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# STRUCTURE

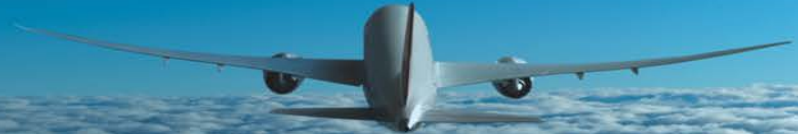
DAY 2

Session 4  
Introducing the new  
Appendix

Session 5  
Interaction of A13 with A6  
and A19

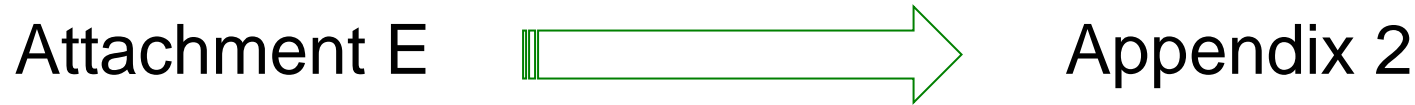
Session 6  
Introducing Doc 10053

## Introducing the new Appendix 2 to Annex 13





## Annex 13, Appendix 2



### Provisions of Appendix 2 are intended to:

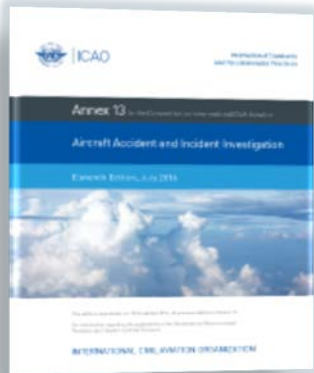
- assist States in developing laws to protect accident and investigation records
- assist the competent authority in administering the balancing test under 5.12



## Annex 13, Appendix 2 (cont'd)

### Structure

1. Introduction
2. General
3. Competent Authority
4. Administration of the Balancing Test
5. Records of the Decisions
6. Final Report



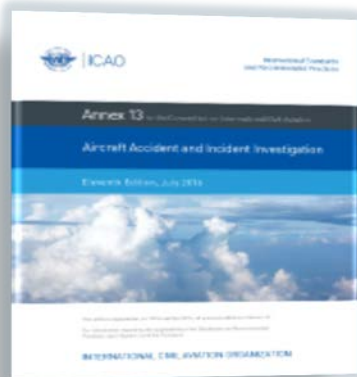


## Annex 13, Appendix 2 (cont'd)

### Section 2. – General

#### Provides clarification for the protection of records listed in 5.12

- Protection of CVRs and AIRs and any transcripts shall apply from the time an accident or incident occurs and continue after the publication of the Final Report.
- Protection of other records listed in 5.12 b) shall apply from the time they come into the custody or control of the accident investigation authority and continue after the publication of the Final report





## Annex 13, Appendix 2 (cont'd)

### Section 3 – Competent Authority

- Designation of the competent authority/ies
- Competent authorities other than courts should be considered
- Balancing test may need to be administered for a range of different purposes
- Need to be capable of balancing the competing interests





## Annex 13, Appendix 2 (cont'd)

### Section 4 – Administration of the Balancing Test

- Satisfied that a material fact in question cannot be determined without the record
- list of factors to be taken into account for the balancing test
  - Some factors favour disclosure, others favour protection





## Annex 13, Appendix 2 (cont'd)

### Section 4.2 – Factors to consider in administering the balancing test:

- a) the purpose for which the record was created or generated;
- b) the requester's intended use of that record;
- c) whether the rights or interests of a person or organization will be adversely affected by the disclosure or use of that record;
- d) whether the person or organization to whom that record relates has consented to make that record available;
- e) whether suitable safeguards are in place to limit the further disclosure or use of that record;
- f) whether that record has been or can be de-identified, summarized or aggregated;
- g) whether there is an urgent need to access that record to prevent a serious risk to health or life;
- h) whether that record is of a sensitive or restrictive nature; and
- i) whether that record reasonably indicates that the accident or incident may have been caused by an act or omission considered, in accordance with national laws and regulations, to be gross negligence, willful misconduct, or done with criminal intent.



## CASE STUDY

As a result of an accident, the coroner orders the Accident Investigation Authority (AIA) to disclose the CVR. The AIA provided the CVR to the coroner, but the pilot's union appealed that the AIA's actions were not appropriate, and the CVR should have never been disclosed.

**What should the Court decide? Please provide your reasons.**





## 2013 Augusta Westland case in Scotland





## CASE STUDY

State A has legislation that safeguards the confidentiality of investigation records. The disclosure of these records is only permitted under strict conditions. The legislation contains a very limited set of criteria (e.g. murder and terrorism), which permit disclosure and use in criminal proceedings.

Please establish whether the system for the protection of the confidentiality of investigation records included in the legislation meets the requirements for the balancing test introduced by Annex 13.



## Amendment to Appendix 2 (cont'd)

### Section 5 – Records of the Decisions

Recording of reasons of balancing test to promote consistency in decision.





## Amendment to Appendix 2 (cont'd)

### Section 6 – Final Report

- In accordance with Chapter 6, 6.5, Final Reports are publicly available in the interest of accident prevention and are not subject to protection under 5.12.
- States should consider limiting the use of Final Reports for purposes other than accident prevention.





## Amendment to Appendix 2 (cont'd)

### Section 7 – Accident and Incident Investigation Personnel

States should consider that accident and incident investigation personnel not be compellable to give an opinion on matters of blame or liability in civil, criminal, administrative or disciplinary proceedings.





## CASE STUDY

The explicit purpose of a Final Report is to prevent future accidents and not to apportion blame or liability. Final reports, which are made publicly available, are normally written in a non-accusatory way. Nevertheless, some national courts have reportedly used Final Reports to seek to establish responsibilities, which is not the objective of a safety investigation.

**What can be done to prevent the use of Final Reports by courts?**



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## Rogers vs Hoyle case of the UK Court of Appeal





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**QUESTIONS?**



# STRUCTURE

DAY 2

Session 4  
Introducing the new Appendix

Session 5  
Interaction of A13 with A6 and  
A19

Session 6  
Introducing Doc 10053

**Amendment 1 to Annex 19:  
New and enhanced SARPs on the  
protection of safety data and safety  
information**





## Amendment to Annex 19

- ❑ New and enhanced SARPs related to the protection of safety data, safety information and related sources based on recommendations of:
  - ✓ Safety Management Panel (**SMP**)
  - ✓ Safety Information Protection Task Force (**SIP TF**)
  - ✓ Coordination Meeting between members of the SIPTF and SMP



Adoption: 2 March 2016

Effective: 11 July 2016

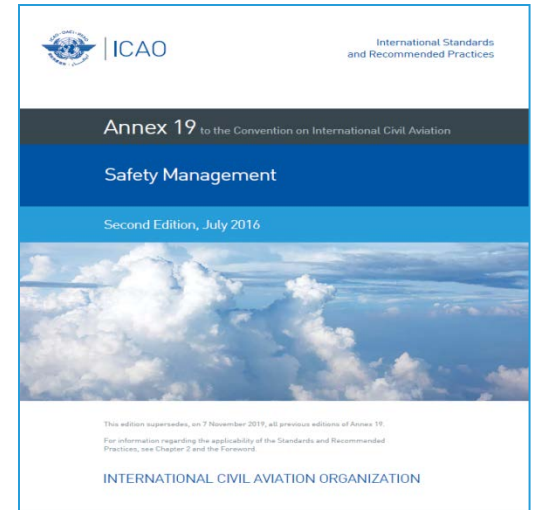
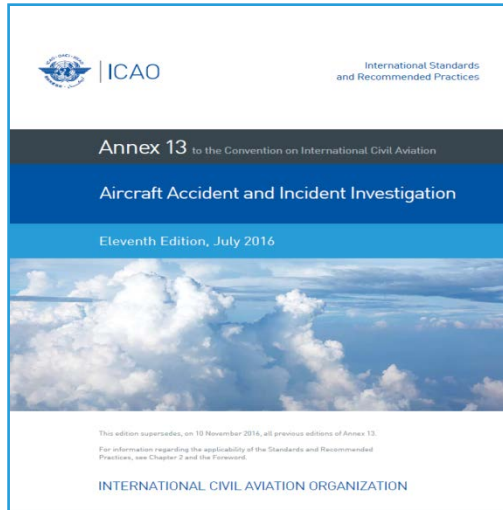
Applicable: 7 November 2019



# Annex 19 Chapter 5 – Safety Data and Safety Information Collection, Analysis, Protection, Sharing and Exchange

## What are the differences between the Annex 13 and Annex 19 protections?

- Scope
- Purpose
- Application of the provisions
- Competent authority





## Annex 19 Chapter 5.3 – Safety Data and Safety Information Protection

- Safety data and safety information in voluntary safety reporting systems and their related sources are accorded a **higher level of protection** through a Standard to ensure their continued availability (Chapter 5 / 5.3.1)
- States are recommended to afford **the protection** to safety data and safety information in mandatory safety reporting systems and their related sources (Chapter 5 / 5.3.2)

Who are the **sources** of safety data and safety information?





## Annex 19 Chapter 5.3 – Safety Data and Safety Information Protection

### Individuals and organizations are protected by:

- ensuring they are not punished on the basis of their report
- limiting the use of reported safety data and safety information to purposes aimed at the maintenance or improvement of safety

These protections apply unless one of the principles of exception is applicable





## Annex 19 Chapter 5.3 – Safety Data and Safety Information Protection

States and service providers can use safety information to take preventive, corrective, or remedial action to:

### **REASONS:**

- guard against the potential for immediate harm or injury as a result of a safety risk until that risk can be identified and mitigated;
- ensure that appropriate action is taken to minimize the likelihood that such a risk might occur again in the future;
- prevent exposure to an unmitigated safety risk; and
- ensure the integrity of the system itself.



## Annex 19, Appendix 3

**Upgrading Attachment B of Annex 19 to the status of an Appendix** establishes new SARPs to **provide greater impetus for their implementation.**

### **Structure:**

**Section 1** – General principles

**Section 2** - Principles of protection

**Section 3** – Principles of exception

**Section 4** – Public disclosure

**Section 5** – Responsibility of the custodian of safety data and safety information

**Section 6** – Protection of recorded data



## Annex 19, Appendix 3 (cont'd)

### Section 1. General principles

Ensures that there is **no potential overlap** with the protection provisions in **Annex 13**.

1.2 When an investigation under Annex 13 – *Aircraft Accident and Incident Investigation* has been instituted, accident and incident investigation records listed in paragraph 5.12 of Annex 13 shall be subject to the protections accorded therein instead of the protections accorded by this Annex.





## Annex 19, Appendix 3 (cont'd)

### Section 2. Principles of protection



- Ensure that safety data and safety information are not used for purposes other than maintaining or improving safety
- Recall that the principles of protection do not apply when States take a preventive, corrective or remedial action that is necessary to maintain or improve aviation safety



## CASE STUDY

A co-pilot submitted a voluntary report in which he informed that the captain left his position during the flight and was missing for 30 minutes. The CAA is considering using the voluntary report to take remedial action, including revoking the captain's license. The captain argued that such an action would be against the provisions of Annex 19. His arguments were based on the fact that it was a voluntary report that was protected.

**Please provide whether the Captain is right and why?**



## Annex 19, Appendix 3 (cont'd)

### Section 3. Principles of exception

Three principles of exception:

- Facts and circumstances reasonably indicating that an occurrence may have been caused by an act or omission considered, in accordance with national laws, to be conduct constituting **gross negligence, willful misconduct or criminal activity**;
- For the **proper administration of justice**; and
- For the purpose of **maintaining or improving safety**.



## Annex 19, Appendix 3 (cont'd)

### Section 4. Public Disclosure

- A new provision, which covers States that have **right-to-know laws**.
- In the context of requests made for **public disclosure of voluntarily supplied information**, certain exceptions would **apply** to accord protection to the safety data and safety information.





## Annex 19, Appendix 3 (cont'd)

### Section 5. Responsibility of the custodian of safety data and safety information

States should ensure that each Safety Data Collection and Processing System (SDCPS) has a designated custodian to:

- ❖ administer the protection of safety data and information and related sources under Annex 19; and
- ❖ ensure that they are released and used in accordance with its provisions.



## Annex 19 Appendix 3 – (cont'd...)

### Section 6. Protection of recorded data

- Ambient workplace recordings are governed by national privacy laws
- Different frameworks for the protection under Annex 13 and Annex 6

6.1 States shall, through national laws and regulations, provide specific measures of protection regarding the confidentiality and access by the public to ambient workplace recordings.

6.2 States shall, through national laws and regulations, treat ambient workplace recordings required by national laws and regulations as privileged protected data subject to the principles of protection and exception as provided for in this appendix.



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# STRUCTURE

DAY 2

Session 4  
Introducing the new  
Appendix

Session 5  
Interaction of A13 with A6  
and A19

Session 6  
Introducing Doc 10053

**Latest Amendment to Annex 6:  
New SARPs on the protection of flight recorder  
recordings in routine operations**





## Background – Latest Amendment to Annex 6

### Protection and use of flight recorder recordings in routine operations

- Amendments based on **GEPAIR's recommendations** that took into account the findings and recommendations of the Flight Recorder Panel (FLIRECP) and the SIPTF.
- CVRs and AIRs were initially made to support accident and incident investigation
- Increasing use of CVRs and AIRs by operators outside the context of Annex 13.







## Latest Amendment to Annex 6

### Key Elements

- Limits the use of such recordings;
- Acknowledges that there is no provision on the protection of cockpit voice recorder (CVR) and airborne image recorder (AIR) recordings outside the scope of an Annex 13-type investigation; and
- Addresses the protection of flight recorder recordings in day-to-day or “routine” operations.





## Latest Amendment to Annex 6

Use of CVRs and AIRs should be limited only to:

- ✓ safety-related purposes, with appropriate safeguards;
- ✓ When these recordings or transcripts are sought for criminal proceedings.





## Annex 6 – Applicable from Nov 2019

3.3.4 States shall not allow the use of recordings or transcripts of CVR, CARS, Class A AIR and Class A AIRS for purposes other than the investigation of an accident or incident as per Annex 13 except where the recordings or transcripts:

- a) are related to a safety-related event identified in the context of a safety management system; are restricted to the relevant portions of a de-identified transcript of the recording; and are subject to the protections accorded by Annex 19;
- b) are sought for use in criminal proceedings not related to an event involving an accident or incident investigation and are subject to the protections accorded by Annex 19; or
- c) are used for inspections of flight recorder systems as provided in Section 7 of Appendix 8.



# Annex 6 – Applicable from Nov 2019

3.3.5 States shall not allow the use of recordings or transcripts of FDR, ADRS as well as Class B and Class C AIR and AIRS for purposes other than the investigation of an accident or incident as per Annex 13, except where the recordings or transcripts are subject to the protections accorded by Annex 19 and:

- a) are used by the operator for airworthiness or maintenance purposes;
- b) are used by the operator in the operation of a flight data analysis programme required in this Annex;
- c) are sought for use in proceedings not related to an event involving an accident or incident investigation;
- d) are de-identified; or
- e) are disclosed under secure procedures.



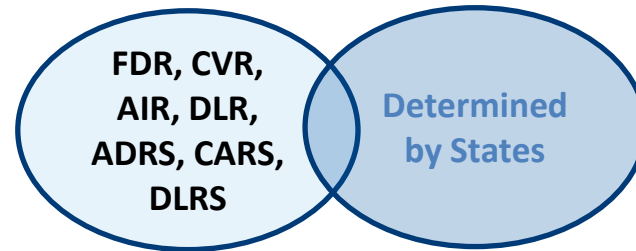
## Flight Recorder Recordings vs. Ambient Workplace Recording

### Annex 6

- **Flight recorder** is any type of recorder installed in the aircraft for the purpose of complementing accident/incident investigation.
- Flight recorders include:
  - Crash protected flight recorders (eg: FDR, CVR, AIR and DLR); and
  - Lightweight flight recorders (eg: ADRS, CARS, AIRS and DLRS)

### Annex 19

- **Ambient workplace recordings** are determined by the national laws of States.



**Flight recorders do not automatically fall under the ambient workplace recordings**

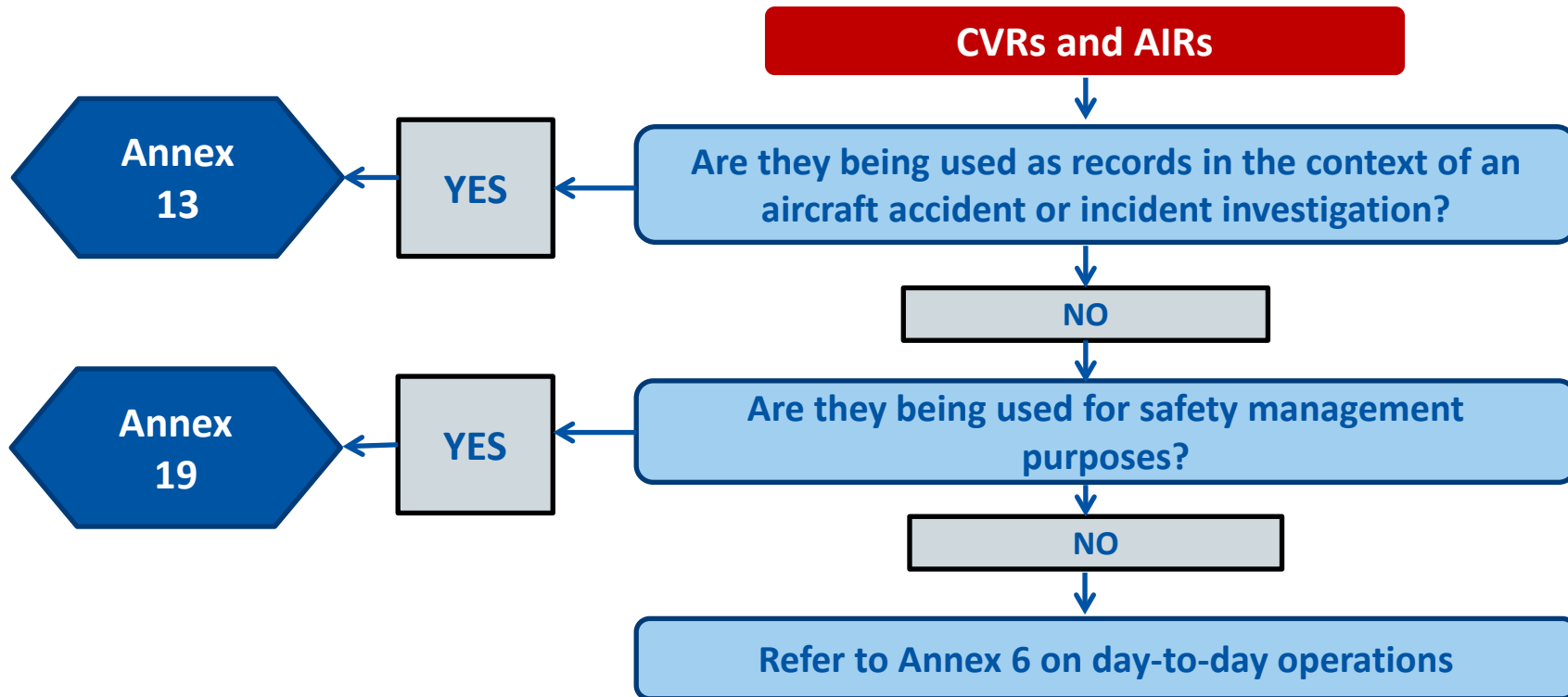


# Key Differences

Annex 13	Annex 19	Annex 6
Accident & incident investigation records	Safety data, safety information and related sources	Flight recorder recordings
Accident and incident investigation	Safety management	Routine operations
Balancing test	Principles of exception	Safety related purposes or criminal proceedings



## Interaction of protective frameworks in Annexes 6, 13 and 19





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# STRUCTURE

DAY 2

Session 4  
Introducing the new  
Appendix

Session 5  
Interaction of A13 with A6  
and A19

Session 6  
Introducing Doc 10053

## Introducing the *Manual on Protection of Safety Information* (Doc 10053)

### Part I – *Protection of Accident and Incident Investigation Records*





## Purpose of the Manual

- Provides guidance on the protection of certain records pertaining to accident or incident investigations
- Material in the Manual is consistent with Annex 13 and is complimentary to other existing documents
- Manual will be updated and expanded as additional provisions are developed
- Recommended for the benefit of the accident and incident investigation community, regulators, judicial authorities, service providers and others involved





## The Manual does not address:

- Protection related to safety data and safety information within Annex 19
- Protection and use of CVRs/AIRs in routine operations within Annex 6





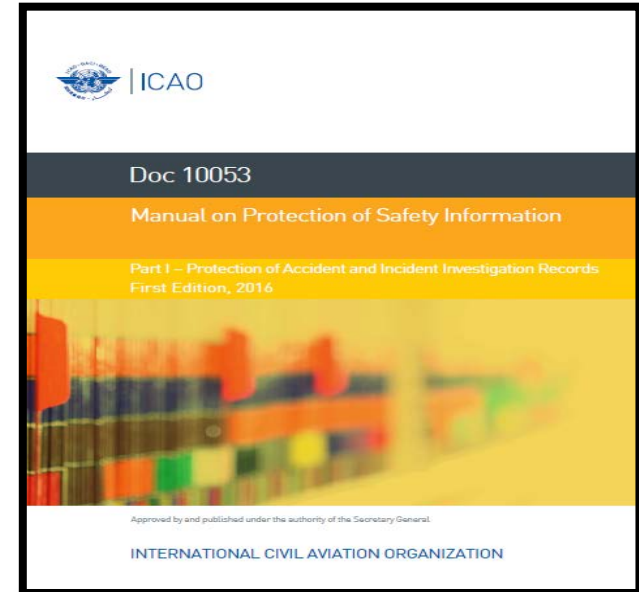
## Structure of the Manual

Chapter 1. Overview of the manual

Chapter 2. Accident and incident investigation fundamentals

Chapter 3. Protection and use of certain accident and incident investigation records

Chapter 4. Interaction of accident investigation authorities





## Chapter 3 – Protection and use of certain accident and incident investigation records

**Balancing test** – whereby a competent authority assesses competing public interests and decides which interest should prevail leading to the determination referred to in Std. 5.12





## Steps for the Administration of the Balancing Test

**Step 1** – Identify the competing public interest

**Step 2** – Confirm the status of the record

**Step 3** – Direct to the original source

**Step 4** – Determine that there is a material fact in question

**Step 5** – Apply the balancing test

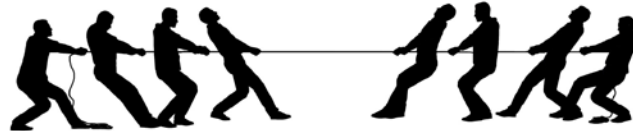
**Step 6** – Record the decision





## Step 1 – Identify the competing public interest

- Identify the proposed purpose of the disclosure or use of the investigation record
- The purpose needs to be contextualized to identify the appropriate competent authority





## Step 2 – Confirm the status of the record

- CVRs and AIRs recordings as well as their transcripts are protected no matter who has possession of them
- Records in 5.12 b) are protected only when they are in the custody or control of the accident investigation authority.







## Step 3 – Directing to the original source

- Protection is afforded to certain records when they are in the custody or control of the accident investigation authority (Std. 5.12 b))
- Direct to the original source of the record (Std. 5.12.4, A13)
- Information available from another source



## Step 4 – Determining if there is a material fact in question

- In case of a criminal, civil, administrative or disciplinary proceeding
- The material fact requirement recognizes the adverse consequences that might flow from the disclosure or use of the content of records

**material fact**



## Step 5 – Application of the balancing test

### The competent authority must:

- weigh the competing interests raised by the particular circumstances of the case:
- consider a number of factors (A13, Appendix 2, 4.2)
  - ✓ consent to make the record available (4.2 d)
  - ✓ suitable safeguards (4.2 e)
  - ✓ de-identification, aggregation or summary
- identify all other relevant factors.



## Factors favouring the disclosure or use of the investigation record

- Right to a fair trial
- Public confidence in the judicial system
- Right-to-know laws
- Public's concern for safety
- Need to maintain or improve safety

(how critical)

### Not substantive factors:

- Public curiosity
- Fascination



Factors favouring  
disclosure



## Factors favouring protection of the investigation record

- Adverse domestic and international impact (Std. 5.12)
  - ✓ Failure of persons to cooperate
  - ✓ Lack of access to the information
- Competent authority may refer to the precedents and statements from persons involved about their concerns
- Competent authority be able to form a view about the impact.

**Factors favouring protection**





## Assess the weight of the competing factors

Does the proposed purpose of disclosure outweigh the interest in retaining the protections?

- Factors favouring disclosure vs. the factors favouring protection
- Each case is different
  - Criminal, civil, administrative or disciplinary proceedings
  - Requests under right-to-know laws
  - Actions by CAA to maintain or improve aviation safety



## Step 6 – Record the decision

- Requirement of **A13, Appendix 2, Section 5**
- Reasons should be drafted in clear and unambiguous language
- Submit records of decisions to ICAO (A13, Appendix 2, Section 5, Note)



## Benefits of recording decision:

- ✓ Enhances the quality of the decision
- ✓ Keeps competent authority accountable
- ✓ Fair to those affected by the decision
- ✓ Facilitates review and/or appeal process
- ✓ Consistency, transparency and standardization
- ✓ Precedents that help later decision-makers
- ✓ Fosters homogeneous implementation







## Chapter 4 – Interactions of accident investigation authorities with

- **Civil Aviation Authority**
- **Judiciary**
- **Media**
- **Families of victims of accidents**





## Interactions with the CAA

- ❑ CAA's requests should be directed to the original source of the information whenever possible
- ❑ Requests in order to maintain or improve safety  
➔ balancing test





## Interactions with the Judiciary

- Gross negligence, willful misconduct, criminal intent
- Parallel investigations
- Consider making accident and incident investigation personnel non-compellable







## Interactions with families of victims of accidents

- Responsibility to provide relevant, timely and validated information to the families and survivors (advisories, copies of media releases)
- A State that suffered fatalities or serious injuries to its citizens has the right to appoint an expert to participate in the investigation (Std. 5.27)
- Appoint a liaison or focal point

Guidance on assistance to accident victims and their families is included in the *Manual on Assistance to Aircraft Accident Victims and their Families* (DOC 9973) and the *ICAO Policy on Assistance to Aircraft accident Victims and their Families* (DOC 9998)



## CASE STUDY

Mr. Blake is the pilot of an aircraft that crashed in State A. Two passengers died during the accident. The families of the victims bring a claim in negligence against Mr. Blake, alleging that Mr. Blake was drunk during the flight. Mr. Blake argues that he was not. The claimants have asked that all witness statements and communications between persons involved in the operation of the aircraft be disclosed for use in their civil suit against Mr. Blake.

**Please administer the balancing test (step by step) and explain each step.**



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