



The Protection of the Sources of Safety Information

James Burin

Flight Safety Foundation, USA

Author Biography:

Jim Burin has 36 years of aviation experience and 28 years of experience in the aviation safety field. He is a graduate of Dartmouth College and has a Master of Science Degree in Systems Analysis from the Naval Postgraduate School. His work in aviation safety includes controlled flight into terrain, human factors, safety program organization, accident investigation, operations, administration, education, and organizational and leadership influences on safety. He is a retired Navy Captain, having commanded an attack squadron and a Carrier Air Wing during his 30-year career. Prior to joining the Flight Safety Foundation he was the Director of the School of Aviation Safety in Monterey, California. As the Director of Technical Programs his duties include organizing and overseeing safety committees and managing safety related conferences and research. He has frequently spoken at safety conferences, seminars, and workshops around the world.

The Protection of the Sources of Safety Information

James M. Burin
Director of Technical Programs
Flight Safety Foundation

Aviation safety has an enviable and well earned reputation for accident reduction and risk management. The way we reduce risk in aviation is a model for other organizations and disciplines. We use information from lessons learned and other sources, like FOQA, non-punitive reporting systems, LOSA, etc. to constantly improve our system. Without this information, aviation safety can not and will not improve. We use this information not to punish or place blame, but to prevent future accidents and reduce risk. However, there is a serious challenge to improving aviation safety today, and it does not deal with CFIT, runway incursions, or maintenance issues. This challenge was originally titled the “criminalization of safety”, but the new title you see above more accurately reflects the goal of the Flight Safety Foundation’s efforts. This effort involves complex factors that include types of legal systems, local cultures, traditions, and approaches to human error. What the Foundation is advocating is the need to develop an international framework that protects information obtained through all safety data acquisition sources.

Now some may ask, protection from what? Well, aviation professionals face punishment from several sources, like criminal proceedings, civil actions, or regulatory actions. **Figure 1** is a partial listing of some safety events that have turned out to be judicial events also. Any punishment administered is based on factors such as the type of legal system in use, the local culture, and tradition. There are two basic legal systems in the world, Napoleonic (or Roman) law and Common law. In Roman law, the judge decides what is truth and who is guilty. He is an active participant in the investigation. In common law, the judge just acts as a referee, and does not decide guilt or truth, and he is not involved in the investigation. Of course there are variations and combinations of these two systems around the world.

There are also different approaches to human error. In the theoretical (or idealistic) approach, human beings are assumed to be able to avoid all mistakes if they want, so an error is a lack of good will, and an accident is seen as the result of careless behavior and so it is a crime. In the practical (or realistic) approach to human error, human beings are seen as fallible, so to err is human and not necessarily careless behavior. In this approach an accident is not a crime unless it involves gross negligence or willful misconduct. In safety, we separate errors and violations – the law does not. If a culture is blame centered, this will obviously discourage the flow of information concerning errors. Also, in some countries the culture may favor penalties for simple human error, so concealing one’s own mistakes is in effect encouraged. Not a good way to improve any system.

Recent years have shown a trend toward the increased access to and utilization of accident and incident reports and other safety data as evidence in judicial proceedings. ICAO has several provisions that address this topic (**see fig. 2**). The cornerstone ICAO

document is Annex 13, and the cornerstone provision is in paragraph 5.12 (see fig. 3). At first glance, this appears to be exactly what any safety professional would want to have in terms of protection. However, a closer look reveals that it may not provide as much protection as we might think, or want. After reading 5.12 closely, you can see that no state would ever have to file a difference to it. If you do not make the specified information available, you comply. If you do make the information available, you also comply. Not much protection there. In addition, 5.12 only addresses accident and serious incident records, such as CVR's, transcripts, and opinions. It does not address sources of safety information like FOQA, LOSA, non-punitive reporting systems, etc. A few countries – notably Australia, New Zealand, and Canada – have implemented 5.12 in its true spirit and indeed protect accident/incident records well. However, in a recent Eurocontrol survey, it was discovered that over half of the countries surveyed did not even have the basic protections of annex 13, 5.12 implemented into their National laws.

Some people feel that formal protection for safety information is not needed, and that common sense and some of the current “gentlemen’s agreements” are sufficient to provide any protection required. However, it is not unusual to find that gentlemen are not always involved in these issues, and that common sense is not always so common in legal matters. However, the news isn’t all bad – there are some success stories. In New Zealand, a long and bitter court battle resulted in a law being passed on the use (or more precisely the non-use) of the CVR in legal proceedings. Canada is about to pass an amendment to their national aeronautics act that requires safety data reported on a voluntary basis be protected from disclosure and enforcement. In the United States, FAR part 193 provides protection from FOIA for voluntarily submitted safety information. In 2003 the European Union passed a directive on occurrence reporting that greatly enhanced the protections provided. Finally, there is the Denmark case. This has become the poster child for this effort, as it is a real world example of what can go wrong, and how formal protections can make it better. In 1996 Denmark developed a program requiring pilots, maintenance technicians, ATC controllers and other aviation personnel to report specific flight occurrences. The program provided no guarantees of confidentiality. In 1997, because of freedom of information laws, Denmark was required to give access to these reports to the press. This action was not well received. The number of reports decreased by half in 1998, and a third again in 1999. The message was obvious, and a prime example of why we are involved in this effort. There was no protection, so the flow of vital safety information virtually stopped. In December of 2000 a bill was proposed to the Danish Parliament to make reporting of all matters of a flight safety nature free of penalty and confidential. The bill passed in May 2001. In the first year after the passage of the new law, the number of reports doubled – and it continues to increase.

So the question is, what should be done to protect this vital safety information? At the request of Stuart Matthews, the President and CEO of Flight Safety Foundation, the Flight Safety Foundation’s Icarus committee addressed this issue and provided inputs back to Mr. Matthews. He reviewed these inputs and in January of 2003 sent a letter to Dr. Assad Kotaite, the President of the ICAO Council, concerning protecting the sources of safety information to ensure the free flow of safety information. He offered the

Foundation's assistance in drafting an assembly resolution to address the challenge. In February 2003 Dr. Kotaite responded positively to the letter and said an assembly resolution would provide the framework necessary and the timing was appropriate for the 2004 assembly. He said "I believe the combined efforts and expertise of ICAO and FSF offer the potential for a most successful outcome."

Since the exchange of letters in early 2003, the Foundation and ICAO have worked diligently to craft an assembly resolution that addresses this issue. The proposed resolution requires that ICAO develop legal guidance to assist States to enact national laws and regulations to protect information from safety data collection systems, while allowing for the proper administration of justice in the State. It also requires states to examine their existing legislation and adjust as necessary, or enact laws and regulations, to protect information from safety data collection systems based on the legal tools developed by ICAO. In addition, the resolution requires ICAO report to the next ordinary session of the assembly on this matter. The ICAO Council has endorsed the proposed resolution, and it will go before the general assembly for approval in September 2004.

The public interest requires a balance between the protection of safety information and the availability of evidence in judicial actions. In addressing this challenge, the Flight Safety Foundation hopes to insure protection of safety information sources, and thus maintain or increase the flow of safety information so vitally needed to constantly improve our already superb safety record. This will enable us to continue to strive toward the Foundation's goal of "Making flying safer by reducing the risk of an accident."

Figure 1:

Existing ICAO Provisions

Annex 13 – Investigation of Accidents, paragraph 5.12
Statements from persons, communications, medical and private information, cockpit voice recorders (CVR) and transcripts, and opinions expressed in analysis of information shall not be made available for purposes other than for accident/incident investigation, unless the appropriate authority for the administration of justice in the State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations

Figure 2:

Recent Judicial Examples	
Japan:	Pilot prosecuted and tried over turbulence accident
Korea:	Pilot threatened with prosecution following CFIT accident
New Zealand:	Pilots tried for manslaughter. CVR used as evidence by both defense and prosecution (Pilots acquitted)
Taiwan:	Pilots held following runway accident
Italy:	ATC and others jailed after runway incursion accident
Switzerland:	ATC under judicial investigation following a midair
France:	Judge retains vital piece of crash evidence for use in a possible criminal trial
USA:	Prosecutor demands access to ASAP data following CFIT accident
Greece:	Pilots put on trial following turbulence accident

Figure 3:

Existing ICAO Provisions

- * **ICAO Assembly Resolution 33 - 16**
 - **Global Aviation Safety Program (GASP)**
- * **ICAO Assembly Resolution 33-17**
 - **Non-Disclosure of Accident/Incident Records**
- * **ICAO Annex 13: 8.3**
 - **Voluntary reporting should be non-punitive and protected**
- * **ICAO Annex 13:5.12**
 - **Protects Accident/Incident Records**
- * **ICAO Annex 13: 5.4.1**
 - **Separation of Technical and Judicial Investigations**