

Protect the Data

The discussion of protecting aviation safety data from use in courts of law prompted this exchange between Rutger G. Vossen, board member, technical affairs for the Dutch Airline Pilot Association, and William R. Voss, president and chief executive officer, Flight Safety Foundation:

Dear Mr. Voss,

In your Executive's Message (ASW, 3/11) you stated that Flight Safety Foundation issued advice to the U.S. Congress which, in your opinion, strikes the right balance between the needs of safety and justice:

We suggested that the disclosure of all safety information — including flight data, voluntary reports, data from cockpit voice recorders and flight data recorders, and so forth — should only be allowed if the prosecution can convincingly show that a fair trial cannot be achieved without it.

The Dutch Air Line Pilots Association (VNV-ALPA) is quite active within the International Federation of Air Line Pilots' Associations and the European Cockpit Association and is a member of Flight Safety Foundation. The VNV has fiercely defended the philosophy that use of flight data recorder (FDR) and cockpit voice recorder (CVR) information should not be allowed in criminal proceedings; we have supported the sector in achieving this in the Netherlands. The Dutch prosecutor has access to the data only if the event is convincingly related to terrorism, murder, manslaughter or hijacking.

The VNV was surprised by your advice. Use of these data in legal proceedings is detrimental to aviation safety and undermines the accident investigation process, whose sole goal is to learn from the tragedy.

In the Joint Resolution Regarding Criminalization of Aviation Accidents, signed Oct. 17, 2006, the signatory organizations, including the Foundation, recognize that the sole purpose of protecting

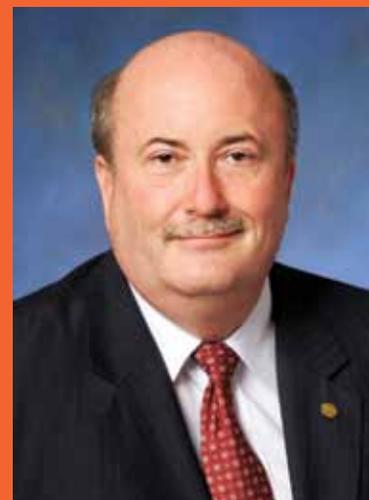
safety information from inappropriate use is to ensure its continued availability to take proper and timely preventative actions to improve aviation safety. No reference is made to the possible use of data in criminal proceedings.

It seems that the Foundation supports the possibility that the prosecutor, if he can convincingly show that a fair trial cannot be achieved without it, will be allowed by a judge to use this information. In our opinion, every prosecutor can use this argument because the use of all data will enhance his research result and is therefore essential. According to advice 2009-022 issued by the Dutch Group of Aviation Specialists, it may be concluded that only aviation specialists are able to weigh the consequences in CVR and FDR data regarding gross negligence and professional behavior; prosecutors are not so capable and therefore might make erroneous conclusions. In the Dutch system, the Civil Aviation Administration, which has the responsibility to review and categorize all safety-related events, consults experts about forwarding a report to the Ministry of Justice.

Your statement that these protections in U.S. law would be quite an accomplishment, as well as providing a model for others, is questionable, taking into consideration that several countries have more stringent rules regarding the use of recorders in legal proceedings. Our global goal should be higher than the basis of the advice mentioned in your article.

The VNV is interested in the arguments and circumstances as to what made the Foundation develop this advice. We therefore kindly ask you for more information regarding the background of the recommendation to Congress.

Looking Beyond Accidents



Dear Mr. Vossen,

First, I have to agree in principle on the protections of CVR data. The Foundation has been vocal on occasions when these data were released for shock value during questionable legal proceedings. I would always agree that the strongest protection for CVR audio is justified. The written transcript of a CVR, however, is difficult to keep out of court.

In my column, I cited the protections for CVR data in U.S. law as an example that might be applied to the protection of *other safety information*, such as voluntary reports, flight data management, etc. I didn't mean to imply one shouldn't argue for stronger protections of CVR data. In the United States, what exists is the best we could get. U.S. law requires that there must be no other means to achieve justice and that the disclosure may only be in the judge's chambers. This rule has existed for decades and has worked well. I understand there has been an exception in the Colgan Air accident that speaks more to the effectiveness of that family group than to the weakness of the provision.

But the real threat to our safety systems is more insidious. Increasingly, courts are requiring airlines to surrender confidential reports in cases in which there was no accident and possibly not even an incident. It could be something as simple as a routine worker's compensation claim for time off. This is something that must be dealt with aggressively. If our safety databases become a hunting ground where prosecutors and litigators routinely search for cases, safety management as we know it will end.

Dealing with this type of disclosure is different than dealing with the aftermath of a tragedy. In this regard, we have sought legal tests to be applied to limit the broad access now allowed. Our first

instinct was to suggest that all safety information should forever be prohibited for use in courts. However, such a position would effectively place those in the aviation industry above the interests of justice. In any country, the judicial system will object to a process that gives complete protections to any part of the industry. That approach isn't practical.

Regardless of practicalities, if it were possible to achieve *complete* protection for all safety information, should we accept it? Many of us in the Foundation say, "Probably not." In my experience, while the aviation industry is comprised of some amazing and dedicated professionals, I have met some who are less admirable and would do anything for money.

Where does that leave us? Anyone who lives in a lawful society could be forced to justify his or her actions in a court of law, and the presiding judge would ultimately decide what evidence could be used to prove guilt or innocence. The judge would consider the nation's rules of evidence, rules that someday must take into account the vital nature of protected safety information.

That is why we support provisions to force a judge to explicitly consider whether the disclosure of confidential safety data is the only way to achieve justice, and, if it is, to use the data in a way that limits disclosure. This is not absolute protection, but, ultimately, justice must be achieved. Remember, this request for disclosure may be made to support the defense as easily as the prosecution. Absolute protection of safety data could ultimately cause a miscarriage of justice that would send an innocent aviation professional to prison.

In the end, we must be seen as responsible and pragmatic advocates of both public safety and justice.