SAFETY CHILL

BY BARRY WISZNIOWSKI

Journalists are rightly concerned about "libel chill," the threat of litigation used to discourage investigative reporting that can damage powerful interests. Though underreported by journalists, there is another "chill" that is every bit as dangerous to the public interest.

I'm referring to "safety chill," the fear of legal liability, which is threatening to choke off the free flow of information through the aviation safety system that protects the traveling public.

There is no doubt that confidential reporting and collaborative investigations have led to dramatic improvements in aviation safety, with no fatal accidents reported in North American commercial aviation since the Colgan Air Bombardier Q400 crash near Buffalo, New York, U.S., in February 2009.

However, courts and administrative tribunals are increasingly threatening this system, putting the interests of litigants in our adversarial legal system ahead of any privilege or confidentiality attached to communications within the air safety reporting regime.

Airlines and pilots regularly and voluntarily provide details on hundreds of potentially hazardous incidents, based on the understanding that investigators and regulators will keep this information confidential and it will never be used against the reporters.

Without such safeguards, trust among pilots and other participants could disappear, destroying the flow of information that powers the aviation

safety system. Making confidential information public could "chill" voluntary reporting.

This concern has recently led to conflict between the U.S. Federal Aviation Administration (FAA) and the U.S. National Transportation Safety Board, which sought access to FAA safety data. This information on safety incidents has been reported by airlines voluntarily with the understanding that it would be kept confidential. The FAA is rightly concerned that such voluntary reports would quickly dry up if airlines lose confidence in the integrity of the safety system, depriving everyone of valuable information.

Confidentiality is an integral part of Air Canada's Safety Reporting Policy, which governs the relationship between the airline and its pilots. However, this policy states that confidentiality cannot be maintained if it conflicts with law or an order from a court or administrative tribunal.

Numerous courts over the past several years have concluded that protections in safety reporting programs or investigation protocols cannot be sustained if "the likely result is injustice, whether to plaintiff or defendant," according to one such court decision.

In 2006, Canada's Federal Court of Appeal ruled that on-board recordings and transcripts of communications between pilots and air traffic controllers can be disclosed if "the public interest in the proper administration of justice outweighs the importance of the privilege attached to the on-board recording."

The judgment went on to state that a court could "require any person to give evidence that relates to the on-board recording." This was borne out by a British Columbia court in 2008, which compelled a Transportation Safety Board investigator to testify in civil litigation arising from a helicopter accident.

More recently, an Ontario court in 2009 ordered disclosure of a cockpit voice recording and transcription in civil litigation between Air France and the Greater Toronto Airports Authority, finding that a full hearing between litigants trumped any privilege attached to the recording.

The bottom line in Canada is that safety information can be used in any legal proceeding, if a court decides that the public interest in "the proper administration of justice" outweighs the protections of confidentiality extended to obtain sensitive aviation information.

This power to compel the release of confidential safety information also extends to players in Canada's workplace health and safety system, who have begun to access aviation safety reports (ASRs) submitted by pilots. These ASRs are used by pilots to flag issues and incidents incurred while on duty, so that individual safety issues can be addressed and any worrisome trends identified. Pilots have always been generous in contributing ASRs, assuming that any information contained in them would remain confidential.

However, recent decisions and actions have demonstrated that joint health and safety workplace committees, health and safety officers, appeals officers and the Canada Industrial Relations Board can see and use ASRs without pilots' consent, by virtue of the powers granted to them under the Canada Labour Code.

These health and safety officials are entitled to ask for "any information that the committee or representative considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities" under the Code.

They are also entitled to "full access to all of the government and employer reports, studies and tests relating to the health and safety of employees in the workplace." The Federal Court ruled in 2010 that an ASR was an "employer report" and ordered it supplied to a workplace health and safety committee.

This is a worrisome trend. If pilots and other participants in the aviation safety system lose confidence in such protections, the information that is the lifeblood of that system will simply disappear.

In Canada, we need legislation to provide confidentiality protections within the aviation safety system. At a minimum, the law should be changed so that confidential safety information is disclosed as a last resort, if it is the only way to achieve justice. The burden of proof should be placed on the party seeking to disclose the protected information, with such release taking place under strict limitations. Our federal government, which recently set aside consideration of amendments to the Aeronautics Act, should put this matter back on its legislative agenda.

In the interest of public safety, we must take action to ensure that "safety chill" doesn't become a total freeze.

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