



**WORKING PAPER**

**ASSEMBLY — 37TH SESSION**

**TECHNICAL COMMISSION**

**Agenda Item 27: The protection of certain accident and incident records**

**PROGRESS REPORT ON THE PROTECTION OF CERTAIN ACCIDENT AND INCIDENT RECORDS, AND SAFETY DATA COLLECTION AND PROCESSING SYSTEMS**

(Presented by the Council of ICAO)

**EXECUTIVE SUMMARY**

The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. Considering that a balance needed to be struck between the need for the protection of safety information and the need for the proper administration of justice, legal guidance for the protection of information from safety data collection and processing systems (SDCPS) has been developed by ICAO and incorporated as Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation* on 23 November 2006.

This paper addresses the protection of safety information by States in consideration of Attachment E and provides a progress report on action taken pursuant to Assembly Resolutions A36-8 and A36-9. Revisions to the resolutions are proposed in accordance with the recommendations of the 2010 High-level Safety Conference (Doc 9935) and the report of the 2008 Accident Investigation and Prevention (AIG) Divisional Meeting (Doc 9914).

**Action:** The Assembly is invited to:

- a) note the information contained in this paper;
- b) review the modifications proposed and adopt the Resolution in Appendix A on non-disclosure of certain accident and incident records to supersede Resolution A36-8; and
- c) review the modifications proposed and adopt the Resolution in Appendix B on protecting information from safety data collection and processing systems in order to improve aviation safety to supersede Resolution A36-9.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objectives A and F by providing States with legal guidance to assist them in protecting safety information from inappropriate use.
<i>Financial implications:</i>	Funding for some of these activities will need to come from a combination of potential savings related to productivity or efficiency gains within the Secretariat and voluntary contributions to the SAFE Fund.
<i>References:</i>	Annex 13 — <i>Aircraft Accident and Incident Investigation</i> Doc 9935, <i>Report of the High-level Safety Conference 2010</i> Doc 9914, <i>Report of the Accident Investigation and Prevention Divisional Meeting (2008)</i> Doc 9899, <i>Report of the Technical Commission of the 36th Session of the Assembly</i> Doc 9902, <i>Assembly Resolutions in Force</i> (as of 28 September 2007)

## 1. INTRODUCTION

1.1 Assembly Resolutions A36-8: *Non-disclosure of certain accident and incident records* and A36-9: *Protecting information from safety data collection and processing systems in order to improve aviation safety* instruct the Council to provide a progress report to the next ordinary session of the Assembly on the protection of those safety information by States in consideration of Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation*.

1.2 The Technical Commission in the 36th Session of the Assembly had referred the matter of possible inconsistencies between paragraph 5.12 and Attachment E of Annex 13 — *Aircraft Accident and Incident Investigation* to the AIG Divisional Meeting (2008) which was held in Montréal from 13 to 18 October 2008, following the Assembly session.

## 2. DISCUSSION

### 2.1 Protection of certain accident and incident records

2.1.1 Pursuant to A36-8, and in preparation for AIG/08, the Secretariat undertook a consultation with States in May 2008, especially with regard to the protection of certain accident and incident records. Some seventy-seven per cent (41 / 53) of responding States indicated that Attachment E to Annex 13 had assisted them in the development/implementation of means to protect certain accident and incident records. In the remaining States, Attachment E had not been of assistance in protecting certain accident and incident records mainly due to impediments in their national laws and regulations.

2.1.2 Notwithstanding the aforementioned, AIG/08 was of the view that inconsistencies existed between paragraph 5.12 and Attachment E to Annex 13, and that the relevant guidance was worded in very broad terms, thus not facilitating implementation. As a consequence, the meeting acknowledged that further work on the protection of safety information was necessary and recommended that ICAO undertake a study with the aim of reviewing and facilitating the implementation of paragraph 5.12 and Attachment E to Annex 13, and that due consideration be given to the issues documented and discussed under this subject.

### 2.2 Protection of safety data collection and processing systems (SDCPS)

2.2.1 State letter AN 6/1-10/1, dated 8 January 2010, sought comments from States on the application of legal guidance in Attachment E to Annex 13 for the protection of the SDCPS. It is noted that SDCPS include certain accident and incident records (as described in paragraph 5.12 of Annex 13); mandatory and voluntary incident reporting systems (as described in Chapter 8 of Annex 13); and self-disclosure reporting systems, including automatic data capture systems (as described in Annex 6 — *Operation of Aircraft, Part I — International Commercial Air Transport — Aeroplanes, Chapter 3*) as well as manual data capture systems.

2.2.2 It is noted that forty per cent (23 / 57) of the responding States did not provide comments to the consultation addressed in 2.1.1 above.

2.2.3 Sixty-six per cent (38 / 57) of responding States indicated that Attachment E to Annex 13 had assisted them in the development and/or implementation of means to protect certain accident and incident records, while sixty-eight per cent (39 / 57) of States were assisted in protecting information emanating from mandatory reporting systems.

2.2.4 Sixty-three per cent (36 / 57) of responding States benefited from Attachment E to protect information stemming from voluntary incident reporting systems, while fifty-seven per cent (33 / 57) of these States had been assisted by Attachment E in protecting information emanated from self-disclosure reporting systems.

2.2.5 Some twenty-five States which benefited from the guidance in Attachment E to Annex 13, indicated that Attachment E was (or would be) used as the basis from which relevant legislation was (or would be) developed and/or adjusted, including civil aviation regulations.

2.2.6 Thirteen States which did not benefit from the guidance in Attachment E to Annex 13, indicated that this was due to either impediments in their national laws and regulations (four States), or because their national laws and regulations already provided protection for safety information and were in force before the issuance of Attachment E (nine States).

### 3. **HIGH-LEVEL SAFETY CONFERENCE (2010) HELD IN MONTRÉAL (29 MARCH TO 1 APRIL 2010)**

3.1 The 2010 High-level Safety Conference discussed the matter under Topic 2.4 – *The protection of sources of safety information*. The conference recognized that the protection of information from all available sources of safety data from improper use was essential to ensure its continued availability and that such safety information should be used only for safety purposes. It also acknowledged that protection should be to a level commensurate with the nature of the information each source generates, and that such protection should not interfere with the administration of justice in States.

3.2 The conference recommended (Recommendation 2/4) that ICAO establish a multidisciplinary group to progress activities regarding the protection of safety data and safety information with a view to ensure the availability of safety information required for the management of safety.

### 4. **CONCLUSION**

4.1 In response to Assembly Resolutions A36-8 and A36-9, the Secretariat undertook two consultations with States on the protection of safety information gathered from safety data collection and processing systems, in consideration of the legal guidance in Attachment E to Annex 13.

4.2 In addition to the above-mentioned consultations, outlined in paragraphs 2.1 and 2.2, recommendations were addressed to ICAO by AIG/08 and by the High-level Safety Conference (2010) to further study the protection of safety information from improper use.

4.3 In order to reflect the aforementioned, two draft Assembly resolutions are proposed to supersede Assembly Resolutions A36-8 and A36-9.

## APPENDIX A

### DRAFT RESOLUTION FOR ADOPTION BY THE 37TH SESSION OF THE ASSEMBLY

#### **Resolution 27/1: Non-disclosure of certain accident and incident records**

*Whereas* the primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide;

*Whereas* it is essential that cognizance be taken that it is not the purpose of the investigation of accidents and incidents to apportion blame or liability;

*Recognizing* that it is essential that all relevant information be made available to the accident investigators to facilitate the establishment of the causes of accidents and incidents in order to enable preventative action to be taken;

*Recognizing* that the prevention of accidents is essential to safeguard the continued confidence in air transport;

*Recognizing* that public attention will continue to focus on States' investigative actions, including calls for access to accident and incident records;

*Recognizing* that the protection of certain accident and incident records from inappropriate use is essential to ensure the continued availability of all relevant information to accident investigators in future investigations;

*Recognizing* that the measures taken so far to ensure the protection of certain accident and incident records may not be sufficient, and *noting* the issuance by ICAO of legal guidance to assist States in this regard;

*Recognizing* that the legal guidance in Attachment E to Annex 13 has assisted many States in the development and implementation of means to protect certain accident and incident records from inappropriate use;

*Considering* that a balance needs to be struck between the need for the protection of safety information and the need for the proper administration of justice, and that protection should be to a level commensurate with the nature of the information each source generates;

*Mindful* that the accident investigation authorities and the civil aviation authorities acknowledged the need for further study by ICAO on the protection of safety information; and

*Recognizing* the recommendations of the High-level Safety Conference 2010 to establish a multidisciplinary group to address the protection of certain safety information;

*The Assembly:*

1. *Urges* Contracting States to examine and if necessary adjust their laws, regulations and policies to protect certain accident and incident records in compliance with paragraph 5.12 of Annex 13, in order to mitigate impediments to accident and incident investigations, in consideration of the legal guidance for the protection of information from safety data collection and processing systems issued by ICAO, as set out in Attachment E to Annex 13;
2. ~~*Instructs the Council to provide a progress report to the next ordinary session of the Assembly on this matter*~~*Instructs* the Council to consider to enhance, in view of the results of the work of the multidisciplinary group, the provisions on the protection of certain accident and incident records with the aim of facilitating the implementation of Annex 13 provisions addressing the protection of safety information; and
3. *Declares* that this resolution supersedes Resolution A36-833-17.

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## APPENDIX B

### DRAFT RESOLUTION FOR ADOPTION BY THE 37TH SESSION OF THE ASSEMBLY

#### **Resolution 27/2: Protecting information from safety data collection and processing systems in order to improve aviation safety**

*Whereas* the primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide;

*Recognizing* the importance of the free communication of safety information amongst the stakeholders of the aviation system;

*Recognizing* that the protection of safety information from inappropriate use is essential to ensure the continued availability of all relevant safety information, to enable proper and timely preventive actions to be taken;

*Concerned* by a trend for safety information to be used for disciplinary and enforcement actions and to be admitted as evidence in judicial proceedings;

*Noting* the importance of a balanced environment in which disciplinary action is not taken as consequence of actions by operational personnel that are commensurate with their experience and training, but where gross negligence or wilful violations are not tolerated;

*Mindful* that the use of safety information for other than safety-related purposes may inhibit the provision of such information, with an adverse effect on aviation safety;

*Considering* that a balance needs to be struck between the need for the protection of safety information and the need for the proper administration of justice, and that protection should be to a level commensurate with the nature of the information each source generates;

*Recognizing* that technological advances have made possible new safety data collection, processing and exchange systems, resulting in multiple sources of safety information that are essential in order to improve aviation safety;

*Noting* that existing international laws, as well as national laws and regulations in many States, may not adequately address the manner in which safety information is protected from inappropriate use; ~~and~~

*Noting* the issuance by ICAO of legal guidance aimed at assisting States enact national laws and regulations to protect information gathered from safety data collection and processing systems, while allowing for the proper administration of justice;

*Recognizing* that the legal guidance in Attachment E to Annex 13 has assisted many States in the development and implementation of means to protect information gathered from safety data collection and processing systems;

*Mindful* that the civil aviation authorities acknowledged the need for a further study by ICAO on the protection of safety information; and

*Recognizing* the recommendations of the High-level Safety Conference 2010 to establish a multidisciplinary group to address the protection of certain safety information;

*The Assembly:*

1. *Urges* all Contracting States to examine their existing legislation and adjust as necessary, or enact laws and regulations to protect information gathered from all relevant safety data collection and processing systems based, to the extent possible, on the legal guidance developed by ICAO, as set out in Attachment E to Annex 13;

2. *Urges* the Council to cooperate with Contracting States and appropriate international organizations regarding the development and implementation of guidance to support the establishment of effective safety-reporting systems, and the achievement of a balanced environment where valuable information derived from all relevant safety data collection and processing systems is readily accessible, while respecting principles of administration of justice and freedom of information;

3. ~~*Instructs* the Council to provide a progress report to the next ordinary session of the Assembly on this matter~~*Instructs* the Council to consider to enhance, in view of the results of the work of the multidisciplinary group, the provisions on the protection of information gathered from safety data collection and processing systems (SDCPS) with a view to ensure and sustain the availability of safety information required for the management of safety; and

4. *Declares* that this resolution supersedes Resolution A36-935-17.

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