aircraft safety system, in particular with any investigations relative to incidents which might compromise civil aviation safety. It makes it plain that due and proper weight is to be given to a system of data recording and retention which looks to the prevention of future accidents and is not solely focussed on the immediate administration of justice concerns related to one specific incident and underlines the importance of a non-punitive environment within the systems for ensuring aviation system and the principle of a "just culture".

17. Further, the fundamental rights guaranteed by the EU Charter of Fundamental Rights (CFR) must be complied with where the national proceedings at issue fall within the scope of European Union law. [4]

18. The Lord Advocate is bound as a matter of EU law to act in a manner which is compatible with EU law: Article 4(3) of the Treaty on the Functioning of the European Union. The Lord Advocate (and this court) is obliged to act in a manner which is compatible with the Convention rights of the third interested party: Section 6 of the Human Rights Act 1998.However the Lord Advocate's duties to comply with EU law take precedence over his duties to comply with Convention rights in the event of a conflict between the two, by virtue of the principle of the primacy of EU law and "the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law" [5]

19. Article 7 CFR provides that

    "everyone has the right to respect for his or her … communications".

20. Article 8 CFR provides that

    "1. Everyone has the right to protection of personal data concerning him or her"

    and that

    "2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down in law."

21. Article 52(3) CFR provides that

    "Insofar as this Charter concerns rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as laid down by

the said Convention. This provision shall not prevent Union law providing more extensive protection."

22. In the Opinion in *Google Spain* Advocate General Jääskinen summarised the Luxembourg and Strasbourg case law on the fundamental right to privacy and to data protection thus:

"115 I would recall that in the context of the European Human Rights Convention, article 8 ECHR also covers issues relating to protection of personal data. For this reason, and in conformity with article 52(3) of the Charter, the case law of the Court of Human Rights on article 8 of the Human Rights Convention is relevant both to the interpretation of article 7 of the Charter and to the application of the Directive in conformity with article 8 of the Charter.

116 The Court of Human Rights concluded in *Niemietz v Germany* (1992) 16 EHRR 97 that professional and business activities of an individual may fall within the scope of private life as protected under article 8 ECHR; see also *Amann v Switzerland* (2000) 30 EHRR 843 and *Rotaru v Romania* (2000) 8 BHRC 449. This approach has been applied in subsequent case law of that court.

117 Moreover, this court found in the *Volker* case [2010] ECR I-11063, para 52, that:

'the right to respect for private life with regard to the processing of personal data, recognised by articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual . . . and the limitations which may lawfully be imposed on the right to protection of personal data correspond to those tolerated in relation to article 8 ECHR.'

118 I conclude on the basis of the *Volker* case that the protection of private life under the Charter, with regard to the processing of personal data, covers all information relating to an individual irrespective of whether he acts in a purely private sphere or as an economic operator or, for example, as a politician." [6]

23. Articles 7 CFR and 8 CFR provide *at least* the same level of protection of the right to respect for the confidentiality of communications [7] and separately of the processing of personal data [8] as Article 8 ECHR as interpreted by the Strasbourg court does. [9] (For the avoidance of doubt, the interested parties do not seek to rely upon either Article 48 CFR or Article 6(1) ECHR in the present proceedings.)

24. In *Digital Rights Ireland*, on the question specifically of data retention, the Grand Chamber CJEU confirmed that:

    - 652 So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the court's settled case Law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary. [10]

    - 753 In that regard, it should be noted that the protection of personal data resulting from the explicit obligation laid down in article 8(1) of the Charter is especially important for the right to respect for private life enshrined in article 7 of the Charter." [11]

25. It is clear that there is an onus upon the Lord Advocate to provide positive evidence to the court sufficient to satisfy the court that the interference the fundamental rights of the third and fourth interested parties protected as a matter of EU law which the granting of the order sought by the Lord Advocate represents is strictly necessary and so justified. The Lord Advocate has failed to provide the court with such evidence.

26. All go these sources of information confirm the long standing principle that the purpose of accident prevention and flight safety programmes and the avoidance of accidents in the future; it is not their purpose to apportion blame or liability.

27. Many of the concerns that gave rise to the proposal arose from the work of the *Group of Experts appointed by the Commission*[26] who on 3 July 2006 specifically recommended addressing "difficulties and tensions between the safety investigation and judicial investigations"[27] and proposed doing so by introducing "legislative protection from disclosure for confidential documents listed in Chapter 5.12 of Annex 13 to the Chicago Convention". [28]

28. In addition the Report of the High Level Group for the future European Aviation Regulatory Framework, European Aviation, A framework for driving performance improvement, July 2007 observed that "the level of incident reporting, analysis and transparency of the safety system varies widely across Europe."[29]

29. Whilst the Petition relates to the CVR and FDM data from a helicopter it is clear that Article 14(2) of the Regulation (EU) 996/2010 also protects recordings from air traffic control units and therefore work by EUROCONTROL that is referred to within the Commission Staff Working Document as relevant to the interpretation of Article 14.

30. EUROCONTROL is the Europe wide air traffic control organisation.In September 2006 its Performance Review Unit published a report entitled the *Legal and Cultural Issues in relation to ATM Safety Occurrence Reporting in Europe, Outcome of a Survey conducted by the Performance Review Unit in 2005-2006*.[30]The authors of this report noted that of the 36 members of EUROCONTROL in 2006 only half had fully legislated to give effect to paragraph 5.12 of Annex 13.In the conclusion to Chapter 4, Legal Issues, the authors went on to observe:

"Considering that both the judicial system and ATC are public services that act responsibly in the interest of the public, co-operation is needed to achieve the

goal of ensuring public safety. Thus, States with mature systems have an arrangement whereby all safety occurrences remain within the aviation domain and justice is only called in when there is suspicion of certain behaviours having been committed. The range of such behaviours needs to be agreed upon beforehand and made clear to all parties."[31]

31. These *travaux préparatoires* to Regulation (EU) 996/2010 unequivocally demonstrates how important the protection of CVR and FDM data is considered to be.They also evidence a European consensus that it is vital that pilots, crew and operators of aircraft have legal certainty that what they say and do in the cockpit will be used improve aviation safety within an intrinsically non-punitive and just safety culture and not to hunt for potential and unsuspected criminal activity on behalf of pilots, crew and operators.

- **3The facts**

1. On 23 August 2013 an AS332 L2 Super Puma helicopter with registration number G-WNSB ("the Helicopter") crashed on the approach to Sumburgh Airport in the Shetland Islands ("the Sumburgh accident").The captain of the aircraft was the fourth interested party and the co-pilot was the third interested party.

2. Subsequent to the accident the Air Accident Investigation Branch ("AAIB") commenced an investigation into the crash. The AAIB investigation has yet to be concluded and no final report has been published as required by Regulation 13of the 1996 Regulations.

- **4The International legal framework**

The Convention on International Civil Aviation, signed in Chicago on 7 December 1944 ("the Chicago Convention")

1. The 1944 Chicago Convention is the cornerstone instrument of aviation law.It provides for the establishment and operation of the International Civil Aviation Organisation ("ICAO") a UN intergovernmental organisation tasked with fostering technical co-operation in the international aviation industry and the promulgation of global Standards and Recommended Practices (SARPs) for technical and safety harmonization.

2. Article 11 of the Chicago Convention permits each signatory State to devise "laws and regulations" relating to, among other things, "the operation and navigation of such aircraft while within its territory" subject to the limitation that such national laws and regulations cannot conflict with any provision of the Convention itself.

3. Article 12 obliges all signatory States to "keep [their] own [aviation] regulations … uniform to the greatest possible extent, with those established from time to time under the Convention. The regulations established under the Convention are the rule, standards and recommended practice set forth in the Annexes to the Convention.

4. Article 37 requires the ICAO to adopt international standards, recommended practices and procedures dealing with "(k) aircraft in distress and investigation of accidents."International accident investigations are subject to the accident investigation rules of the ICAO.Article 43 obliges Member States to investigate international aviation accidents according to the procedures established by ICAO.

Annex 13 Investigations

5. On 11 April 1951 Annex 13 was adopted by the ICAO under the provisions of Article 37.On 1 November 2001 the Ninth Edition of Annex 13 superseded all previous editions of Annex 13.

6. The aims of Annex 13 are to:

    - standardize the procedures of reporting aircraft accidents and incidents;

- establish procedures ensuring the participation of experts in accident and incident investigation; and

- ensure the expeditious publication of important safety and airworthiness information.

- **5EU Regulation No 996/2010**

1. Civil aviation, and in particular rules concerning civil aviation safety are now regulated at a European level in order to ensurehigh and uniform level of protection for people across the EU. This has involved the adoption of common safety rules and a common European interpretation of those rules.

2. Among the aims of EU regulation in the area of aviation safety is to assist Member States in fulfilling their obligations under the Chicago Convention, by providing a basis for a common interpretation and uniform implementation of its provisions, and by ensuring that its provisions are duly taken into account, to promote European Union views regarding civil aviation safety standards and rules throughout the world and thirdly to provide a level playing field for all actors in the internal aviation market.

3. EU law therefore lays down rules in line with standards and recommended practices and principles set out in and by the Chicago Convention. Thus, for example, Regulation (EC) No 216/2008 [1] which sets up and empowers the European Aviation Safety Agency as an independent Union body with legal personality refers (at recital 16) to"the promotion of a 'culture of safety'" and that "the proper functioning of a regulatory system …requires that incidents and occurrences be spontaneously reported by the witnesses thereto". Recital 16 notes that "such reporting would be facilitated by the establishment of a non-punitive environment" and exhorts Member State to take "appropriate measures ….to provide for the protection of such information and of those who report it." Recital 36 notes that "it is necessary to

establish appropriate measures to ensure both the necessary protection of sensitive safety data and to provide the public with adequate information pertaining to the level of civil aviation safety". To this end Article 15 of Regulation 216/2008 provides for the creation of an "information network" among the Commission, the European Aviation Safety Agency and the national aviation authorities to exchange any information and share it with "entities entrusted with the investigation of civil aviation accidents and incidents, or with the analysis of occurrences"., are entitled to access to that information.

4. The obligations at international law upon those Contracting States of the Chicago Convention who are also Member States of the European Union (such as the UK) to give effect to accident investigation provisions of Annex 13 are fulfilled at regulation at an EU level. Regulation (EU) 996/2010 makes provision for the investigation and prevention of accidents and incidents in civil aviation. This EU regulation came into force on 2 December 2010.By virtue of Article 288(2) of the Treaty on the Functioning of the European Union ("TFEU") this EU regulation is of general application and is "binding in its entirety and directly applicable in all Member States" without the need for any further national implementing measures whether from Member States executives or legislatures.

5. Regulation (EU) 996/2010 contains the following recitals, among others, in its preamble (emphasis added):

   "(4) The *sole* objective of safety investigations should be the prevention of future accidents and incidents *without apportioning blame or liability*.

   (5) *Account should be taken of the Convention on International Civil Aviation, signed in Chicago on 7 December 1944* (the Chicago Convention), which provides for the implementation of the measures necessary to ensure the safe operation of aircraft. *Particular account should be taken of Annex 13 to the Chicago Convention*

and of its subsequent amendments, which lay down international standards and recommended practices for aircraft accident and incident investigation, as well as the understanding of the terms of State of Registry, State of the Operator, State of Design, State of Manufacture and State of Occurrence used therein.

[….]

(21) Efficient safety investigation is possible only if important pieces of evidence are duly preserved.

(22) The civil aviation safety system is based on feedback and lessons learned from accidents and incidents which require *the strict application of rules on confidentiality in order to ensure the future availability of valuable sources of information. In this context sensitive safety information should be protected in an appropriate way.*

(23) An accident raises a number of *different* public interests such as the prevention of future accidents and the proper administration of justice. *Those interests go beyond the individual interests of the parties involved and beyond the specific event*. The right balance among all interests is necessary to guarantee the overall public interest.

(24) The civil aviation system should equally promote *a non-punitive environment facilitating the spontaneous reporting of occurrences and thereby advancing the principle of 'just culture'*.

(25) The information provided by a person in the framework of a safety investigation should *not* be used against that person, in full respect of constitutional principles and national law.

(26) Member States should have the option to limit the cases in which a decision of disclosure regarding information obtained during a safety

investigation could be taken, without affecting the smooth functioning of the judicial system."

6. In investigating an air accident the aim is to identify any mechanical defects that need to be corrected, operational procedures that need to be changed, and human factor issues that need to be addressed. The investigating officers seek to determine the cause of the accident and make safety recommendations on the basis of that determination. In order to be able to do this they require to be able to ingather all available information, including crucially the data available from the CVR and the FDR, as well as being able to interview all and any relevant aviation personnel. This concept of all parties involved being able freely and willingly to share all relevant information to the air accident investigation authorities within the context of a "non-punitive environment" and a "just culture" is a central aspect of the idea of the aim of air accident investigation being promotion of safety and the prevention of future occurrences in the aviation industry. This is based on a culture of all persons involved being able to share information without fear of any reprisals or punishment or criminal proceedings being taken against them. In a sense the quid pro quo of aviation personnel being completely open with air accident investigators and agreeing to the intensive recording of their activities in the cockpit is an assurance that this openness will not then be used against them by prosecution authorities seeking to establish blame, crime and punishment.

7. Consistently with this approach Article 14 of Regulation (EU) 996/2010 provides as follows (emphasis added):

   "Article 14

   Protection of sensitive safety information

   1. The following records shall *not* be made available or used for purposes *other than safety investigation*:

. all statements taken from persons by the safety investigation authority in the course of the safety investigation;

a. records revealing the identity of persons who have given evidence in the context of the safety investigation;

b. information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals;

c. material subsequently produced during the course of the investigation such as notes, drafts, opinions written by the investigators, opinions expressed in the analysis of information, including flight recorder information;

d. information and evidence provided by investigators from other Member States or third countries in accordance with the international standards and recommended practices, where so requested by their safety investigation authority;

e. drafts of preliminary or final reports or interim statements;

f. *cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units*, ensuring also that information not relevant to the safety investigation, particularly information with a bearing on personal privacy, shall be appropriately protected, without prejudice to paragraph 3.

2. The following records shall *not* be made available or used for purposes other than safety investigation, *or other purposes aiming at the improvement of aviation safety*:

- **8THE CIRCUMSTANCES OF THE PRESENT PETITION**

1. On 22 January 2014 CHC received from the Police Service of Scotland a request that CHC disclose Flight Data Monitoring data for the previous flight approaches to Sumburgh Airport in respect of the third and fourth interested parties.The data specified by the Police Service of Scotland in the request of 22 January 2014 is indefinable data in terms of clause 6.3 the FDM Agreement.

2. Following correspondence between solicitors acting for the interested parties and CHC the request was not pursued by the police.Instead, the present petition of the Lord Advocate has been brought under and in terms of Regulation 18 of the 1996 Regulations.

3. The 1996 Regulations bear to have been made by the Secretary of State for Transport, in exercise of the powers conferred by sections 75 and 102 of, and paragraphs 4 and 6 of Part III of Schedule 13 to, the Civil Aviation Act 1982.The 1996 Regulations replaced the Civil Aviation (Investigation of Air Accidents) Regulations 1989/2062 ("the 1989 Regulations") which had also been made under the authority of Section 75(1).

4. The 1996 regulations, so far as relevant, provide as follows:

Disclosure of relevant records

18.—

(1) Subject to paragraphs (2) and (4) to (6) below no relevant record shall be made available by the Secretary of State to any person for purposes other than accident or incident investigation.

(2) Nothing in paragraph (1) above shall preclude the Secretary of State making a relevant record available to any person where-

(a) in a case where that person is a party to or otherwise entitled to appear at judicial proceedings, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those proceedings, or

(b) in any other circumstances, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those circumstances.

(3) In this regulation-

- "judicial proceedings" includes any proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath,

- "relevant court" in the case of judicial proceedings or an application for disclosure made in England and Wales means the High Court, in the case of judicial proceedings or an application for disclosure made in Scotland means the Court of Session and in the case of judicial proceedings or an application for disclosure made in Northern Ireland means the High Court,

- "relevant record" means any item in the possession, custody or power of the Secretary of State which is of a kind referred to in sub-paragraphs (a) to (e) of paragraph 5.12 of the Annex ; and

- "Secretary of State" includes any officer of his.

(4) Subject to paragraph (6) below no order shall be made under paragraph (2) above unless the relevant court is satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom.

(5) A relevant record or part thereof shall not be treated as having been made available contrary to paragraph (1) above in any case where that record or part is included in the final report (or the appendices to the final report) of the accident or incident.

(6) The provisions of this regulation shall be without prejudice to any rule of law which authorises or requires the withholding of any relevant record or part thereof on the ground that the disclosure of it would be injurious to the public interest."

5. In the present petition, the Lord Advocate seeks an order under Regulation 18(2) of these 1996 Regulations. It is clear that the petition relates directly to the Sumburgh accident.There are as yet no judicial proceedings and so the order could only be made under Regulation 18(2)(b).The information sought by the Lord Advocate ("the Records") includes CVR and FDM data recorded at or around the time of the crash.It is clear that these records sought by the Lord Advocate are relevant records for the purposes of the 1996 regulations.

6. Regulation 18(4) provides that before it may release relevant records the Court must carry out a balancing exercise and be satisfied that the interests of justice in these circumstances outweighs any adverse domestic and international impact which disclosure may have on (a) the investigation into the crash or (b) any future accident or incident investigation undertaken in the United Kingdom.

7. The Interested Parties do not contend that that release of the Records would have any adverse domestic and international impact on the current investigation into the crash and therefore it is the second leg of the test; the risk to future accident or incident investigations undertaken in the United Kingdom, that is engaged.

8. In addressing the test in Regulation 18(4) the Interested Parties have each averred in ANS 13 that there would be adverse domestic and international impacts on future accident or incident investigation undertaken in the United Kingdom and have specified what those adverse impacts would be.

9. This position is supported by the letter from the Office of the Advocate General, dated 18 September 2015, and the affidavit from Captain Nick Norman, dated 6 May 2015.The Interested Parties have sought an affidavit from the Chief Inspector of Air Accidents to supplement the Advocate General's letter.Reference is made to CAP 739 'Flight Data Monitoring', Second Edition, published by the Civil Aviation Authority in June 2013.

10. The Lord Advocate's averments are more limited. There is no averment that the Petitioner has a reasonable suspicion that a criminal offence has been committed such as might be made in a Petition to a Sheriff for a search warrant. They can be found in STAT 13 and amount to a blanket denial of the answers for the interested parties and an averment that disclosure would not prejudice the approach adopted and required of the AAIB in the course of its safety investigations and that the Air Navigation Order 2009 ("ANO") requires CVR and FDM equipment to be installed and switched on in aircraft such as G-WNSB. There is no material lodged in support of these averments.

11. It is submitted that it is for the Lord Advocate positively to demonstrate to this court that the requirements of the test provided for in Regulation 18(4) are met.This cannot be done by simple assertion. In any event the averments made by the Lord Advocate do not come close to providing a sufficient substantive basis to do that.

- **9PURPOSIVE CONSTRUCTION OF THE 1996 REGULATIONS**

1. The 1996 Regulations differed from the 1989 Regulations in that they were intended to implement the obligations of the United Kingdom under the Directive 94/56/EC of 21

November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents. Since the 1996 Regulations were made, however, Directive 94/56/EC has been repealed and is replaced by the directly applicable EU Regulation.

2. The 1996 Regulations have to be interpreted and applied so far as possible in a manner which is consistent with the requirements of Regulation (EU) 996/2010. [12]The fact that Regulation (EU) 996/2010 post-dates the 1996 Regulations is irrelevant. [13]

3. If and insofar as the 1996 Regulations cannot be interpreted in a manner which is consistent with the requirements of Regulation (EU) 996/2010 then the incompatible provisions have to be disapplied by the court as incompatible with directly applicable EU law. [14] This is a consequence of the principle of primacy of EU law[15] whereby the provisions of EU law take precedence over all and any incompatible domestic law, whether found in primary or in secondary legislation.[16]

4. In order to ensure that Regulation 18(4) of the 1996 Regulations is interpreted in a manner consistent with Regulation (EU) 996/2010 the Court is also referred to the following sources:-

    - The legislative process behind Regulation (EU) 996/2010
    - Annex 13 to the Chicago Convention
    - Attachment E to Annex 13 to the Chicago Convention ("Attachment E")
    - The Air Navigation Order 2009
    - CAP 739: Flight Data Monitoring; Second Edition, published by the Civil Aviation Authority June 2013 ("CAP 739") and
    - The FDM Agreement

- **10THE LEGISLATIVE PROCESS BEHIND REGULATION (EU) 996/2010**

1. Regulation (EU) 996/2010 arose out of a proposal of the European Commission of 29 October 2009 on the investigation and prevention of accidents and incidents in civil aviation.[17]In the proposal document the Commission explained why it was necessary to change the regulatory framework built around Directive 95/56/EC as it no longer met the requirements of the Community and Member States.

2. One of the problems identified that required a change in the relevant regulatory framework was that there was a specific issue with tensions between safety investigations and other proceedings.[18]Consideration was given to a system of voluntary co-operation, but it was considered that a voluntary system could not be expected to adequately resolve issues where legal certainty was needed, such as protection of sensitive safety information.[19]It is submitted that this requirement for legal certainty should mitigate against the disclosure of CVR and FDM information in all but the most extreme circumstances. The Commission proposed that the new regulation should

   "strengthen the efficiency of safety investigations by implementing into the Community law the international standards and recommended practices related to protection of evidence and sensitive safety information, in accordance with Annex 13 to the Chicago Convention;"

3. The background to the Commission's proposal is to be found in the Commission Staff Working Document[20] which noted, *inter alia*,:

   - that sensitive safety information was protected within Annex 13 of the Chicago Convention, but was not explicitly protected under and in terms of Directive 95/56/EC and separately was not uniformly protected by member states.[21]

- that national judicial and prosecution authorities often argued that the obligation to sanction illegal activities trumped any safety considerations, and that any evidence may and should be used for the purposes of examining liability, in accordance with the principle of the open assessment of evidence.[22]

- that the use of sensitive safety information for purposes other than safety investigations can have the effect of reducing the willingness of operators to engage with safety systems.[23]

- Directive 95/56/EC did not establish clear principles or guidance defining under which conditions such information could be disclosed to the judicial authorities and that the absence of such clear principles or guidance may discourage aviation professionals from open reporting of occurrences, and thus reduce the opportunities for the EU aviation community to collectively learn from mistakes.[24]

- There was a need to ensure that there was legal certainty about the access to sensitive information.[25]

- **11ANNEX 13 OF THE CHICAGO CONVENTION**

1. As we have noted, the Convention on International Civil Aviation was signed by the United Kingdom at Chicago on 7 December 1994 and is known as the Chicago Convention. The Chicago Convention established the International Civil Aviation Organization (ICAO) and standards for the investigation of air accidents have been part of the work of the ICAO since at least 1946.On 11 April 1951 Annex 13 was adopted by the ICAO under the provisions of Article 37 of the Chicago Convention which require the ICAO to adopt international standards, recommended practices and procedures dealing with "(k) aircraft in distress and investigation of accidents;".

2. At page (vi) of Annex 13 contracting states (including the United Kingdom) are invited to use in their own national regulations, as far as is practicable, the precise language of those ICAO Standards that are of a regulation character. Chapter 5 of Annex 13 deals with Investigations into accidents and incidents and Article 5.12 sets out the standard in respect of the 'Non-disclosure of records". It can be seen that the language of Article 5.12 has, in general terms, been adopted by the United Kingdom in the wording of Regulation 18(4) of the 1996 Regulations. It should be observed that the regulation as worded would appear to limit consideration of the impact of disclosure in the 1996 Regulation to the United Kingdom.As we have seen, despite the specific terms of Regulation 18(4) Article 14 of Regulation (EU) 996/2010, requires consideration also to be given to the wider international impact of any order for disclosure.

3. Article 5.12 of Annex 13 contains two Notes.These are provided to give guidance to the interpretation of the Standard.[32]Note 2 makes provision for the application of Attachment E.Note 1 is in the following terms.It is of particular significance in the context of the present petition:

   "Note 1.— Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety."

4. In *R. (Federation of Tour Operators) v HM Treasury* Stanley Burnton J. (at para 65) described the ICAO as "the guardian of the Chicago Convention, by which it was created" and referred to its recommendations and resolutions as an aid to the proper

interpretation of the Chicago Convention as well as setting out the general principles of interpretation applicable to the Chicago Convention in the following terms:

"The general principle applicable to the interpretation of treaties is prescribed by Art.31(1) of the Vienna Convention on the Law of Treaties, which, although it came into force well after the conclusion of the Chicago Convention, is generally accepted as declaratory of existing international law:

'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.''

State practice is relevant to the interpretation of a treaty. Art.31(3) of the Vienna Convention requires there to be taken into account, together with the context:

''(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;..''[33]

5. Note 1 represents the opinion of the ICAO as to the meaning intent and purpose of the Annex 13 provisions of the Chicago Convention. This is an important consideration in determining the issue of whether the petitioner has made out a sufficient case for the records he seeks to be ordered to be released by this court.This Court should not without good and proper cause depart from the considered judgment of the ICAO of the adverse effect to international aviation safety resulting from the release of the very records sought by the Lord Advocate in the present petition

- **12ATTACHMENT E**

1. Attachment E was published by the International Civil Aviation Organisation on 23 November 2006 and published as an addendum or attachment to Annex 13.As is stated on page 32 of the edition of Annex 13 of the Chicago Convention:

   "These Attachments do not constitute a part of Annex 13 — Aircraft Accident and Incident Investigation. The material contained herein is intended to assist in the application of Annex 13."

   Attachment E describes itself as a series of principles that have been distilled from examples of national laws and regulations provided by States and that the principles could be adapted or modified to meet the particular needs of the State enacting laws and regulations to protect safety information.

2. In Attachment E *"safety information"* is defined as information gathered from safety data collection and processing systems (SDCPS) and includes CVR recording by reference to Chapter 5.7 of Annex E.It is submitted that there is no practical difference between *"safety information"* in terms of Attachment E, *"relevant records"* in Regulation 18 of the 1996 Regulations and "sensitive safety information" in Article 14 of Regulation (EU) 996/2010.

3. The approach of Attachment E is to set down some General Principles (Section 2), lay down five absolute Principles of Protection (Section 3) and three Principles of Exception (Section 4).

4. The fourth Principle of Protection is that *"Safety information should not be used in any way different from the purposes for which it was collected".* This principle is relevant to the present petition because the collection of CVR and FDM data from the Helicopter was carried as part of an accident prevention and flight safety programme.[34]

5. Section 4 of Annex E provides that exceptions to the protection of safety information should only be granted by national laws and regulations when one of three Principles of Exception apply. The effect of Attachment E for safety information is that the test in Article 5.12 of Annex 13, Regulation 18(4) of the 1996 Regulations and Article 14 of Regulation (EU) 996/2010 can only be met if one of the three Principles of Exception apply.The first two principles of exception relate to the situation where something close to the suspicion that a criminal offence has occurred.[35]

6. In respect of the first Principle of Exception the Lord Advocate has not averred that he has reasonable suspicion of any of the factors provided for; particularly that there has been gross negligence or wilful misconduct. In these circumstances the first Principle of Exception cannot be used to justify the release of the records.

7. In respect of the second Principle of Exception the assessment envisaged has to be carried out by an *"appropriate authority"* which is not defined in Annex 13 or Attachment E. However there is a clear reference to an *"appropriate authority for the administration of justice"* in Article 5.12 of Annex 13.It is submitted that in terms of Regulation 18(4) of the 1996 Regulations the appropriate authority would be the Court. There is no averment by the Lord Advocate that would entitle the Court to conclude that this test was met (particularly that there has been gross negligence or wilful misconduct) and it is submitted that the second Principle of Exception cannot be used to justify the release of the information.

8. The third Principle of Exception is similar to the second leg of Regulation 18(4) of the 1996 Regulations, but is wider as it covers more than just future accident or incident investigations undertaken in the United Kingdom and extends to the future availability of safety information. The third Principle of Exception is closely tied to the first General Principle[36] and the Court should require clear and persuasive evidence that the release of the CVR and FDM information will not adversely affect the

continued availability of safety information (particularly informative CVR data) so that proper and timely preventative action can be taken and aviation safety improved.

9. In addition it must be correct that the averment that the Lord Advocate has ordered an investigation into potential criminality cannot, given the absence of reasonable suspicion that the first and second Principles of Exception apply, be a factor that can be given very great weight in respect of the third Principle of Exception as to do so would render those earlier principles unnecessary.

10. The investigation of deaths does not fall within the scope of the third Principle of Exception as it does not form part of the administration of justice and in those circumstances Attachment E would tend to suggest that the fact that in addition to the Lord Advocate proposes to investigate these deaths independently of the AAIB is a factor that should not be given any weight in carrying out the balancing exercise envisaged within Regulation 18(4) of the 1996 Regulations.

- 13**CAP 393: AIR NAVIGATION: THE ORDER AND THE REGULATIONS**

1. The Lord Advocate has made reference in the petition to Articles 37, 152 and Schedule 4 of the ANO. In order to assist those concerned with day-to-day matters relating to air navigation who require an up to date version of the ANO and associated Regulations the Office of the General Counsel of the Civil Aviation Authority has published *CAP 393: Air Navigation: The Order and the Regulations*. It is of course necessary to make reference to the officially printed version of the ANO when referring to Articles of the ANO, but CAP 393 provides an accessible guide to the ANO.

2. Article 37 and Schedule 4 of the ANO provide that aircraft such as the Helicopter must have a CVR and FDM system installed and Article 152(2) provides that the recorder must always be in use from the time the rotors first turn for the purpose of taking off until the rotors are next stopped.

3. It is anticipated that the Lord Advocate may argue the combination of these requirements are such that CVR and FDM data will still be collected even if the Court orders the release of the Records. But such an approach misunderstands the purpose of CVR and FDM systems. When read with Article 94(4) ANO the purpose of these systems is to collect data to assist in the prevention of accidents and incidents, and it is not the purpose of such an accident prevention and flight safety programme to apportion blame or liability. The importance of such a purpose to the operation of CVR and FDM systems is discussed in the Advocate General's letter and the affidavit from Captain Norman.

4. Article 94(4) of the ANO is very clear that the purpose of such a programme is the prevention of accidents and incidents and it is not the purpose of an accident prevention and flight safety programme to apportion blame or liability.[37]The ANO could have included include the proper administration of justice and investigation in crime as a purpose of an accident prevention and flight safety programme, but did not do so.

5. As the letter from the Advocate General explains if there is a belief that CVR and FDM data will be made available to prosecuting authorities and the police even when there is no reasonable suspicion that a criminal offence that cannot but undermine the system either by encouraging crews to delete data after the completion of a flight or introducing a climate of reticence in the pilots' place of work.

- **14CAP 739: FLIGHT DATA MONITORING AND THE FDM AGREEMENT**

1. Article 94 of the ANO requires operators of aircraft registered in the United Kingdom flying for the purpose of public transport must establish and maintain an accident prevention and flight safety programme.

2. An accident prevention and flight safety programme is defined[38] as a programme designed to detect and eliminate or avoid hazards in order to improve the safety of

flight operation and can include a Flight Data Management Programme ("FDM Programme").Operation of an FDM Programme is mandatory for large aircraft. UK offshore helicopter operators such as CHC voluntarily elected to fully implement FDM across all their North Sea helicopter operations in advance of any regulatory action.[39]It is submitted that considerable weight should be given to the opinion of Captain Norman as set out in his affidavit as he was the Programme Manager for the first helicopter operator to be involved in the Helicopter Flight Data Management trials described in Chapter 11 of CAP 739.The CAA has produced guidance as to good practice in the operation of FDM Programmes and CAP 739 Flight Data Monitoring sets out the CAA's guidance in this area. This was first issued on 29 August 2003, but was extensively revised in June 2013.

3. In both versions of CAP 739 the CAA have made it abundantly clear that:

   "Flight Data Monitoring (FDM) is the systematic, pro-active use of digital flight data from routine operations to improve aviation safety within an intrinsically non-punitive and just Safety Culture."[40]

4. CAP 739 outlines good practice and indicates what may constitute an operator's FDM programme system that is acceptable to the CAA. In particular the CAA have emphasised that in order for an FDM programme to operate successfully all parties involved (which includes pilots, operators, and other staff) are fully aware of their roles and responsibilities in the operation of the FDM programme and particular that:

   "It is important that the underlying principles to be applied are understood by all parties and signed up to, early in the process. Once this is done, when problems or conflicts of interest arise, they form the foundation of practical solutions. Everyone involved should know the limits which the agreements place on them. In uncertain cases there should be an accepted procedure by which a course of action can be approved."[41]

5. The CAA advises the operators should enter into agreements with the crew who will operate the aircraft.[42]No doubt mindful of this advice[43] CHC entered into the FDM Agreement with the Second Interested Party. This created a Flight Data Management Steering Committee within CHC ("the FDMSC").Because it was created on the advice and guidance of the CAA in implementation of Article 94 of the ANO the Court should give considerable weight to the terms of the FDM agreement in assessing the balancing act provided for in Article 18(4) of the 1996 Regulations.

6. Under clause 6.2 of the FDM Agreement CHC have undertaken that no indefinable data will be disclosed to anyone except under the terms of the FDM Agreement. Consistently with Article 14 of EU Regulation No 996/2010 and with Annex 13 of the Chicago Convention on International Civil Aviation, the Agreement provides in particular that identifiable Flight Data Monitoring ("FDM") data would not be made available to any persons outside CHC other than for the purpose of the investigation of accidents and the improvement of flight safety.

7. In terms of the Agreement a disclosure of identifiable data such as that sought by the Lord Advocate in the present petition can only be authorised by the FDM Steering Committee. The FDM Steering Committee has not authorised any disclosure of identifiable data to the Police Service of Scotland or The Crown Office and Procurator Fiscals Service (COPFS).

8. The interested parties submit that the disclosure of identifiable data such as is sought in the present would be contrary to the terms, spirit and intent of the Agreement and would have an adverse effect on its proper functioning.

a. *all* communications between persons having been involved in the operation of the aircraft;

b. written or electronic recordings and transcriptions of recordings from air traffic control units, including reports and results made for internal purposes;

c. covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, where so requested by the safety investigation authority issuing the recommendation;

d. occurrence reports filed under Directive 2003/42/EC. [2]

Flight data recorder recordings shall not be made available or used for purposes other than those of the safety investigation, airworthiness or maintenance purposes, except when such records are de-identified or disclosed under secure procedures.

3. Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law *may* decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 *for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation*. Member States may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union.

The communication of records referred to in paragraphs 1 and 2 to another Member State for purposes other than safety investigation and, in addition as regards paragraph 2, for purposes other than those aiming at the improvement of aviation safety may be granted *insofar as the national law of the communicating Member State permits*.

Processing or disclosure of records received through such communication by the authorities of the receiving Member State shall be permitted solely after prior consultation of the communicating Member State and subject to the national law of the receiving Member State.

4. *Only the data strictly necessary for the purposes referred to in paragraph 3 may be disclosed.*

1. **PREVIOUS LITIGATION ABOUT THE DISCLOSURE OF CVR DATA TO LAW ENFORCEMENT AUTHORITIES**

Australia

1. The litigation in *Australian National Airlines Commission v Commonwealth of Australia* ***[44]*** arose out of a civil action for damages following a ground collision between aeroplanes. An application was made by one of the parties pursuing the civil action for inspection of cockpit voice record tape. There was however an agreement between Director-General of Civil Aviation and pilots' organization limiting permissible use of recorded information. The pilots' organization threatened to withdraw from its agreement allowing for the installation of cockpits recorder if information was used otherwise than for agreed purpose. The Minister of State accordingly opposed the application for recovery on the basis of a claim to privilege founded upon public interest.

2. Mason J. in the High Court of Australia decided himself to listen to the tape and considered that it contains material relevant to the disposal of the civil action. His judgment makes no reference to the Chicago Convention or its principles. In particular he did not consider the wider public interest in the maintenance of an open non-culpable just culture in the aviation industry and the potential damage that his order might do to future air accident investigation both domestically and internationally. His judgment is of little relevance or assistance to the matters to be considered by the court in the present case

New Zealand

3. The litigation in *New Zealand Air Line Pilots' Association Inc v Attorney-General* [45] arose out of an air accident in which an aircraft coming into land experienced a

landing gear problem and the aircraft impacted a hill on the extended runway centreline. This was a controlled flight into terrain accident and resulted in the death of four passengers and the flight attendant. The flight crew survived.

4. The New Zealand's Transport Accident Investigation Commission (TAIC) conducted a full investigation into the accident and as part of their investigation both the CVR and flight data recorder (FDR) were analysed. Concurrent with this investigation was a criminal investigation conducted by the police. As part of the criminal enquiry, the police requested that the Accident Investigation Commission provide them with actual CVR tape, not just a transcript of the recording, but the Commission refused to do so. At the time of this accident, New Zealand had no legislation making it mandatory for an aircraft to use a cockpit voice recorder.

5. The matter went to the High Court and then to the Court of Appeal of New Zealand which held that the provisions of Annex 13 of ICAO were not automatically included in New Zealand law and that the case therefore turned on the relevant national law concerning public interest immunity and the recovery of privilege information. However at the time this case was being litigated the relevant New Zealand national legislation – *The Transport Accident Commission Act 1990* – did *not* provide comprehensive regulatory regime for the disclosure of safety information. The New Zealand Appeal Court concluded (in contrast with the provisions of the 1996 Regulations and Regulation (EU) 996/2010s) that those protections that did exist of investigation data were limited to the period of the investigation and had been spent by the time the police seized the CVR data.In the absence of more robust protection the Appeal Court had to consider whether the powers of the District Court Judge to grant a search warrant were limited by Article 5.12 of Annex 13 and concluded that they were not.

6. In any event this decision predates and accordingly takes no account of the provisions of Regulation (EU) 996/2010 which, for all the reasons outlined above, necessarily lead this court to a different result from that of the New Zealand court.

Canada

7. *Société Air France v NAV Canada* ***[46]*** is a decision of the Ontario Court of Appeal arising from a civil accident for damages brought by Air France and its insurers against Air Traffic Control at Toronto's Pearson International Airport following an accident involving one of its plane overshooting the runway, pitching into a ravine, and bursting into flames. The aircraft was totally destroyed with no loss of life but with injuries to passengers, some serious. The passengers also raised a multi-million class action for damages. The defendant in the Air France action NAV Canada (NAV) which was responsible for air traffic control allege that the Air France pilots were negligent in the way in which they approached the runway and landed the aircraft that night. The issue before the court was whether to order production of the CVR to parties for use in the civil litigation. The court noted that Section 28(6) of the Canadian Transportation Accident Investigation and Safety Board Act 1989 allows a court to order the production of CFR records if a request is made, and a court, after listening to it, and giving the air accident investigation Board an opportunity to make representations, concludes that the public interest in the proper administration of justice outweighs in importance the privilege that the section accords to it. The Canadian legislation referred to does not set out the same tests as are contained in EU Regulation 996/2010 – in particular the Article 14(3) of disclosure outweighing the adverse domestic and international impact that such action may have on that or any future safety investigation and/or the Article 14(4) test of strict necessity. Further and in any event, the Ontario Court of Appeal was apparently not referred to and made no reference to Section 28(7) of Canadian Transportation Accident Investigation and Safety Board Act 1989 in its current form as at 2015.This provides as follows:

"*Use prohibited*

An on-board recording may <u>not</u> be used *against any of the following persons* in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or *in legal or other proceedings*, namely … aircraft, train or ship crew members…"

England

8. *Rogers v Hoyle* [47] is a recent decision of the Court of Appeal of England and Wales. It does not address the operation of Regulation 18(4) of the 1996 Regulations, but does consider the admissibility of an AAIB Report as evidence in civil proceedings in England and Wales.

9. It is submitted that the points of law raised in the present application and notes of argument are of general public importance and have not previously been ruled upon by the CJEU.A reference to the CJEU earlier rather than later would expedite matters in avoiding the need for appeals within the national legal order. It is a course of action which is favoured by the second, third and fourth interested parties as being in the general public interest.

2. ARTICLE 267 TFEU REFERENCE TO THE CJEU

1. In the present case it is clear that issues of EU law are engaged and their interpretation and application of EU law is central to the proper resolution of the issues before the court. This court is therefore acting essentially as a local EU law court working in co-operation with the CJEU to ensure that EU law is fully and properly observed. As the Full Court of the CJEU has stated in its Opinion 1/09 on *A Draft Agreement on the European and Community Patents Court* (emphasis added):

"65 … The essential characteristics of the EU legal order … are in particular its primacy over the laws of the Member States and the direct effect of a whole series of

provisions which are applicable to their nationals and to the Member States themselves. [48]

66 As is evident from art.19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.

67. Moreover, it is for the Court to ensure respect for the autonomy of the EU legal order thus created by the Treaties. [49]

68 It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere co-operation, set out in the first subparagraph of art.4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. [50] Further, pursuant to the second subparagraph of art.4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union.

In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law.[51]" [52]

2. The preliminary reference procedure provided for under Article 267 TFEU is essentially best seen a mechanism - which is independent of the parties litigating before the national court - for co-operative dialogue between national courts and the Court of Justice, as the Grand Chamber CJEU recently re-affirmed (emphasis added):

"[T]the system established by Art.234 EC (now Article 267 TFEU) with a view to ensuring that Community law is interpreted uniformly in the Member States instituted direct co-operation between the Court of Justice and the national courts by

means of a procedure which is completely independent of any initiative by the parties. [53]

As the Advocate General explains in points AG100 to AG104 of his Opinion, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary. [54]" [55]

3. Article 267 TFEU provides as follows:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

4. In Customs and Excise v ApS Samex the then Bingham J. summarised the advantages which the Court of Justice has in deciding issues of EU law over ajudge sitting in a national court as follows (emphasis added):

"[The Court of Justice of the European Union] has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve.

Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue.

Where the interests of member states are affected they can intervene to make their views known. That is a material consideration in this case since there is some slight evidence that the practice of different member states is divergent.

Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival.

The interpretation of Community instruments involves very often not the process familiar to common lawyers of the laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton.

The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court." [56]

5. As Master of the Rolls the by now Sir Thomas Bingham MR gave the following general guidance to lower courts as to when they might properly exercise their discretion to refer a matter to the CJEU in ex parte Else:

   "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the EU law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself.

   In considering whether it can with complete confidence resolve the issue itself, the national court must be fully mindful of the differences between national and EU legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the EU and of the great advantages enjoyed by the Court of Justice in construing EU instruments. If the national court has any real doubt it should ordinarily refer." [57]

6. Following ex parte Else there is a presumption in favour of the referral to Luxembourg of points of EU law.Factors which may be significant in relation to whether and when the court should use its power to make a preliminary reference include:

   - the expense and delay involved in the reference procedure (to be weighed against the expense and delay which may be occasioned by going through a national appeal process before reaching a court of final instance which is obliged to refer issue of EU law court necessary for the determination of the cause to the CJEU

- the wishes of the parties (although this is not required under EU law and is certainly not determinative or dispositive of whether any Article 267 Reference should be made[58] and

- the general importance of the point of law which is at issue.

3. **Conclusion**

1. For the reasons set out in these submissions it is submitted that the Court should adopt one of these three courses of action:

i. Conclude that in the absence of positive averments by the Petitioner that the adverse domestic and international impact of disclosure of the Records on any future safety investigation would not outweigh the benefits of disclosure that it should refuse the prayer of the Petition,

ii. Positively conclude on the basis of the averments of Interested Parties, the letter from the Advocate General and the affidavit of Captain Norman that the adverse domestic and international impact of disclosure of the Records on any future safety investigation would be significant and refuse the prayer of the Petition,

iii. alternatively should seek the guidance of the Court of Justice of the European Union by way of a preliminary reference under and in terms of Article 267 TFEU as to the factors relevant to the application of the test set down in Article 14(3) of Regulation (EU) 996/2010 on the need for disclosure to outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation.The advantage of this last course of action is that it allows all other Member States of the European Union to participate in the process before the court and thereby allow the issues of anticipate international impact to be more readily clarified by the CJEY for their application by this court.

May 2015 **FRED MACKINTOSH, Advocate**

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[1] Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2008] OJ L 79/1

[2] Directive 2003/42/EC on occurrence reporting in civil aviation ("the 2003 Directive") contains the following recital, among others, in its preamble:

> "(11) The sensitive nature of safety information is such that the way to ensure its collection is by guaranteeing its confidentiality, the protection of its source and the confidence of the personnel working in civil aviation."

Among the 2003 Directive's operative provisions are the following Articles

> "*Article 1*
>
> Objective
>
> The objective of this Directive is to contribute to the improvement of air safety by ensuring that relevant information on safety is reported, collected, stored, protected and disseminated. The sole objective of occurrence reporting is the prevention of accidents and incidents and not to attribute blame or liability.
>
> *Article 2*
>
> Definitions
>
> For the purpose of this Directive: […]

> 'occurrence' means an operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has *not* resulted in an accident or serious incident, hereinafter referred to as 'accident or serious incident."

[3] Case C-465/04 *Honyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-2879 at para 24.

[4] Case C-617/10 *Åkerberg Fransson* 26 February [2013] ECR I-nyr, [2013] 2 CMLR 46 at § 21

[5] Opinion 2/13 *On EU (non-)accession to the Council of Europe*18 December [2014] ECR I-nyr, § 246, and Opinion 1/09 [2011] ECR I-1137, § 65

[6] Case C-131/12 *Google Spain SL and another v Agencia Espanola de Proteccion de Datos (AEPD) and another* [2014] QB 1022 per Advocate General Jääskinen at paras 115-8

[7] See *PG v. United Kingdom* (2008) 46 EHRR 51

> "58 … Private-life considerations may arise … once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Art.8, even where the information has not been gathered by any intrusive or covert method. The Court has referred in this context to the Council of Europe's Convention of January 28, 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force on October 1, 1985 and whose purpose is:
>
> > "[T]o secure in the territory of each Party for every individual . . . respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him."
>
> Such data being defined as "any information relating to an identified or identifiable individual".
>
> …
>
> 59. … A permanent record has … been made of the person's voice and it is subject to a process of analysis directly relevant to identifying that person in the context of other personal data. Though it is true that when being charged the applicants answered formal questions in a place where

police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants."

[8] See *Perry v United Kingdom* (2004) 39 EHRR 3

"36 .. Article 8 ECHR …. may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". It cannot therefore be excluded that a person's private life may be concerned in measures effected outside a person's home or private premises. A person's reasonable expectations as to privacy is a significant though not necessarily conclusive factor.

37 . The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.

….

41. … The permanent recording of the footage and its inclusion in a montage for further use may therefore be regarded as the processing or collecting of personal data about the applicant.

…

42. … The footage in question in the present case had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it would be recorded and used for identification purposes.

43. The Court considers therefore that the recording and use of the video footage of the applicant in this case discloses an interference with his right to respect for private life."

[9] In Case C-256/11*Dereci* [2011] ECR I-11315 at para 70

> "[I]nsofar as art.7 of the Charter of Fundamental Rights of the European Union ("the Charter"), concerning respect for private and family life, contains rights which correspond to rights guaranteed by art.8(1) of the ECHR, the meaning and scope of art.7 of the Charter are to be the same as those laid down by art.8(1) of the ECHR, *as interpreted by the case law of the European Court of Human Rights*".

[10] Case C-473/12 *Institut professionnel des agents immobiliers (IPI) v Englebert* [2014] 2 CMLR 297, para 39 and the case law cited.

[11] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others (Irish Human Rights Commission intervening)* [2015] QB 127, CJEU (Grand Chamber) at paras 52-3

[12] *Litster v Forth Dry Dock Co Ltd* 1989 SC (HL) 96

[13] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4153 at 4159:

> in applying national law, *whether the provisions in question were adopted before or after the directive*, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter. (emphasis added)

[14] *R v Secretary of State for Transport ex parte Factortame (No 2)* [1991] 1 AC 603, 658-59 (Lord Bridge)

[15] Case 6/64 *Costa v ENEL* [1964] ECR 585

[16] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629 at 643.

[17] COM(2009) 611 final, 2009/0170 (COD)

[18] cf, Section 5.1, page 4

[19] cf, Section 5.2, page 5

[20] Regulatory Impact Assessment / Commission Staff Working Document, 29 October 2009

[21] Staff Working Document, Section 2.3.1, page 13

[22] Staff Working Document, Section 3.3.1.1, page 18

[23] Staff Working Document, Case II, page 20

[24] Staff Working Document, Section 3.3.1.2, page 21

[25] Staff Working Document, Section 4.1.2, page 34

[26] Staff Working Document, Annex 1, page 62

[27] Staff Working Document, Section 3.3.1.1, page 18

[28] Staff Working Document, Section 3.3.1.2, page 21

[29] Report of the High Level Group for the future European Aviation Regulatory Framework, European Aviation, A framework for driving performance improvement, July 2007, part 3.8, page 31

[30] Performance Review Commission, Eurocontrol, PRU Safety Survey 2006

[31] PRU Safety Survey, Paragraph 4.6.3

[32] Page (vii) of Annex 13 – definition of '*Notes'*

[33] *R. (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin) [2008] Env. L.R. 22 per Stanley Burnton, J. at paras 48-9

[34] CAP 739, Paragraph 11.3 onward "UK Helicopter FDM Research and Development"

[35] For example; negligently endangering an aircraft contrary to Article 137 of the ANO. Details of penalties can be found in Article 214 and Schedule 13 of the ANO. There are of course many offences listed in the ANO of which a substantial number could conceivably be proved by the use of CVR or even FDM records.

[36] Section 2.1 of Attachment E

> "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."

[37] See page 120 of CAP 739

[38] Article 255 ANO

[39] CAP 739, Paragraph 11.3 onward "UK Helicopter FDM Research and Development"

[40] CAP 739, Paragraph 1.1

[41] CAP 739, Paragraph 4.15

[42] CAP 739, Paragraph 4.16

[43] Which was also included in the first edition of CAP 739 in Chapter 9 of that edition of CAP 739 on 26 September 2006

[44] *Australian National Airlines Commission v Commonwealth of Australia* [1975] HCA 33; (1975) 132 CLR 582 (29 August 1975)

[45] *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269

[46] *Société Air France v NAV Canada* [2010] ONCA 598

- **1**[47] *ROGERS V HOYLE* [2015] QB 265

[48] See Opinion 1/91 *Re Draft Treaty on a European Economic Area (No.1)* [1991] ECR I-6079 at para 35

[49] See Opinion 1/91 *Re Draft Treaty on a European Economic Area (No.1)* [1991] ECR I-6079 at para 2

[50] See, to that effect, Case C-298/96 *Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1998] ECR I-4767 at para 23

[51] See, to that effect, Case C-432/05 *Unibet (London) Ltd v Justitiekanslern* [2007] ECR I-2271 at [38] and case law cited

[52] Opinion 1/09 *Re a draft Agreement on the European and Community Patents Court* [2011] 3 CMLR 4 (CJEU Full Court) at paras 65-9 (emphasis added – footnotes in original)

[53] See, to this effect, Joined Cases *Da Costa en Schaake NV, v Nederlandse Belastingadministratie* [1963] ECR 31at [38]; Case 62/72 *Bollmann v Hauptzollamt Hamburg-Waltershof* [1973] ECR 269 at [4]; and Case C-261/95 *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* [1997] ECR I-4025 at [31]

[54] See, to this effect, Case 126/80 *Salonia v Poidomani* [1981] ECR 1563 at [7]

[55] Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECR I-411

[56] *Customs and Excise v ApS Samex* [1993] 3 CMLR 194 per Bingham J. at para 31

[57] *R. v International Stock Exchange of the United Kingdom and the Republic of Ireland, ex parte Else* [1993] QB 534 at 545.

[58] See, for example, *R. v Secretary of State for the Environment ex parte Greenpeace* [1994] 4 All ER 352; [1994] 3 CMLR 737