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Ref.: AN 6/1-10/1

8 January 2010

**Subject:** Application by States of legal guidance in Attachment E to Annex 13 for the protection of safety data collection and processing systems (SDCPS)

**Action required:** Questionnaire to reach Montréal by 8 April 2010

Sir/Madam,

1. I have the honour to invite your attention to 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*, which can be accessed at: [http://www.icao.int/icaonet/dcs/9902/9902\\_en.pdf](http://www.icao.int/icaonet/dcs/9902/9902_en.pdf). Both resolutions instruct the Council to provide a progress report to the next Ordinary Session of the Assembly on the protection of safety information by States, in consideration of the legal guidance set out in Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation*, which is reproduced in Attachment A.

2. It should be recalled that the International Civil Aviation Organization carried out a consultation with States in 2008 (State letter AN 6/1-08/40, dated 9 May 2008, refers) regarding only the protection of certain accident and incident records as per paragraph 5.12 of Annex 13. Attachment B addresses the results of this consultation.

3. In order to prepare for the 37th Session of the Assembly, I would be grateful if you could inform me of the implementation status by your Government regarding the protection of safety information derived from SDCPS, which includes certain accident and incident records. It would be appreciated if you would send the views of your Government to reach me not later than 8 April 2010. To facilitate the preparation of your reply, I suggest that you complete the questionnaire in Attachment C, including any additional comments as deemed necessary.

Accept, Sir/Madam, the assurances of my highest consideration.

Raymond Benjamin  
Secretary General

**Enclosures:**

- A — Attachment E to Annex 13
- B — Protection of certain accident and incident records
- C — Questionnaire on the protection of safety information

**ANNEX 13**  
**ATTACHMENT E. LEGAL GUIDANCE FOR THE PROTECTION OF**  
**INFORMATION FROM SAFETY DATA COLLECTION AND**  
**PROCESSING SYSTEMS**

**1. INTRODUCTION**

1.1 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. This fact was recognized by the 35th Assembly of ICAO, which noted that existing national laws and regulations in many States may not adequately address the manner in which safety information is protected from inappropriate use.

1.2 The guidance contained in this Attachment is therefore aimed at assisting States enact national laws and regulations to protect information gathered from safety data collection and processing systems (SDCPS), while allowing for the proper administration of justice. The objective is to prevent the inappropriate use of information collected solely for the purpose of improving aviation safety.

1.3 Because of the different legal systems in States, the legal guidance must allow States the flexibility to draft their laws and regulations in accordance with their national policies and practices.

1.4 The guidance contained in this Attachment, therefore, takes the form of a series of principles that have been distilled from examples of national laws and regulations provided by States. The concepts described in these principles could be adapted or modified to meet the particular needs of the State enacting laws and regulations to protect safety information.

1.5 Throughout this Attachment:

- a) *safety information* refers to information contained in SDCPS established for the sole purpose of improving aviation safety, and qualified for protection under specified conditions in accordance with 3.1 below;
- b) *operational personnel* refers to personnel involved in aviation operations who are in a position to report safety information to SDCPS. Such personnel include, but are not limited to, flight crews, air traffic controllers, aeronautical station operators, maintenance technicians, cabin crews, flight dispatchers and apron personnel;
- c) *inappropriate use* refers to the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public;
- d) SDCPS refers to processing and reporting systems, databases, schemes for exchange of information, and recorded information and include:
  - 1) records pertaining to accident and incident investigations, as described in Chapter 5;

- 2) mandatory incident reporting systems, as described in Chapter 8;
- 3) voluntary incident reporting systems, as described in Chapter 8; and
- 4) self-disclosure reporting systems, including automatic data capture systems, as described in Annex 6, Part I, Chapter 3, as well as manual data capture systems.

*Note.— Information on safety data collection and processing systems can be found in the Safety Management Manual (SMM) (Doc 9859).*

## **2. GENERAL PRINCIPLES**

2.1 The sole purpose of protecting safety information from inappropriate use is to ensure its continued availability so that proper and timely preventive actions can be taken and aviation safety improved.

2.2 It is not the purpose of protecting safety information to interfere with the proper administration of justice in States.

2.3 National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice.

2.4 National laws and regulations protecting safety information should prevent its inappropriate use.

2.5 Providing protection to qualified safety information under specified conditions is part of a State's safety responsibilities.

## **3. PRINCIPLES OF PROTECTION**

3.1 Safety information should qualify for protection from inappropriate use according to specified conditions that should include, but not necessarily be limited to: the collection of information was for explicit safety purposes and the disclosure of the information would inhibit its continued availability.

3.2 The protection should be specific for each SDCPS, based upon the nature of the safety information it contains.

3.3 A formal procedure should be established to provide protection to qualified safety information, in accordance with specified conditions.

3.4 Safety information should not be used in a way different from the purposes for which it was collected.

3.5 The use of safety information in disciplinary, civil, administrative and criminal proceedings should be carried out only under suitable safeguards provided by national law.

#### **4. PRINCIPLES OF EXCEPTION**

Exceptions to the protection of safety information should only be granted by national laws and regulations when:

- a) there is evidence that the occurrence was caused by an act considered, in accordance with the law, to be conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct;
- b) an appropriate authority considers that circumstances reasonably indicate that the occurrence may have been caused by conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct; or
- c) a review by an appropriate authority determines that the release of the safety information is necessary for the proper administration of justice, and that its release outweighs the adverse domestic and international impact such release may have on the future availability of safety information.

#### **5. PUBLIC DISCLOSURE**

5.1 Subject to the principles of protection and exception outlined above, any person seeking disclosure of safety information should justify its release.

5.2 Formal criteria for disclosure of safety information should be established and should include, but not necessarily be limited to, the following:

- a) disclosure of the safety information is necessary to correct conditions that compromise safety and/or to change policies and regulations;
- b) disclosure of the safety information does not inhibit its future availability in order to improve safety;
- c) disclosure of relevant personal information included in the safety information complies with applicable privacy laws; and
- d) disclosure of the safety information is made in a de-identified, summarized or aggregate form.

#### **6. RESPONSIBILITY OF THE CUSTODIAN OF SAFETY INFORMATION**

Each SDCPS should have a designated custodian. It is the responsibility of the custodian of safety information to apply all possible protection regarding the disclosure of the information, unless:

- a) the custodian of the safety information has the consent of the originator of the information for disclosure; or
- b) the custodian of the safety information is satisfied that the release of the safety information is in accordance with the principles of exception.

## **7. PROTECTION OF RECORDED INFORMATION**

Considering that ambient workplace recordings required by legislation, such as cockpit voice recorders (CVRs), may be perceived as constituting an invasion of privacy for operational personnel that other professions are not exposed to:

- a) subject to the principles of protection and exception above, national laws and regulations should consider ambient workplace recordings required by legislation as privileged protected information, i.e. information deserving enhanced protection; and
  
- b) national laws and regulations should provide specific measures of protection to such recordings as to their confidentiality and access by the public. Such specific measures of protection of workplace recordings required by legislation may include the issuance of orders of non-public disclosure.

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## PROTECTION OF CERTAIN ACCIDENT AND INCIDENT RECORDS

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. This fact was recognized by the 35th ICAO Assembly, which noted that existing national laws and regulations in many States might not adequately address the manner in which safety information is protected from inappropriate use.

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, the 35<sup>th</sup> ICAO Assembly instructed the Council to develop appropriate legal guidance that would assist States to enact laws and regulations to protect all safety data collection and processing systems (SDCPS), while allowing for the proper administration of justice in the State. SDCPS refers, inter alia, to certain accident and incident records as set forth in paragraph 5.12 of Annex 13.

Accordingly, legal guidance for the protection of information from SDCPS was developed by ICAO and incorporated as Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation* on 23 November 2006.

During the 36th ICAO Assembly (Montréal, 18 to 28 September 2007), some concerns were raised regarding the need for future work on the implementation of the provisions in Attachment E to Annex 13. Subsequently, ICAO sent out State letter AN 6/1-08/40, dated 9 May 2008, seeking States' comments on the level of implementation of paragraph 5.12 of Annex 13, in consideration of the legal guidance set out in its Attachment E.

Forty-one States, representing over 77% of the fifty-three respondents, 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 twelve States indicated that Attachment E had not been of assistance in protecting certain accident and incident records.

States which benefited from Attachment E indicated that the guidance concerned was, in general, of significant assistance in matters regarding the protection of accident and incident records. In some States, Attachment E was used as the basis from which relevant legislation was drafted, including domestic civil aviation laws, while in others, the guidance was used to adjust civil aviation regulations.

As for the twelve States which did not benefit from Attachment E, the following summary of justifications is presented:

- a) in four States, relevant legislation/regulation to protect accident and incident records had either already been established before the issuance of Attachment E, or because laws and regulations were still being developed;
- b) in five States, laws and regulations in force did not allow, in general, for the implementation of the guidance in Attachment E;

- c) in two States, there was still no provision in their legislation to duly protect accident and incident records; and
- d) in one State, relevant laws and regulations in force already reflected the maximum protection that could be afforded to records specified in paragraph 5.12 of Annex 13.

With basis on the aforementioned, ICAO noted that the guidance in Attachment E to Annex 13 had been of assistance to numerous States in the development and/or implementation of legislation to protect certain accident and incident records, as set forth in paragraph 5.12 of Annex 13. On the other hand, in some States, Attachment E had not been of assistance mainly due to impediments in their national laws and regulations.

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ATTACHMENT C to State letter AN 6/1-10/1

**QUESTIONNAIRE ON THE PROTECTION OF SAFETY INFORMATION**

This questionnaire will assist the ICAO Secretariat in the preparation of a progress report to the next ICAO Assembly on the application of legal guidance, in Attachment E to Annex 13, for the protection of information from safety data collection and processing systems (SDCPS).

Reply: To reach ICAO by 8 April 2010

To: The Secretary General  
International Civil Aviation Organization  
999 University Street  
Montreal, Quebec  
Canada H3C 5H7

1. Attachment E to Annex 13 has assisted (**State**) \_\_\_\_\_ in the development and/or implementation of means to protect information from SDCPS as follows (please select “YES” or “NO” as appropriate):

- |  | YES                      | NO                       |
|--|--------------------------|--------------------------|
| a) Certain accident and incident records, as per paragraph 5.12 in Annex 13  | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Mandatory incident reporting systems, as described in Chapter 8 of Annex 13   | <input type="checkbox"/> | <input type="checkbox"/> |
| c) Voluntary incident reporting systems, as described in Chapter 8 of Annex 13   | <input type="checkbox"/> | <input type="checkbox"/> |
| d) Self-disclosure reporting systems (including confidential reporting systems), automatic data capture systems (e.g. FDA data), and manual data capture systems (e.g. LOSA data, hazard reporting data) | <input type="checkbox"/> | <input type="checkbox"/> |

2. As appropriate, please briefly describe how Attachment E to Annex 13 has assisted your Government in adjusting laws, regulations and policies to protect information from SDCPS which were selected as “YES” above.

3. As appropriate, please briefly describe why Attachment E to Annex 13 has not assisted your Government in adjusting laws, regulations and policies to protect information from SDCPS which were selected as “NO” above.

4. As appropriate, please list the documents in which your Government has prescribed the protection of information from SDCPS, including the date they entered into force (e.g. National Aviation Law, dated 5 April 1991; Safety Information Regulation, dated 17 October 2008).

5. Please make any suggestions deemed necessary as regards Attachment E to Annex 13.

(Please use extra sheets as required)

— END —