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**THE INVESTIGATOR, THE MEDIA, AND THE  
RIGHTS OF THE PUBLIC**

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Good morning everyone.

At the last conference I discussed how the media are not the enemy, just ignorant. I discussed how to manage your media profile at a strategic level and how to deal with the sudden impact of media attention. We didn't delve into the fundamental political and social issues. Some of those issues are now among the general themes of this conference. I've summarised these as "the investigator, the media, and the rights of the public".

You'll have noticed that I didn't use the axiom much loved by the media as an excuse for what they are doing. I did not say the "public's right to know" but the "rights of the public". The problem we have to deal with, and the subject of my discussion, is that the public have rights besides the "right to know" and some of those rights are at times in conflict. These are issues requiring considerable judgement and while we may exercise judgement on an individual basis, the investigator needs some over-arching guidance.

Today I'll talk about how the Civil Aviation Authority juggles the Official Information Act, the Privacy Act and its own Act, in particular the requirements to provide and maintain a Civil Aviation Register. I'll describe the regulatory "threshold" beyond which the CAA proactively makes information available, and I'll look at those times when the CAA will fight to protect information. This covers both accident information and other information gathered by a regulator. The point is this, that while we may talk about CVR material and the effects of the CVR legislation, there are many other building blocks of safety information and we need to look at their management as a whole.

As an opening gambit, I'd say that the media do not hold the monopoly on determining public rights. In terms of "the right to know" we also should have a firm view of what we will and will not make available and to whom, and for what purpose, and that the foundation of those policies should be based firmly on the broader spectrum of public rights. In short, the CAA is very open when it can be and holds fast when it can't.

Let's begin with this "right to know". Somewhere someone coined the concept that the public has the right to know, the same way they enjoy other fundamental rights and freedoms. Generally the expression means they have the right to know what their elected representatives are machinating, they have the right to know what their bureaucracies are undertaking, and they have the right to know what information is being officially held about them. Some of these concepts spill over to the private sector. If a factory discharges cyanide into the Avon River then it's a pretty good bet the public has a right to know. The media are a form of representation for the public. While the media enjoy no more rights than the public, they can be far more forceful in demanding and exploiting those rights.

The media argument is that the public has "a right to know", and that it is in the public interest for information to be made available. Surely the public has the right to know whether the aircraft they are flying in, and the airline operating it, are indeed safe?

The countervailing argument, is that the public has other rights, such as the "right" to a safe aviation system. At times the release of information will not be in the public interest, partly because to do so would stymie the flow of vital safety information, and could destroy the relationships which are the foundation stones of aviation safety. You will argue that information must be regarded as solely used for the purpose of air safety investigation and for no other. And then someone else will pop up and talk about other

public “rights” including protection from those who would do them wrong, or who have been culpable of crime and should be held accountable. Another conflict.

And then there is a further, complicating, “right”. I am obliged to provide the CAA with some information. I have to provide the IRD with some information. And I have no right to refuse. I am expected, as an aviator and aircraft operator, to tell everything I know about an accident or incident. But nobody will ever know if I do. I can only be encouraged to do so. Carte blanche right to know access would impinge on my right to privacy and confidentiality. And if push came to shove, I would say that my right to privacy is more profound and sacred than your right to know my details.

Then there is a further complication in that of the individual’s right to information as opposed to the public’s right. The various legislation provides not for public rights to information but individual rights. Those individual rights are seen by law secondary in some cases to the public interest, as opposed to a public right.

So on one hand we have the public’s right to know. The question this raises is “the right to know what?” And what right is this anyway? And on the other, a need to withhold that right because it may be in the public’s best interest or an overbearing private interest. Those kind of questions keep judges and barristers in Jaguars. The social and political question is how can these “rights” be balanced, and by whom? And when?

The media would argue – and I have not only used the argument but often had it used against me – that it is the job of the media to decide what information the public should get. They are the public’s representatives. They can be very vociferous on this.

The problem, is that the media is not neutral. Put aside that there’s a year-round open season on government agencies and airlines. Discard any thought about the media being owned by people who want to manipulate public thought - such as who’s going to be the next government. I don’t mean that. What I mean is that the reporter wants a “good” story. One that will read interestingly and is something the public will want to know about. That demand will predominate over the public’s right to know despite it hiding behind that “right”. The public interest in practice is secondary.

In other words, the media is arguing that they are the only people who can determine what facts should be in the public arena. They are arguing that only they have the right to determine what is in the public interest to be released. They will say that only they have the right to determine what your rights are.

What are you going to do about that? How do we manage our responsibilities? How do we balance the right to know against the obligation to withhold in order to respect other rights?

The CAA’s responsibilities to the public are set in legislation. We exist to reduce the rate of aviation accidents on behalf of the public and our primary purpose is to undertake activities which promote safety at reasonable cost to the nation. We are held accountable by Parliament, by our own Authority, and yes, by the media. The CAA has a policy that as a state agency we should be open with the media wherever that coincides with the public interest in aviation safety and accountability. Our aims are to inform the public and enhance aviation safety while strictly minimising the risks arising from media practices.

The CAA undertakes a wide range of regulatory actions ranging from routine audits through enforcement and certificate withdrawal. The CAA is often asked, especially post accident, for an airline's regulatory history, especially the results of any audits. Many of these requests by the media are through the provisions of the Official Information Act. We have even had a request under the terms of that Act for the CAA to provide to the reporter the results of all audits on all operators every month.

The CAA does not release audit findings to the media. Official Information Act requests from the media for this information are rebutted. We say release of this information may damage the public interest in that it may inhibit the free flow of information that is vital for safety. This distinction has been recognised by the Ombudsman.

Further, a question was raised during the 1998 Ministerial Inquiry that company employees should have selective access to audit results. Having reviewed the matter, the CAA concluded that employees have reasonable access to the information and there is no special case to routinely provide such results on the grounds of safety. The CAA is bound to treat each request for information according to legislation. If we are to withhold information we must have grounds for it. The legislation does not require the CAA to release audit results per se except following a request and only then in accordance with legislation, which also provides good grounds for withholding such information.

However, the CAA has maintained a policy that a threshold exists beyond which the right of the public to know transcends the right of the operator to privacy, and the free flow of information can no longer be damaged. In practice, the threshold has been set at the point where the CAA has taken overt regulatory action to prevent further flights by an operator. This means, that if an operator is "grounded" for investigation, the public will be told as soon as possible that the action has been taken and why. The outcome of the investigation is made public either at the conclusion, or if prolonged, at suitable stages. Release of this information reinforces the reasoning that the public can be assured that any operator flying is deemed to be safe because they are pro-actively told about those whose safety is in doubt. It reassures the public that the CAA is active in working on their behalf.

Something closer to your heart, are accident investigations. Every news item about an accident will state that "air accident inspectors are investigating". The media frequently requests the outcomes of these investigations. It is a firmly held view within industry that all fatal accidents must be investigated and that the accident report will be disseminated so they can learn from the mistakes of others. In response, summaries of accident and occurrence investigations undertaken by the CAA are published on the website and in the CAA publications.

For the last three years 8 out of 10 fatal accidents in New Zealand have been investigated not by the Transport Accident Investigation Commission but by the CAA. CAA fatal accident reports are completed to ICAO standard and are of primary assistance to a coronial inquest. We send reports free to those media most affected, and to anyone else who asks. The reports are available on the website.

We do not comment on, and nor do we speculate on, ongoing investigations. The New Zealand media accept this. This is possibly national culture – in the United States the transcript and tapes of the pilots last words are on the six o'clock news. Not here.

Most of the information we receive is the reporting of occurrences, incidents and defects under Rule Part 12. It is this material that we are most eager for industry to report for all the reasons of analysis and accident prevention that you are so aware of. Industry will only provide that information if they know it stops with us. If they feel for a moment that it comes to us and slips straight on to the media, we can kiss goodbye any further disclosure. Information provided in this way by industry is not made publicly available. Summaries are produced, but not in identifiable form.

The reduced level of protection for CAA investigations compared with TAIC investigators means some CAA material may be obtained by third parties. In an example, we found after a crash that relevant work on an aircraft that was supposed to have been done, was in fact not done. The engineer involved came clean to the CAA investigators. The owner wants recompense and has gained access to the CAA's files. Our Director has said that each request for such information must be considered in light of Section 9 of the Official Information Act as to whether it is likely to prejudice supply of similar information, or be prejudicial to measures protecting the safety of the public. In short, although there are some legal limits, we want all safety information provided to us, or discovered by safety investigation, to be protected and used only for safety purposes.

The CAA maintains the Registry. Registry material is available to the public and much of the material is on the web. The web does not include the names and details of individuals. Our practice has been to make available upon request the confirmation of name, pilot licence type, and address. Requests for aggregated information – such as the names and addresses of all commercial pilot licence holders – is denied. This stance is based on the concept that provision of the information is a statutory requirement and the person providing the information understands some details will be available on the Registry, and that others may peruse the Registry to confirm information. However, it is most unlikely that persons providing the information had an awareness or have given any approval that it would be aggregated for perhaps commercial purpose such as a mailing list. In other words, ask the CAA if Martyn Gosling holds a pilot's licence and we'll tell you; but ask for all pilot licence holders and we won't.

It is common for the media to ask whether XYZ Airlines has an aircraft operating certificate. The names of current certificate holders is available from the Registry and is on the web. The public has "the right to know" that an operator holds the documents it purports to have. The obverse view is taken when an airline applies for a certificate. We will confirm to the media that we have no application from XYZ but will generally give no details once the application has been received. This is in the belief that details of the application are significantly commercially sensitive and are provided to the CAA in confidence. Release of this material to the public domain is for the client – not a Government agency. I believe the CAA could be held to account if a client claimed financial loss through premature release of confidential information. This is accepted by the New Zealand media, but it doesn't stop them from asking.

CAA enforcement actions resulting in a court decision are in the public domain. The CAA maintains the view that enforcement is a necessary regulatory tool but one of last resort. Summaries of prosecution results are published in our magazine but only as a means of deterrence and a source of information such as law interpretation.

So we'd say the CAA has a robust policy and methodology for routine release to the public of material it holds. They are in summary:

- Regulatory Action – no information released until the threshold is crossed. The threshold is when overt CAA action is taken to prevent further activity.
- Accidents and occurrences reports - summarised and produced on the website and in *Vector*. No further details are generally provided.
- Fatal accident reports – full release.
- Client details – only material in the Registry is released, and for individuals and operators only.
- Client details – no details of an application are released unless already in the public domain.
- Enforcement – summaries published.

In a nutshell, the CAA has to manage conflicting public rights. To meet the right to know it could toss out occurrence reports and other material gained from safety investigations into a huge pile in the street and tell all and sundry to take what they want. Or it can assure the public that their right to safety is maintained and show that when there is a significant failure they will be told. One of these will have a better long term impact on safety systems, and that is a valid interpretation of “the public interest”.

The proof of the pudding is two fold. Firstly we enjoy a good relationship with the media and we receive very few Official Information Act requests from the media. This is primarily because I actively encourage them to come to me first. I generally say “just ask me, if I can tell you I will and if I can't I won't and the Ombudsman agrees with me”. I make them aware of the balancing act we must maintain. The media understand this. They know we are an open organisation. They know we make information available to them when we can and we have a reputation for being helpful and proactive. That reputation stands us in very good stead when we have to say “no”.

And secondly, we have a good relationship with the industry on this. Incident reporting is increasing. That is a positive step in maintaining a safe aviation system – and that is definitely the public's right.

So in summary:

- There is a right to know, but this right must be balanced against other rights.
- The media do not hold the monopoly on determining public rights. You also have a stake and a say.
- Investigative and regulatory organisations must balance the public's right to know against the need to withhold in order to meet other public rights.
- There are means of achieving this balance, sometimes on a case by case basis.

Thank you.