



ASSEMBLY — 39TH SESSION

TECHNICAL COMMISSION

Agenda Item 36: Aviation safety and air navigation implementation support

PROTECTION OF SAFETY INFORMATION

(Presented by Peru and supported by the countries of the South American (SAM) Region and the twenty-two Member States of the Latin American Civil Aviation Commission (LACAC)<sup>2</sup>)

EXECUTIVE SUMMARY

This working paper examines opportunities for improvement relating to the need to take a close look at aspects of safety information protection.

**Action:** The Assembly is invited to review the arguments put forward in this working paper with a view to requesting ICAO to consider incorporating the Region's suggestions into the amendment to Annex 19.

<i>Strategic Objectives:</i>	This working paper relates to the Safety Strategic Objective.
<i>Financial implications:</i>	N/A
<i>References:</i>	Annex 19 — <i>Safety Management</i> Annex 13 — <i>Aircraft Accident and Incident Investigation</i>

<sup>1</sup> Spanish version provided by Peru.

<sup>2</sup> Presented by 22 Contracting States (Argentina, Aruba, Belize, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela (Bolivarian Republic of)).

## 1. INTRODUCTION

1.1 On February 22, 2016, the ICAO Council adopted Amendment 15 to Annex 13 — *Aircraft Accident and Incident Investigation*, which considers the current difficulties experienced by the authority responsible for accident and incident investigation in adequately protecting the records and the multiple reports, interests, and projects related to the investigation.

1.2 The following elements and key factors referred to in the amendment should be highlighted: a) the improved protection of investigation records, while simultaneously maintaining a balance between the objectives of the investigation and other public interests; b) effective means for protecting the records that are under the control of the investigating authority; c) support for States that enables the designated competent authority to apply the “balancing test for conflicting interests”; d) the acknowledgement that different protective safeguards are required for different circumstances and that complete protection can be counter-productive; e) adaptation to different legal systems and State practices in order to provide effective protection of investigation records.

1.3 Subsequently, on March 2, 2016, the Council adopted Amendment 1 to Annex 19 — *Safety Management*, which considers a series of recommendations derived from the 2nd HLSC 2015. At that conference, it was apparent that the positions on information protection were valid but also divergent, and that at the time, there were no clear criteria for specifying what was to be protected. This was corrected in Amendment 1 to Annex 19, which includes the following: a) standardization of the terms used throughout the amendment, b) development of definitions for safety data and information, and c) consideration of the content of the guidance material in Attachment B of Annex 19 as part of the Standards and Recommended Practices (SARPs) on this subject.

1.4 The South American (SAM) Region recognizes and appreciates the work done by ICAO and the rapid response to and consideration of the concerns raised by the States of the Region during the 2nd HLSC held in February 2015, as well as the comments made by the States of the Region concerning the content of Amendment 1 to Annex 19.

## 2. DISCUSSION

2.1 The current trend in these States with respect to information is to promote the transparency of public management and to regulate citizens’ rights to access information. It is in this context that it has been difficult for the States of the Region to establish a legal framework for the protection of safety information, which is essential to decreasing the accident rate and thus to protecting human lives.

2.2 Clearly, it is fundamentally important to protect against the inappropriate use of safety information so that it continues to be available in a way that enables States to adopt adequate and appropriate preventive measures.

2.3 Despite the significant improvements contained in Amendment 1 of Annex 19, the States of the Region consider that ICAO still needs to take additional action to help States achieve their objectives for information protection, especially as follows:

### *Levels of and conditions for protection*

2.3.1 Amendment 1 of Annex 19 refers to States’ obligation to share safety information considered to be of interest to other States, and it stipulates the condition that the level of protection and

the conditions under which such information will be shared must be agreed upon. Additionally, States must ensure that the conditions are specified under which safety data and information and the related sources qualify for protection.

2.3.2 The foregoing situation creates a contradiction in the sense that when Annex 19 was drafted, the scope of protection clearly included safety data and information and related sources. The inclusion of conditions and levels for determining the scope of protection of the above-mentioned elements could, however, leave some data, information and related sources outside the scope of protection despite their need for protection. They necessarily should be protected in light of the very mandate of Amendment 1 to Annex 19, which does indeed grant each State the authority to establish its own conditions and levels.

2.3.3 If this situation persists, ICAO will need clearly to define the conditions and levels it is referring to so that we can rely on having standardized elements for all States.

#### ***Related sources***

2.3.4 Amendment 1 to Annex 19 established the scope of protection, setting out three elements which must be protected: safety data, safety information, and the related sources. Although the first two elements have been defined, there is no definition of what could be considered related sources.

2.3.5 The lack of a definition of related sources would mean that the States do not have complete information as to which specific sources they have to protect. Such an omission could lead some States to fail to identify all of the sources, thereby undermining the progress made by ICAO on the definitions already provided in the amendment.

#### ***Right to know law***

2.3.6 It is general knowledge that laws relating to the right to know or laws concerning the freedom of information, open records, or transparency allow the public to access information held by the State.

2.3.7 In considering it a mandatory obligation for States to create exceptions within right-to-know laws in order to guarantee the confidentiality of voluntarily supplied safety data and information, ICAO is creating a requirement that limits States' freedom to regulate the protection of safety information through the regulatory frameworks that they consider appropriate and that could, in fact, be more effective, such as a special law on the protection of safety information independent of the right-to-know law.

2.3.8 The foregoing is based upon a degree of complexity involved in incorporating exceptions into this type of law. The following examples of such complexity can be highlighted.

2.3.9 While it is true that exceptions to this rule can be found, access to information, like any right, is not absolute. The exceptions must, however, meet the following requirements: a) they must be expressly set out in a law (includes the Constitution); b) the exception must be supported by the need to protect a fundamental right (privacy or life, for example) or other constitutional right (national security, for example); c) it is not sufficient for the exception simply to be provided for in the Law. Rather, in order for it to be legitimately enforced, the party alleging the violation must prove that in the case in question, dissemination of the information will create a certain (real), impending, and serious risk (evidence of harm) to the basic right or other constitutional legal right which the cited exception is intended to protect; d) the interpretation of the exception must always be restrictive.

2.3.10 Therefore, taking into account the type of information that is associated with safety, all of the aforementioned requirements could be met without their legitimacy being questioned, but the complexity involved in providing evidence of impending harm could make it obligatory to submit information relevant to safety.

2.3.11 In accordance with all of the above statements, the Region requests that ICAO make the requirement more flexible so that the States have the power to choose the legal mechanism they will use to achieve the objective of protecting safety information, which is considered a priority by all of the States.

***ICAO's strategy for implementing information protection***

2.3.12 We consider it appropriate to request ICAO to step up its efforts so that it may offer the region clarity regarding the scope and object of the protection. Thereafter, ICAO will have to consider a complete strategy that includes all those in the relevant authorities who are involved in the approval of the legal framework for the protection of safety information so that it can convince the political, legislative and legal institutions and the wider citizenry of the importance of such an approval.

2.3.13 Considering that there is no doubt within the world of aviation that information protection is important, it could serve as a key negotiating tool for ICAO to work actively with the various levels within States, given that its involvement as an international organization specialized in civil aviation would be of great assistance in achieving the desired outcomes.

**3. CONCLUSION**

3.1 The Assembly is invited to urge ICAO to consider taking into account the proposals contained in this working paper.

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