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Accessibility of investigation records from the aircraft accident at Bijlmermeer: a comparative legal analysis

Choi, J.; Truxal, S.J.

Citation
Choi, J., & Truxal, S. J. (2024). *Accessibility of investigation records from the aircraft accident at Bijlmermeer: a comparative legal analysis*. The Hague: Adviescollege Openbaarheid en Informatiehuishouding. Retrieved from https://hdl.handle.net/1887/4106817

Version:	Publisher's Version
License:	Leiden University Non-exclusive license
Downloaded from:	https://hdl.handle.net/1887/4106817

Note: To cite this publication please use the final published version (if applicable).

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The Netherlands

INTERNATIONAL INSTITUTE OF AIR AND SPACE LAW

ACCESSIBILITY OF INVESTIGATION RECORDS

FROM THE AIRCRAFT ACCIDENT AT *BIJLMERMEER*

-A COMPARATIVE LEGAL ANALYSIS

J. CHOI (IIASL), PROF.DR. S. TRUXAL (IIASL)

FINAL REPORT, DATED 1 MARCH 2024

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Disclaimer

This academic research report, commissioned by The Adviescollege Openbaarheid en Informatiehuishouding (ACOI), has been prepared following independent desk research and informal discussions and interviews with experts in the field as well as representatives of the ICAO Legal and External Affairs Bureau, the Air Navigation Bureau and the Air Transport Bureau and representatives of selected ICAO Member States. The report also draws in part on research conducted in connection with the near-finished Ph.D. project 'Criminal Liability of Pilot of Accident Cases (provisional title)' of this report's principal author, Jinyoung (Jin) Choi.

Samenvatting van het onderzoek

De Tweede Kamer der Staten-Generaal heeft het Adviescollege Openbaarheid en Informatiehuishouding (hierna: het ACOI) gevraagd advies uit te brengen over de openbaarheidsregimes bij en de toegang tot de stukken over de vliegramp in de Bijlmer die zich in het Nationaal Archief bevinden. Het Instituut voor Lucht- en Ruimterecht van de Universiteit Leiden heeft in het kader hiervan in opdracht van het ACOI internationaal vergelijkend onderzoek verricht naar de wijze waarop men in het buitenland omgaat met openbaarheid van en toegang tot onderzoeken naar vliegrampen.

Hoofdstuk 1

De onderzoeksgebieden betreffen hier meer specifiek de uitleg van Bijlage 13 bij het Verdrag inzake de internationale burgerluchtvaart van 1944 (hierna: Verdrag van Chicago), de toepassing van het concept van *Just Culture* (hierna: *Just Culture*) en het uitvoeren van de balancing test.

Er is gezocht naar antwoorden op vragen over criteria voor de vertrouwelijkheid van gegevens, de juridische interpretatie van Just Culture in het kader van het luchtrecht en de toepassing van de bij het Verdrag van Chicago horende balancing test door diverse ICAO-lidstaten. De onderzoeksvragen luiden:

- Welke criteria worden gebruikt om te bepalen welke documenten vertrouwelijk moeten zijn volgens Standaard 5.12 in Bijlage 13 van het Verdrag van Chicago (hierna: ICAO Bijlage 13) en Verordening (EU) nr. 996/2010 en hoe worden deze criteria toegepast in onderzoeken naar luchtvaartongevallen en -incidenten?
- Wat is de verhouding tussen Standaarden 5.12 en 6.2 van ICAO Bijlage 13?
- Wat is de (juridische) betekenis en toepassing van *Just Culture* in relatie tot het belang van openbaarheid in het kader van de internationale burgerluchtvaart?
- Wat zijn de criteria voor het uitvoeren van een balancing test?
- Hoe moet het concept van *Just Culture* worden geïnterpreteerd en toegepast volgens ICAO Bijlage 13 en Verordening (EU) nr. 996/2010?
- Wat is de invloed van *Just Culture* op de Nederlandse wet- en regelgeving?
- Voeren lidstaten van ICAO een balancing test uit?
- En zo ja, hoe passen de verschillende ICAO-lidstaten de balancing test toe om te bepalen dat bepaalde type documenten die vertrouwelijk moeten blijven mogelijk toch openbaar worden?

Voor de beantwoording van deze onderzoeksvragen zijn diverse relevante juridische bronnen geraadpleegd. Allereerst het eerder genoemde Verdrag van Chicago uit 1944, waarbij per 5 februari 2024 in totaal 193 staten (ICAO-lidstaten) zijn aangesloten. Deze lidstaten zijn verplicht om het Verdrag na te komen. Verder zijn er de zogenoemde Standaarden en Richtlijnen (hierna: SARPs). Dit zijn wereldwijde verplichtingen op het gebied van veiligheid onder het Verdrag van Chicago. ICAO neemt SARPs aan en wijzigt deze via Bijlagen bij het Verdrag. ICAO Bijlage 13 gaat over hoe te handelen bij luchtvaartongevallen en is in het bijzonder relevant voor dit rechtsvergelijkend onderzoek. Hoe de SARPs in de verschillende nationale wet- en regelgeving zijn geïmplementeerd verschilt tussen ICAO-lidstaten: de SARPs worden niet altijd geïmplementeerd, eventuele afwijkingen ervan worden vaak niet gemeld en ook de naleving ervan is in principe aan de lidstaten gelaten. In Nederland wordt de

juridische impact van SARPs, in het bijzonder Standaarden, van geval tot geval beoordeeld door de rechter. Dat geldt dus ook voor Standaarden 5.12 en 6.2. En vanuit het EU-rechterlijk kader zijn met name enkele rechtstreeks werkende Verordeningen zoals 996/2010 relevant voor Hoofdstuk 3 van dit onderzoek, dat gaat over de balancing test.

Hoofdstuk 2

Hoofdstuk 2 bespreekt de inhoud en strekking van ICAO Bijlage 13. Artikel 26 van het Verdrag van Chicago richt zich op het onderzoek naar ongevallen en incidenten, en verplicht Staten om een onderzoek uit te voeren volgens de door ICAO aanbevolen procedures zoals uiteengezet in ICAO Bijlage 13. Deze Bijlage bevat onderzoeksprotocollen en -principes en legt de nadruk op het voorkomen van ongevallen en incidenten door via feitenonderzoek de oorzaak te achterhalen zonder een schuldige aan te wijzen, dus in lijn met de Just Culture zonder dit begrip expliciet te noemen.

Standaard 5.12 van ICAO Bijlage 13 ziet op de mate van vertrouwelijkheid van bepaalde gegevens verzameld door de onderzoeksautoriteiten. Bepaalde gegevens worden beschermd tegen openbaarmaking om misbruik van luchtvaartveiligheid gerelateerde informatie te voorkomen, waaronder cockpitvoicerecorderopnames en medische informatie. Uitzonderingen hierop zijn situaties waarin openbaarmaking noodzakelijk wordt geacht door de bevoegde juridische autoriteiten of wanneer de gegevens relevant zijn voor de luchtvaartveiligheid.

Beslissingen over openbaarmaking kunnen ook afhangen van het oordeel van bevoegde autoriteiten en kunnen een belangenafweging tussen openbaarheid en luchtvaartveiligheid inhouden. Standaard 5.12 stelt dat openbaarmaking afhankelijk is van het nationale recht en het afwegingskader in Appendix 2 van ICAO Bijlage 13.

In hoofdstuk 2 is de balancing test verder toegelicht aan de hand van Appendix 2 van ICAO Bijlage 13 en het door ICAO opgestelde '*Manual on Protection of Safety Information Part 1 – Protection of Accident and Incident Investigation Records (Doc 10053)*' (*hierna*: Handboek voor de Bescherming van Veiligheidsinformatie). De balancing test is een afwegingskader om de impact te bepalen van het openbaar maken of gebruik van gegevens van onderzoeken naar ongevallen en incidenten op huidige of toekomstige onderzoeken. Dit rapport stelt op basis van het Handboek voor de Bescherming van Veiligheidsinformatie een tienstappen plan voor om de afwegingstest uit te voeren.

- *Stap 1 – Aanwijzen van (een) bevoegde autoriteit(en):*
  Staten moeten een (of meerdere) autoriteit(en) aanwijzen om de balancing test uit te voeren. Zo is het mogelijk om een rechterlijke autoriteit aan te wijzen wanneer openbaarmaking noodzakelijk is in een juridische procedure, een overheidsorgaan wanneer verzoeken om inzage op grond van openbaarheidswetgeving betreft of een onderzoeksautoriteit wanneer de documenten gebruikt zullen worden ten behoeve de luchtvaartveiligheid. Permanente autoriteiten worden aanbevolen vanuit het oogpunt van efficiëntie en consistentie.

- *Stap 2 – Bepalen welk publiek belang moet worden afgewogen:*
  Het belang van vertrouwelijkheid van de gegevens moet worden afgewogen tegen het belang van een juridische procedure, het recht op overheidsinformatie, en regulering van luchtvaartveiligheid.

- *Stap 3 – Vaststellen van de status van het document:*
  Cockpitvoicerecorderopnames, airborne image recordings en transcripten hiervan mogen niet openbaar en kunnen dus ook niet onderworpen worden aan een balancing test. Alle andere documenten kunnen wel deel uit maken van een balancing test.

- *Stap 4 – Verwijs naar de oorspronkelijke bron:*
Verzoeken om openbaarmaking van documenten moeten zoveel mogelijk worden doorverwezen naar de organisatie die in bezit is van het oorspronkelijke document.

- *Stap 5 — Kan openbaarmaking het beoogde gevolg hebben:*
Draagt de openbaarmaking van de documenten daadwerkelijk bij aan het onderliggende belang van een verzoek.

- *Stap 6 - Toepassen van de balancing test:*
De bevoegde autoriteiten (zie stap 1) wegen de verschillende factoren, zoals het doel waarvoor de gegevens zijn verzameld, het beoogd gebruik, eventuele potentiële negatieve effecten op individuen, bedrijven, en luchtvaartveiligheid.

- *Stap 7 – Inventariseer de standpunten die openbaarmaking ondersteunen:*
Standpunten die openbaarmaking ondersteunen, kunnen bijvoorbeeld een transparante en controleerbare overheid zijn of publieke veiligheidszorgen omvatten.

- *Stap 8 – Inventariseer standpunten die pleiten voor vertrouwelijkheid:*
Standpunten die pleiten voor het beschermen van de onderzoeksgegevens zijn bijvoorbeeld de risico's voor de luchtvaartveiligheid, eventuele negatieve gevolgen voor individuen en bedrijven en de mogelijke negatieve gevolgen voor toekomstige onderzoeken.

- *Stap 9 - Wegen van alle geïnventariseerde belangen:*
Alle belangen worden gewogen op basis van hun belang en potentiële impact.

- *Stap 10 – Vastleggen van de beslissingen:*
Beslissingen genomen tijdens de balancing test worden vastgelegd voor eenduidige en consistente besluitvorming.

Standaard 6.2 van ICAO Bijlage 13 beperkt de bevoegdheid van Staten om ontvangen conceptverslagen of ontvangen documenten verkregen tijdens een onderzoek vrij te geven zonder uitdrukkelijke toestemming van de Staat dat het onderzoek heeft uitgevoerd, tenzij deze de documenten al openbaar heeft gemaakt.

Nederland is als lidstaat van ICAO verplicht om luchtvaartongevallen te onderzoeken conform artikel 26 van het Verdrag van Chicago en de procedures in ICAO Bijlage 13. Het doel van technische onderzoeken is voornamelijk het achterhalen van de oorzaak van de ramp in plaats van het aanwijzen van een schuldige.

Paragraaf 2.4 van het rapport gaat in op de openbaarmaking van onderzoeksgegevens, inclusief cockpitvoicerecorderopnames in relatie tot nationale wetgeving en internationale afspraken, waarbij een balans tussen het publieke belang en de bescherming van veiligheidsgevoelige informatie moet worden gevonden.

Hoofdstuk 3

Hoofdstuk 3 analyseert de verschillende Europese juridische kaders, waaronder Verordening (EU) nr. 996/2010, en belicht meerdere aspecten over de onderzoeksgegevens van de vliegramp in de Bijlmermeer. Deze Verordening is van toepassing op onderzoeken naar ongevallen en ernstige incidenten binnen de grenzen van EU-lidstaten of die betrekking hebben op in de EU geregistreerde luchtvaartuigen.

Verordening (EU) nr. 996/2010 benadrukt het belang van Just Culture binnen de luchtvaartindustrie. Just Culture stimuleert openheid binnen de industrie en het melden van gebeurtenissen zonder angst voor nadelige gevolgen. Grondwettelijke beginselen en nationale wet- en regelgeving kunnen de mate waarin vertrouwelijke verstrekte informatie kan worden gebruikt, beperken.

De Verordening noemt verschillende categorieën van vertrouwelijke informatie die beschermd moeten worden. De informatie mag alleen gebruikt worden voor de omschreven doelen van het veiligheidsonderzoek. Deze informatie omvat bijvoorbeeld verklaringen van getuigen, cockpitvoicerecorderopnames en concepten van onderzoeksrapporten. De Verordening beschermt op eenzelfde wijze documenten als het Verdrag van Chicago, maar bepaalde categorieën van documenten worden meer beschermd.

Hoewel Verordening (EU) nr. 996/2010 niet expliciet verwijst naar een balancing test zoals in ICAO Bijlage 13, kunnen gerechtelijke autoriteiten of aangewezen bevoegde instanties wel degelijk een afweging maken of het vrijgeven van bepaalde onderzoeksgegevens opweegt tegen eventuele negatieve effecten op onderzoeken. Dit suggereert dat een balancing test impliciet is opgenomen in de Verordening, zij het dat lidstaten hierin een eigen keuze kunnen maken.

Een recent uitspraak van het Hof van Justitie van de Europese Unie benadrukt de vertrouwelijkheid van informatie gerelateerd aan veiligheidsincidenten in de luchtvaart, zelfs wanneer deze door de media wordt opgevraagd. Deze uitspraak onderstreept het belang van vertrouwelijkheid ten aanzien van specifieke onderzoeksgegevens om de veiligheidsdoelstellingen van de luchtvaart te ondersteunen. De toegang tot deze onderzoeksgegevens door het publiek of de media kan vanwege dit belang worden beperkt.

Hoofdstuk 4

In Hoofdstuk 4 wordt een vergelijkende analyse uitgevoerd naar vijf landen.

- Australië

  De *Transport Safety Investigation Act 2003* (TSI Act) regelt in hoeverre documenten van onderzoeken naar vliegongevallen openbaar zijn. De TSI Act bevat criteria voor het maken van een belangenafweging om ongevalsgegevens openbaar te maken. Er zijn daarnaast specifieke bepalingen in de TSI Act die zien op de wijze van publicatie en de voorwaarden waaronder informatie openbaar kan worden om zo vertrouwelijke informatie zoveel mogelijk te beschermen. Deze criteria worden met een balancing test toegepast door rechtbanken of lijkschouwers.

- Nieuw-Zeeland

  Het openbaarmakingsregime is in Nieuw-Zeeland geregeld in de *Transport Accident Investigation Commission Act 1990 (TAIC Act)*. De *Transport Accident Investigation Commission (TAIC)* is verantwoordelijk voor het onderzoek en neemt de beslissing om ongevalsgegevens al dan niet openbaar te maken. Het uitvoeren van een balancing test is voorbehouden aan het Hooggerechtshof van Nieuw-Zeeland (Engels: *High Court*).

- Republiek Ireland

  EU-regelgeving zoals de Verordeningen (EU) nr. 996/2020 en 376/2014 bepalen in Ierland de mate waarin documenten over luchtvaartongevallen openbaar kunnen zijn. Alleen het Hooggerechtshof (Engels: *High Court)* is in Ierland bevoegd de balancing test uit te voeren en te beslissen welke documenten die onderdeel zijn van een onderzoek naar een luchtvaartongeval openbaar kunnen

zijn. De *Air Navigation Regulation* biedt specifieke bescherming voor ongevalsgegevens, inclusief verklaringen van getuigen, communicatie en opnames, zoals de cockpitvoicerecordings.

- Verenigd Koninkrijk:

De *UK Accident Investigation Regulation* en andere juridische kaders regelen de mate waarin ongevalsgegevens openbaar kunnen zijn. Het Hooggerechtshof (Engels: *High Court*) is de enige bevoegde autoriteit voor het uitvoeren van de balancing test.

- Verenigde Staten

De mate waarin ongevalsgegevens in de Verenigde Staten openbaar kunnen zijn, wordt gereguleerd door verschillende wetten, zoals 49 *US Code* (hierna: USC). §1154 en regelgevingen zoals Title 49 van de *Code of Federal Regulations* (hierna:CFR) §835.1. Alleen rechtbanken hebben de bevoegdheid om te bepalen of documenten wel of niet openbaar kunnen (of mogen) zijn na een belangenafweging, waarbij het belang van openbaarheid zwaar weegt. De *Freedom of Information Act (FOIA)* geeft hiervoor voldoende ruimte voor een belangenafweging waarbij evenwel rekening wordt gehouden met privacybelangen, de gevolgen voor rechtshandhaving en eventuele belangen die spelen in rechtszaken.

Over het algemeen hebben alle landen wet- en regelgeving aangenomen om vertrouwelijke informatie te beschermen en onafhankelijke onderzoeken te borgen. Maar specifieke juridische bepalingen, welke autoriteiten bevoegd zijn en een FOIA maken het verschil tussen Australië, Nieuw-Zeeland, de Republiek Ierland, het Verenigd Koninkrijk en de Verenigde Staten.

Hoofdstuk 5

Hoofdstuk 5 van het onderzoek bevat een samenvatting van de voornaamste bevindingen uit de voorgaande hoofdstukken met betrekking tot *Just Culture*, ICAO Bijlage 13, en het toepassen van de balancing test in verschillende landen.

Just Culture is cruciaal voor het bevorderen van een cultuur van veiligheid en transparantie binnen de luchtvaartindustrie. *Just Culture* streeft naar een evenwicht tussen verantwoordelijkheid en het willen leren van incidenten. Het moedigt professionals aan veiligheidsproblemen te melden zonder angst voor onrechtvaardige straffen. Zowel ICAO Bijlage 13 als Verordening (EU) nr. 996/2010 ondersteunen *Just Culture* door het rapporteren en het leren van fouten te stimuleren, terwijl veiligheid voorop blijft staan. De Nederlandse wetgeving dient in lijn te zijn met de principes van *Just Culture*,

Standaard 5.12 van ICAO Bijlage 13 benadrukt de vertrouwelijkheid van documenten in ongevalsonderzoeken, waarbij evenwel een evenwicht moet worden gezocht tussen openbaarheid en de bescherming van vertrouwelijke informatie. Hoewel zowel Bijlage 13 als Verordening (EU) nr. 996/2010 de vertrouwelijkheid van verschillende categorieën van informatie benadrukken, biedt de laatste meer bescherming en vallen meer documenten onder de reikwijdte van de Verordening. Standaard 6.2 verplicht Staten tot het niet verspreiden of publiceren van concept eindrapporten of onderzoeksdocumenten die zij hebben ontvangen van de onderzoekende Staat zonder toestemming van diezelfde onderzoekende Staat. Standaard 6.2 beïnvloedt daarom de openbaarmaking van specifieke ongevalsgegevens onder Standaard 5.12 niet.

Lidstaten voeren een balancing test uit om te bepalen of ongevals- en incidentonderzoeksgegevens openbaar gemaakt kunnen worden. Hierbij moet rekening gehouden worden met verschillende factoren zoals veiligheid, wettelijke voorschriften, privacy en het algemeen belang. Hoewel niet verplicht onder ICAO Bijlage 13, wordt het uitvoeren van de balancing test

beschouwd als een best practice. Verschillende landen, waaronder Australië, Nieuw-Zeeland, de Republiek Ierland, het Verenigd Koninkrijk en de Verenigde Staten, voeren een balancing test uit om te bepalen of ongevalsgegevens openbaar gemaakt kunnen worden.

Deze analyse belicht het belang van Just Culture en de rol van ICAO Bijlage 13 bij het waarborgen van de vertrouwelijkheid van ongevalsgegevens, en het gebruik van een balancing test door de lidstaten om een evenwicht te vinden tussen openbaarheid aan de ene kant en bescherming van gevoelige informatie in het belang van de luchtvaartveiligheid aan de andere kant.

1 Introduction to the study

1.1 Background of the research

1.1.1 General background

The Dutch House of Representatives requested The Advisory Board on Public Access and Information Management (*Adviescollege Openbaarheid en Informatiehuishouding,* hereinafter 'the ACOI'), to provide advice on the regimes of public disclosure and access to investigation records related to the accident occurred at *Bijlmer* district in Amsterdam, the Netherlands (hereinafter the accident at *Bijlmermeer*). By the law of the Netherlands, records of the aircraft accident and incident investigation remain in the custody of the accident investigation authorities of the Netherlands only for the first 20 years since the closure of the investigation.[1] In the specific case of the records of the accident at *Bijlmermeer*, they are currently archived in the National Archives of the Netherlands and will not be fully disclosed until at least 2068.[2]

According to the ACOI, the extent of openness and accessibility of these documents is primarily derived from multilateral and regional treaties. These include the Convention on International Civil Aviation (ICAO),[3] hereinafter 'the Chicago Convention' (1944), and, at European Union (EU) Law, Regulation (EU) No 996/2010, which is amended by Regulation (EU) No 373/2014.[4] While, in particular, Annex 13 (hereinafter 'ICAO Annex 13') under the Chicago Convention (1944) deals with the international civil aviation of the Contracting States, Regulation (EU) No 996/2010 covers the investigating and preventing accidents and incidents in civil aviation within the European Union (EU) Member States.

Therefore, the international comparative study on the application of ICAO Annex 13 is an especially pertinent subject of scope to address the question of the possibilities for potentially increasing the transparency of and access to accident investigation records. The ACOI interprets the degree to which certain documents are not made public under ICAO Annex 13, which is also influenced by the principles emanating from that same Annex, also known as 'the Just Culture principle' (hereinafter 'Just Culture').[5] This principle is also embedded in Regulation (EU) No 996/2010, amended by Regulation (EU) No 373/2014.

Concerning the above, there are two issues at hand.

On the one hand, ICAO Annex 13 is oriented towards enhancing aviation safety by encouraging open and honest reporting of incidents and errors without fear of reprisals, sanctions, or retaliation against

[1] *See,* Artikel 12(1), Archiefwet 1995, Nederland.

[2] *See*, NOS Nieuws, 'Kamer wil inzage stukken Bijlmerramp, 'zelfs handleiding is geheim, dat slaat nergens op'' (2023) <https://nos.nl/artikel/2471278-kamer-wil-inzage-stukken-bijlmerramp-zelfs-handleiding-is-geheim-dat-slaat-nergens-op> accessed 31 January 2023. The date only refers to the year in which a dossier will be fully disclosed; the exact date depends on the year that a dossier is closed and has a range of 2068-2074 (which means that the dossiers have been closed in the years 1993-1999). Archival law states that all documents have to be publicly available in due time. Non-disclosure is possible but only for a certain amount of time and no longer that 75 years (hence the difference the Netherlands have made with the Treaty). *See*, Artikel 15, Archiefwet 1995, Nederland.

[3] International Civil Aviation Organization (ICAO), Convention on Civil Aviation ("Chicago Convention (1944)"), 7 December 1944, (1994) 15 U.N.T.S. 295.

[4] Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC

[5] Just Culture is oriented towards enhancing aviation safety by encouraging open and honest reporting of incidents and errors, without fear of sanctions or retaliation. Just culture fosters a reporting culture, learns from mistakes, and prevents recurrence.

reporters. This is the core of Just Culture, which aims to contribute to the fostering of a reporting culture, to learn from mistakes, and to prevent reoccurrences of accidents and incidents.[6]

On the other hand, public disclosure contributes to enhancing public trust, improving transparency, and promoting accountability.

Currently, the records are in the custody of the National Archives with the restriction to access. However, they will be completely disclosed at least after 75 years, which means the right to information prevails based on the Archival Law of the Netherlands. Nevertheless, the question remains of how open and transparent the archived records can be until the restriction is resolved. Therefore, the question remains to clarify, if at all possible, whether and to what extent the protection of safety prevails over the right to information or *vice versa*.

1.1.2 Safety

1.1.2.1 Aviation Safety

Safety has always been and still is the prime focus of ICAO.[7] Initially, the public may understand safety according to its grammatical definition, namely to be the "state of being protected from or guarded against hurt or injury" and "freedom from danger."[8] However, 'aviation safety' is a technical term or concept that should be understood in a wider and technical context rather[9] than just as a word in international civil aviation. Currently, ICAO defines 'safety' as the "state in which risks associated with aviation activities, related to, or in direct support of the operation of aircraft, are reduced and controlled to an acceptable level."[10]

The concept of aviation safety has evolved based on frequent causes of accidents from the early 1900s until the present.[11] These causes have become elements of the concept of aviation safety as it subsists today. The following three points provide examples of each factor:

- Technical factors, i.e., technological components of aviation
- Human factors, i.e., pilots, air traffic controllers, and maintenance personnel
- Organisational factors, i.e., airlines and air traffic service providers

These factors play essential roles in the bigger system's approach, which ICAO supports. In the systemic approach, all factors are closely interconnected and contribute to a more mature safety management system under the auspices of the Chicago Convention (1944).[12]

1.1.2.2 Safety culture in relation to Just Culture

Safety culture is widely recognised among international civil aviation safety advocates.[13] Safety culture maintains a steadfast focus on safety factors alone. Professor Reason, a leading authority on

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[6] Ministerie van Infrastractuur en Waterstaat, *Toezegging beantwoording gewijzigde motie Omtzigt 2281-42 inzake faciliteren ACOI over geheimhouding stukken Bijlmerramp* (I E NW/BSK-2023/149768, 2023)

[7] *See,* the Preamble and Article 44 of the Chicago Convention (1944).

[8] Oxford University Press, 'Prosecution' in Oxford University Press, *Oxford English Dictionary* (Oxford University Press 2023) <https://www.oed.com/search/dictionary/?scope=Entries&q=safety> accessed 31 January 2023.

[9] *See*, Huang J, *Aviation Safety and ICAO* (Ph.D. Dissertation, Leiden University 2009) 3-6.

[10] ICAO, *Annex 19 Safety Management* (2nd edn, ICAO 2016) Definition.

[11] ICAO, *Safety Management Manual* (Doc 9859, 4th edn, 2018) 2-1.

[12] *See,* ICAO, *Safety Management Manual* (Doc 9859, 4th edn, 2018) 2-2.

[13] Civil Air Navigation Services Organisation proposes the definition of 'safety culture' to be the following: "[s]afety culture refers to the enduring value, priority and commitment placed on safety by every individual and every group at every level of the organisation. Safety culture reflects the individual, group and organisational

safety culture, identified four key components: reporting culture,[14] flexible culture,[15] and learning culture,[16] next to Just Culture. Each of these components is interconnected with the other.[17] Among these cultures comprising safety culture, within this report, Just Culture is more significant than others.

Just Culture has been defined by various safety-critical industries, including international civil aviation. For example, ICAO defines Just Culture as follows:

> "An atmosphere of trust in which people are encouraged (even rewarded) for providing essential safety-related information, but in which they are also clear about where the line must be drawn between acceptable and unacceptable behaviour."[18]

With this definition, the EU supports the principle[19] by elaborating it in yet greater detail. Within Europe, Just Culture is defined as follows:

> "[A] culture in which front-line operators or other persons are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but in which gross negligence, wilful violations, and destructive acts are not tolerated."[20]

In other words, unless the causes of accidents amount to gross negligence, wilful violations, or destructive acts, all other acts causing accidents are tolerated so as ultimately to enhance safety based on evidence found and lessons learned from accident investigations.

1.1.3 Transparency

Transparency entails the condition whereby individuals can readily perceive and comprehend a given, or indeed the world's, state of affairs and anticipate how their actions will impact it. It is enshrined in Article 19 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR),[21] which mandates that States must grant citizens access to information as a prerequisite for promoting transparency. In the Netherlands, Article 1.1 of the Open Government Act of the Netherlands prescribes transparency as a "right to access,"[22] which is strengthened by the Archival law of the Netherlands.

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attitudes,norms and behaviours related to the safe provision of air navigation services." *See*, CANSO, *Safety Culture Definition and Enhancement Process*, 2008) 2_3

[14] A workplace atmosphere where individuals feel comfortable reporting their errors and near misses.

[15] Transitioning from the traditional hierarchical structure to a more flattened professional hierarchy, where authority is delegated to task experts as needed, returning to the bureaucratic structure once the crisis has passed.

[16] A readiness and capability to derive appropriate insights from the safety information system and commitment to implementing significant reforms when indicated.

[17] Reason J, *Managing the Risks of Organizational Accidents* (Ashgate Publishing 1997)

[18] ICAO, Doc 9870 AN/463 Manual on the Prevention of Runway Incursions (1st edn, ICAO 2007)

[19] *See*, EU Regulation 376/2014, EU Regulation 996, and Eurocontrol, *Just Culture Policy* (European Organisation for the Safety of Air Navigation (Eurocontrol) 2012).

[20] Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 Apr. 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, Art. 2 (12).

[21] UN, *International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)* Article 19 (2): 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[22] *See,* Art. 1.1 of the Wet open overheid: *"Eenieder heeft recht op toegang tot publieke informatie zonder daartoe een belang te hoeven stellen, behoudens bij deze wet gestelde beperkingen."*

1.2 Research questions

1.2.1 Overview of the research questions

Based on the background above, three research areas are identified: Just Culture, ICAO Annex 13, and the so-called 'balancing test'. The research questions aim to provide an understanding of (the balance between) Just Culture, the confidentiality of certain types of documents, and the openness of investigations into aviation accidents and incidents from international and domestic perspectives. Sections 1.2.2. to 1.2.4 detail the research questions of this study.

1.2.2 ICAO Annex 13

- Which criteria are used to determine which documents must remain confidential according to Article 5.12 of ICAO Annex 13 and Regulation 996, and how are these criteria applied in aviation accident and incident investigations?
- What is the relationship between Standards 5.12 and 6.2 of ICAO Annex 13?[23]
- What is Just Culture's (legal) meaning and application to the importance of public access?
- What are the criteria to conduct a balancing test?[24]

1.2.3 Just Culture

- How should the concept of Just Culture be interpreted and applied according to ICAO Annex 13 and Regulation (EU) No 996/2010?
- How does Just Culture impact Dutch legislation and regulations?

1.2.4 Balancing test

- *Do Member States of ICAO conduct the balancing test?*[25]
- *If so,* how do the various Member States of the ICAO treaty apply the balancing test to possibly make certain types of documents that must remain confidential public?

1.3 Research methodology

1.3.1 Sources of the study

1.3.1.1 International law

In the main, this study analyses the Chicago Convention (1944) as an international legal framework to respond to the research questions as requested by the ACOI. Under the Chicago Convention (1944) framework, this study also refers to the following technical instruments:

- ICAO Annexes; and
- Technical manuals.

1.3.1.2 EU law

As the regional-international legal framework, as per the request of the ACOI, this study also analyses Regulation (EU) No 996/2010, as amended by Regulation (EU) No 376/2014.[26] The details of the legal framework are described in Chapter 3 of this study.

[23] This research question was added according to the request of the ACOI after the offer was accepted.
[24] Subsequent question
[25] This research question was added according to the request of the ACOI after the offer was accepted.
[26] Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007

1.3.1.3 Domestic law

As per the request of the ACOI, the analysis of the domestic legal framework in this study is pertinent to the following jurisdictions:

- Australia;
- the Republic of Ireland;
- New Zealand;
- the Netherlands;
- the United Kingdom (UK); and
- the United States (US)

1.3.2 Structure of the study

This study is divided into the current introduction, doctrinal and empirical research in Chapters 2, 3, and 4, and the conclusion in Chapter 5. The below paragraphs depict substances in the coming chapters of this study.

Chapter 1 is the current chapter that introduces this research.

In Chapter 2, the international legal framework pertinent to the research questions is set out, with the main focus being on the balancing test.

Chapter 3 contains the analysis necessary to respond to the research questions based on the regional legal framework, namely of the EU.

Chapter 4 contains the analysis relevant to responding to research questions based on the domestic legal framework.

In Chapter 5, this study provides syntheses and conclusions based on the preceding chapters.

1.3.3 Research methodology

This study utilises the doctrinal research methodology. Starting with a descriptive discussion on the legal framework at the global, EU, and regional levels, this study subsequently delves into more detail by analysing the framework to present answers to the research questions. Specifically, in the doctrinal analysis of the global treaty framework, this study considers the legal sources identified by the International Court of Justice, which include international treaties and conventions in force, international custom, general principles of law, judicial decisions, and the teachings of the most highly qualified authors.[27]

This study also utilises the qualitative research methodology to present State practices and supplement interpretations made during the doctrinal studies. As attached to this report, invitations are sent to representatives of the ICAO Legal and External Affairs Bureau, ICAO Member States, government personnel, safety professionals, and legal practitioners in the field to conduct a series of interviews. Among others, 10 interviewees accepted the invitations.[28] Semi-structured interviews were conducted based on topics surrounding the defined research questions in Section 1.2 of this study.

One interview was conducted in January 2024, while other interviews took place in February 2024.

[27] *See*, Article 38 of the Statute of the International Court of Justice.
[28] Two informal conversations also took place, but those are not included in this report.

1.4 Legal authority of the legal framework

1.4.1 The Chicago Convention (1944)

The Chicago Convention (1944) is the constitution of international civil aviation.[29] As of 5 February 2024, there are 193 Contracting States to the Chicago Convention (1944), including all States with the jurisdiction discussed in the current report. As a result, all States discussed in this report are obliged to fulfil obligations prescribed by the Chicago Convention (1944); they are ICAO Member States and henceforth referred to as such in this report.

1.4.2 Standards and Recommended Practices

1.4.2.1 Overview

One of the essential obligations in the context of this study is related to Standards and Recommend Practices (SARPs). Under Article 37 of the Chicago Convention (1944), States are committed to uniformly regulating international civil aviation. With this commitment, ICAO adopts and amends technical specifications,[30] so-called SARPs, which can also be referred to as global safety regulations. SARPs are, for reasons of convenience,[31] not included in the text of the Chicago Convention as that would require frequent amendments, and instead are added in the form of Annexes to the Chicago Convention (1944); the Annexes represent 19 essential technical topics.[32] Among others, ICAO Annex 13 is the main source of this study.

1.4.2.2 Standards and Recommended Practices

Technical specifications contained in ICAO Annexes are mostly Standards or Recommended Practices. The definitions of these two types of specifications are as follows:

- A Standard means: "[a]ny specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38."[33]
- A Recommend Practice means: "[a]ny specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interests of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention." [34]

As the above definitions clarify, conformity to the Standards for States is recognised as "necessary," while conformity to the Recommended Practices is (merely) "desirable."

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[29] Havel BF and Mulligan JQ, 'International Aviation's Living Constitution: A Commentary on the Chicago Convention's Past, Present, and Future' (2015-2016) 15 Issues in Aviation Law and Policy 7.

[30] Art. 37 of the Chicago Convention (1944)

[31] Art. 54 (l) of the Chicago Convention (1944)

[32] Annexes deal with the following topics: Personnel Licensing, Rules of the Air, Meteorological Service for International Air Navigation, Aeronautical Charts, Units of Measurement to be Used in Air and Ground Operations, Operation of Aircraft, Aircraft Nationality and Registration Marks, Airworthiness of Aircraft, Facilitation, Aeronautical Telecommunications, Air Traffic Services, Search and Rescue, Aircraft Accident and Incident Investigation, Aerodromes, Aeronautical Information Services, Environmental Protection, Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference, Safe Transport of Dangerous Goods by Air and Safety Management.

[33] All Annexes contain this definition in 'Status of Annex components'. For instance, *see*, ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) (xi)

[34] All Annexes contain this definition in 'Status of Annex components'. For instance, *see*, ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) (xi)

Prof. em. Mendes de Leon pointed out three aspects of SARPs in relation to their implementation into the domestic legal framework:[35]

- ICAO Member States do not always implement SARPs in national legislation and apply them in practice;
- ICAO Member States are often negligent in reporting differences between the SARPs and their national regulations and
- ICAO has regulatory powers but no control mechanism, so compliance cannot be enforced even when all procedures are followed. The Member States are then left to check compliance.

1.4.2.3 Remarks

Based on these definitions, commentators argue for the binding legal force of SARPs.[36] In the Netherlands, although Standards (not Recommended Practices) are published as part of the *Staatsblad*, the relevant court determines the legal force on a case-by-case basis.[37] Hence, the bindingness of Standards 5.12 and 6.2, which this study refers to, should be determined by a relevant court of the Netherlands on a case-by-case basis.

1.4.3 Legal authority of the EU legal framework

1.4.3.1 Types of the EU legal framework

Within the EU, there are following eight legal instruments:

- EU Treaties;
- Regulations;
- Directives;
- Decisions;
- Recommendations;
- Opinions;
- Delegated Acts; and
- Implementing Acts.

The Regulations under the EU Law framework, among other things, are essential to discuss the subject of Chapter 3 further.

1.4.3.2 Legal authority of the regional legal framework - Regulations

Under EU Law, a regulation (such as Regulation (EU) No 996/2010) is a legal act that automatically and uniformly applies to all EU countries upon entry into force. Transposition into national law is not a condition for the legal force of any EU regulations. In the case of Regulation (EU) No 996/2010, as provided in Article 26 of the same regulation, on the 20th day following the publication

[35] Mendes de Leon P, 'Luchtrecht' in Horbach N, Lefeber R and Ribbelink O (eds), *Handboek Internationaal Recht* (2007). *See also*, Huang J, *Aviation Safety and ICAO* (Ph.D. Dissertation, Leiden University 2009).

[36] For instance, Prof. Milde and Prof. Cheng argue against the binding force of the SARPs. *See,* Milde M, 'Enforcement of Aviation Safety Standards: Problems of Safety Oversight' (1996) 45 ZLW 3 and Cheng B, *The Law of International Air Transport* (Stevens & Sons Ltd 1962)

[37] Mendes de Leon P, 'Luchtrecht' in Horbach N, Lefeber R and Ribbelink O (eds), *Handboek Internationaal Recht* (2007). However, there is also an opinion that once published as part of Tractatenblad, SARPs obtain a comparable binding force to the Chicago Convention (1944). *See,* Correia V and Trigeaud B, '*Transport, Navigation et Sources du Droit International - Remarques Générales'* in Saïda El Boudouhi (ed), *Les Transport au Prisme du Droit International Public* (Editions A Pedone 2019) and Stewart ME, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace* (Ph.D. Dissertation, Leiden University 2021).

of the Regulation, it became “binding in its entirety and directly applicable in all Member States,”[38] just like all other Regulations under the EU Law.

1.4.3.3 Remarks

Due to the binding legal force of regulations in EU law, automatically and uniformly, Regulation (EU) No 996 applies without any restriction in Europe. Therefore, Article 14 of the mentioned regulation is binding within the Netherlands.

[38] Article 26 of the Regulation 996.

2 Annex 13 to the Chicago Convention (1944)

2.1 Introduction

Article 26 of the Chicago Convention (1944) serves as a focal point in relation to accident and incident investigations. This provision specifically addresses accident investigations, mandating that the State where the incident occurs conducts an inquiry into its circumstances, adhering as much as possible to procedures recommended by ICAO. These procedures are detailed in ICAO Annex 13.[39]

While ICAO Annex 13 primarily outlines investigation protocols, it also encompasses fundamental principles. One of the main principles outlined in Standard 3.1 is that "[t]he sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability." Based on this principle, Annex 13 thoroughly guides ICAO Member States in technical investigations when accidents or incidents occur.

2.2 Scope of the application

Chapter 2 of ICAO Annex 13 provides that whenever an accident or incident occurs, States shall necessarily conform to the procedures laid in Annex 13. Accidents and incidents in this context should be technically understood rather than grammatically. The definitions of ICAO for the term 'accident' are worth noting.[40]

"Accident:
An occurrence associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down, in which:

a) a person is fatally or seriously injured as a result of:
— being in the aircraft, or
— direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
— direct exposure to jet blast,
except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

b) the aircraft sustains damage or structural failure which:
— adversely affects the structural strength, performance or flight characteristics of the aircraft, and
— would normally require major repair or replacement of the affected component,
except for engine failure or damage, when the damage is limited to a single engine (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, fairings, panels, landing gear doors, windscreens, the aircraft skin (such as small dents or puncture holes), or for minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike (including holes in the radome); or

c) the aircraft is missing or is completely inaccessible."

[39] *See,* Section 2.2.2. of this study.
[40] The definition of 'accident' is directly extracted from the most recent edition of ICAO Annex 13. *See*, ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Chapter 1.

According to this definition, the accident at *Bijlmermeer* falls under the scope of 'accident.' Therefore, procedures laid in ICAO Annex 13 may be applicable.

2.3 Objective of technical investigations

While ICAO Annex 13 does not explicitly mention safety culture or Just Culture, commentators argue that there is an element of Just Culture in the mentioned Annex,[41] especially with the connection to Standard 3.1 concerning the common objective of accident investigations. ICAO Annex 13 explicitly states that the objective of investigations is *fact-finding* rather than *apportioning blame*.[42] Although Just Culture arose during the era where organisational factors received attention as accident causes at the end of the 1990s, this objective under Standard 3.1 has a longer history and, as such, was included in ICAO Annex 13 already in the year 1974.

2.4 Non-disclosure of information

2.4.1 Overview

Since the 1990s, the disclosure of records has received attention within the international civil aviation community.[43] Standard 5.12 of ICAO Annex 13 pertains to the confidentiality of specific records collected by safety investigation authorities.

2.4.2 Scope

The State responsible for investigating an accident or incident is instructed not to release the following records for purposes other than accident or incident investigation:[44]

- Cockpit voice recordings and airborne image recordings and any transcripts from such recordings; and
- records in the custody or control of the accident investigation authority being:
    - all statements taken from persons by the accident investigation authority in the course of their investigation
    - all communications between persons having been involved in the operation of the aircraft
    - medical or private information regarding persons involved in the accident or incident
    - recordings and transcripts of recordings from air traffic control units;
    - analysis of and opinions about information, including flight recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and
    - the draft Final Report of an accident or incident investigation.

This Standard's primary aim is to prevent the misuse of safety-related data by parties conducting concurrent investigations unrelated to aviation safety."

Outside these records, *in principle*, ICAO guides that the protection under Standard 5.12 is not applicable. [45] The other records may include factual information regarding the flight operation,

[41] Challinor CAS, 'Accident Investigators Are the Guardians of Public Safety: The Importance of Safeguarding the Independence of Air Accident Investigations as Illustrated by Recent Accidents' (2017) 42(1) Air and Space Law 43

[42] *See*, Section 2.2.1. of this Study.

[43] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020)

[44] The scope and detailed explanation on the view of ICAO is listed in Appendix of this report. The list is reproduced based on the information provided in ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016)

[45] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 2-4.

including date, time, and location.[46] This type of information is already publicly available and possibly not sensitive in its nature to the current and future accident investigation.

However, ICAO encourages States to determine (non-)disclosure for any records that are also not mentioned under Standard 5.12 of ICAO Annex 13. Therefore, the protection remains at the discretion of the Member States of ICAO. Yet, an interviewee provided a view that all records other than the ones mentioned in the list fall outside the scope of non-disclosure protection.

2.4.3 Exceptions

The protection provided is not, *per se*, absolute. Exceptions can be made in three cases.

Firstly, if a competent authority for legal administration in that State deems that their disclosure surpasses the negative impact, both domestically and internationally, that such action might have on current or future investigations, disclosure may be permitted.

Secondly, the records mentioned above and information relating to an accident or incident should be listed in the final investigation report if the records are relevant to the analysis of causes.[47] This is to avoid a lack of access, which may impede investigations in the future.[48]

Thirdly, the cockpit voice recordings and airborne image recordings shall not be disclosed to the public,[49] but that is not necessarily the case, granting that the identity of persons involved in the accident or incident is not disclosed to the public.[50]

Besides, one may ask if exceptions can be made for accident victims and their families. It has been recognised that assistance to accident victims and their families has to receive better attention.[51] Along the line, one of the manuals recognises the consideration of family members and survivors who wish to be entitled to listen to the cockpit voice recording or gain access to transcripts thereof protected under Standard 5.12 of ICAO Annex 13.[52] For this particular matter, ICAO remains to recognise that recording disclosure towards victims and their families depends on the national policy and legislation while mentioning that such disclosure is contrary to Standard 5.12 of Annex 13.[53] An expert stated that victims and their families should gain access to such information via other authorities, i.e. judicial authorities, but not to the investigation authorities.[54]

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[46] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 2-4.

[47] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 5.12.2.

[48] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 5.12.2. Note.

[49] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 5.12.2.

[50] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 5.12.3.

[51] *See*, ICAO, *Manual on Assistance to Aircraft Accident Victims and their Families* (1st edn, ICAO 2013) and ICAO, *ICAO Policy on Assistance to Aircraft Accident Victims and their Families* (1st edn, ICAO 2013)

[52] ICAO, *Manual on Assistance to Aircraft Accident Victims and their Families* (1st edn, ICAO 2013) 3-6.

[53] ICAO, *Manual on Assistance to Aircraft Accident Victims and their Families* (1st edn, ICAO 2013) 3-6. Nevertheless, the attention to victims and their families is still growing, which resulted in a resolution and amendments in ICAO Annex 9 on facilitation to better assist the group to access the scene of the accidents and such. However, such attention remains at the procedural level. ICAO, *Assembly Resolution A41-14: Assistance to victims of aviation accidents and their families* (2022) and ICAO, *Annex 9 Facilitation* (16th edn, 2022) 8-6 and 8-7.

[54] *See,* Section 2.5.5 of this report.

However, victims and their families have the right to appoint an expert to visit the scene, have access to approved publicly available factual information and information on the progress of the investigation, and finally receive a copy of the final report.[55]

2.4.4 Remarks

As seen, Standard 5.12 presents a challenge. The decision-making is dependent on the authority granted to the "competent authority." It may imply subjective discretion regarding when disclosure outweighs the adverse impact of non-disclosure on aviation safety.[56] However, it also opens the room for transparency to prevail. Nevertheless, Standard 5.12 further provides room for clarity for ICAO Member States by stating that the disclosure is subject to national law and Appendix 2 of Annex 13. The national law is discussed in Chapter 4 of this study, while Section 2.5 below provides details on the balancing test based on Appendix 2 of Annex 13.

2.5 Balancing test

2.5.1 Overview

Appendix 2 of ICAO Annex 13 details the protection of accident and incident investigation records. Especially this Appendix concerns the 'balancing test', which is defined as the "determination by the competent authority, in accordance with Standard 5.12, of the impact the disclosure or use of accident and incident investigation records may have on current or future investigations."[57] The *Manual on Protection of Safety Information*,[58] which interacts with Appendix 2 of Annex 13, provides the details of the administration of the balancing test to determine whether to disclose accident and incident investigation records or not.

The following sections (Section 2.5.2-2.5.11) provide details on the ten-step methods for conducting the balancing test, as guided by ICAO.

2.5.2 Step 1 – Designation of the competent authority(ies)

According to Section 3 of Appendix 2 of ICAO Annex 13, States are obliged to designate a competent authority. Along the line, ICAO refers to a competent authority in this context, any "governmental entity(ies) that has the power and authority to administer the balancing test."[59] This suggests that, firstly, it is not necessarily an accident investigation authority that conducts the balancing test; secondly, there can be more than one authority conducting the test;[60] and thirdly, there may be various competent authorities administering the balancing test per interests.[61] The following paragraphs discuss these matters in more detail:

- **Multiple competent authorities for the balancing test**
    - *Administration of justice*

[55] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 5.27 and ICAO, *Manual on Assistance to Aircraft Accident Victims and their Families* (1st edn, ICAO 2013) 3-7.
[56] *See*, Trögeler M, '*Criminalisation of Air Accidents and the Creation of a Just Culture'* (EALA, 2010).
[57] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) APP 2-1. The definition slightly differs from what the ICAO Manual provides. *See*, ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016)
[58] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016)
[59] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) (x).
[60] Nevertheless, such is still
[61] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-4.

If the disclosure is necessary for the administration of justice or the records become evidence of litigations, a court may be a suitable competent authority.

- *Access to government information*
  When the interest lies in access to government information or freedom of information, an administrative body may be a suitable competent authority.
- *Regulation of aviation safety*
  When the purpose is to use records to regulate aviation safety better, the accident investigation authority may be suitable for administrating the balancing test under the condition that the accident investigation authority is independent of the regulators.

It is important to emphasise that, like with the implementation of SARPs, the designation of the competent authority or authorities remains at the discretion of each ICAO Member State.[62]

The competent authority must be capable of weighing competing interests against the non-disclosure of records to promote a Just Culture. In this, States are encouraged to designate *permanent* competent authorities for efficiency and consistency, ensuring they have appropriate rules and processes in place.[63] In some cases, the legislator may serve as the competent authority, particularly during the legislative or rule-making process.

2.5.3 Step 2 – Identification of the public interests against the non-disclosure

The purposes of conducting the balancing test to determine disclosure may vary. While there may be more, ICAO presents the following interests to be balanced with the non-disclosure of accident records:[64]

- **Administration of justice**
  For the administration of justice, disclosure of records may be relevant to criminal, civil, administrative, and disciplinary proceedings.
- **Access to government information**
  The general public may be concerned about knowing the details of the accident or incident, and media and private individuals may pursue information to understand what has happened.
- **Regulation of aviation safety**
  Accident records may be withheld not only from the public but also from governmental agencies. As accident investigation authorities are required to be independent, these agencies may require access to records to regulate safety.

If there are multiple competent authorities conducting the balancing test, the identification of conflicting interests in Step 2 is essential to further allocate the most relevant competent authority.

In the specific case of the accident at *Bijlmermeer*, the right to access government information is the interest that should be balanced with the non-disclosure of accident records for safety purposes.[65]

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[62] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-4.
[63] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-5.
[64] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-4.
[65] While the question remains on the length of non-disclosure in the accident records at Bijlmermeer. ICAO does not concern about the time factor in its consideration to non-disclosure.

2.5.4 Step 3 – Confirmation of the status of the record

Not all accident investigation records are subject to the balancing test. As identified under Standard 5.12.5 of ICAO Annex 13, [66] cockpit voice recordings, airborne image recordings, and transcripts are *not* subject to disclosure; hence, no balancing test is to be conducted for these records.[67] This restriction exists as both recorders are installed solely for investigation purposes. No matter who possesses these recordings, these records are not subject to disclosure based on the balancing test.

However, all other records are subject to the balancing test if they are under the control of the accident investigation authority.[68]

2.5.5 Step 4 – Recognition of the original source

- **Sources identified in Standard 5.12.4 of ICAO Annex 13**
  In step 3, it was mentioned that some records are absolutely protected while others are not. Based on Standard 5.12.4 of Annex 13, States are guided to direct the requests for balancing tests to the original source.
- **Records outside the coverage of Standard 5.12.4 of Annex 13**
  - **Information available outside the accident investigation authorities**
    As ICAO does not prohibit governmental entities other than designated accident investigation authorities from accessing the accident scene,[69] it is possible that the additional records may be in possession of other authorities, including the judicial authority, police, or even media personnel.[70] In this case, there is no need to involve accident investigation authorities.[71]
    However, the competent authorities may decide not to disclose information under the custody until all alternative sources are exhausted.[72]
  - **Sources under the custody or control of the accident investigation authority**
    Standard 5.12, subsection b), outlines protective measures for specific records while they are in the possession or under the authority of the accident investigation authority. In this context, "possession" denotes the physical holding of the record by the accident investigation authority, while "authority" implies the ability of the

[66] *See* also, Section 2.2.4 of this study.
[67] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-6.
[68] The other types of records may be all statements taken from persons by the accident investigation authority in the course of their investigation; all communications between persons having been involved in the operation of the aircraft; medical or private information regarding persons involved in the accident or incident; recordings and transcripts of recordings from air traffic control units; analysis of and opinions about information, including flight recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and the draft Final Report of an accident or incident investigation. *See*, Section 2.2.4 of this Study. *See also*, ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-2.
[69] *See*, Recommendation 5.4.4. of Annex 13: *"A State should ensure cooperation between its accident investigation authority and judicial authorities so that an investigation is not impeded by administrative or judicial investigations or proceedings."*
[70] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-6.
[71] An interviewee shared an opinion that certain records, such as air freight bills, are in the custody of the investigation authorities but only as a copy. In this case, not only judicial authorities but also airlines may be the alternative and original sources where the information can be disclosed without the balancing test under Annex 13, but still subject to domestic law.
[72] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-7.

authority to obtain physical possession, even if an expert contractor is currently examining the record for investigative purposes.

Procedures and policies governing the handling of records during investigations should be comprehensive. These protocols should also consider the possibility of requests being directed to the original source of the information. If investigators retain only copies of records (as recommended in 5.12.4.1), the original records should still be accessible from their primary sources for purposes other than accident and incident investigations. For example, medical records of individuals involved in an incident should remain accessible from their healthcare providers, and air traffic control recordings should still be obtainable from the pertinent air traffic control authorities.

2.5.6 Step 5 —Material fact in question[73]

In determining whether to disclose investigation records for legal proceedings, it is crucial to consider the concept of a "material fact in question." This term refers to a significant or essential fact disputed between parties and determined by the competent authority overseeing the balancing test.

A material fact in question is pivotal to resolving the issue under consideration. The competent authority must ascertain that the content of the record is necessary to establish such a fact in the proceeding, be it criminal, civil, administrative, or disciplinary. If an adjudicative fact can be established without relying on the investigation record, the protection of the record for investigative purposes should be prioritised. In such cases, there is little incentive to risk prejudicing the investigation when the key facts of the proceedings can be established independently.

This requirement for material facts acknowledges the potential adverse effects of disclosing or using record content for purposes beyond accident investigation. For instance, it recognises the risk of aviation personnel refusing to cooperate with investigators if their privacy is compromised. If the fact in question is peripheral and does not affect the outcome of the proceedings, the investigation record should not be jeopardised.

The degree to which an investigation record contributes to determining a material fact in question in legal proceedings is a crucial consideration in conducting the balancing test.

2.5.7 Step 6- Application of the balancing test

Step 6 is the application of the balancing test, where the designated competent authorities should give consideration to the identification and weighting of competing interests. The following list contains the examples of the considerations concerning the administration of the balancing test:[74]

- the purpose for which the record was created or generated;
- the requester's intended use of that record;
- whether the rights or interests of a person or organisation will be adversely affected by the disclosure or use of that record;
- whether the person or organisation to whom that record relates has consented to make that record available;
- whether suitable safeguards are in place to limit the further disclosure or use of that record;
- whether that record has been or can be de-identified, summarised or aggregated;
- whether there is an urgent need to access that record to prevent a serious risk to health or life;

[73] As referred in Section 2.2.5.6., Step 5 may be less relevant to the present *Bijlmerramp* case.

[74] *See*, ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-8 and ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Appendix 2

- whether that record is of a sensitive or restrictive nature; and
- whether that record reasonably indicates that the accident or incident may have been caused by an act or omission considered, in accordance with national laws and regulations, to be gross negligence, wilful misconduct, or done with criminal intent.

2.5.8 Step 7 – Identification of factors supporting the disclosure

In the case of freedom of information, the factor may be government transparency and openness. It is important to determine if the public curiosity is a good factor. ICAO identifies that a *simple* public curiosity is not a substantive or justifiable factor justifying the disclosure of records.[75] The public's fascination with seeing the witness statements or recordings does not establish a right to the information.[76] The purpose of the FOIA may be "good order and functioning of the community and government affairs for the well-being of its citizens."[77]

In the case of better regulation of safety purposes, the public's concern about understanding any safety issues may play a factor.

2.5.9 Step 8 – Identification of factors favouring the protection of investigation records:

Once the identification of favouring factors for the disclosure is completed, the competent authority or authorities should assess the negative impact of the disclosure. The disclosure should not pose a potential risk of safety information becoming unavailable due to release and its impact on cooperation with investigations. A question may be "if there is a reasonable possibility of safety information becoming unavailable due to the release."[78]

In this consideration, past precedents, if any, may assist the competent authority in examining indicative adverse effects and industry concerns regarding record release for purposes beyond investigations.

Next to the impact on public safety, there may be a potential detriment to individuals. To the general public involved in the records, the disclosure of investigation records could cause embarrassment or loss of livelihood, including the impact on aviation personnel.[79]

And finally, the safety interests of better regulations and accident prevention may conflict.

2.5.10 Step 9- Weighting of competing factors

2.5.10.1 Weighting factors

The competing factors around the disclosure should be considered. For example, each case should be evaluated on its individual merits.[80] Therefore, depending on the case, different factors may be considered to carry varying degrees of importance and prevail over one another.

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[75] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-9.
[76] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-9.
[77] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-9.
[78] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-9.
[79] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-11.
[80] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-10.

ICAO presents the following effecting factors for the weighting:[81]

- **Awareness and consent:**
  - recognising the potential effect of disclosure on current and future investigations, ICAO explicitly mentions that all persons related to the records should consent to disclosure or use for purposes other than the investigation.
  - Whether a person related to records is aware of or consented to the purposes of the collection of records before their creation may have an impact on the decision of the competent authority.
  - The decision may also be based on whether persons who provided information were assured of confidentiality.
- **Threats to health or life**
  - If disclosure "lessens or prevents" threats to the health or life of a person, the factor may be weighted greater.

2.5.10.2 Mitigation of negative consequence of disclosures

In all cases, States may consider mitigating the negative consequences associated with the disclosure or use of records for purposes other than investigations. Several safeguards can be implemented.

National legislation may be a means to limit disclosure at all. Domestic law may grant authorities the power to require that records remain confidential after a decision to grant access is already made. States and accident investigation authorities can also enact legislation, regulations, policies, and procedures to manage the handling of sensitive investigation records, such as cockpit voice recordings, recognising their particular sensitivity. In case of privacy, medical, or proprietary information, domestic law may also restrict the release and use of records for non-investigative purposes.

However, without limiting the release, de-identification of records is another safeguard to prevent unintended consequences of disclosure or use. An interviewee saw this as also an obligation under ICAO Annex 13. However, its effectiveness can be limited in cases where the individuals involved are well-known or the incident has a high profile. The process's success also depends on the nature of the information and the disclosure or use of the forum. If de-identification can protect the identities involved and does not impede the record's intended use, it is considered viable. Otherwise, alternative safeguards such as protective orders, closed proceedings, in-camera reviews, and summaries may be implemented to allow for limited disclosure.

Accident investigation authorities are encouraged to adopt best practices for securing information and controlling access and authorisation to protect records. This includes limiting the collection of sensitive records to those necessary for the investigation and retaining them only as long as needed. Investigators are advised to keep only copies of investigation records, ensuring the original records remain accessible for purposes other than investigations if required. This approach helps balance the need for confidentiality in investigations with other potential public interests.

[81] ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-11.

2.5.11 Step 10 – Recording the decisions

Once the decision is made, the competent authority records it. By recording decisions, they can become part of a series of precedents, guiding future decision-making processes with similar factual contexts. Relying on precedents offers predictability, ensuring consistency in decision-making.

Recording is necessary to provide predictability to the citizens. Those involved in creating records must understand how they may be disclosed and used afterwards to foster cooperation during creation. Uncertainty may lead to reluctance to fully participate.

Enhancement of predictability further creates certainty, which would foster cooperation. A higher level of certainty regarding record disclosure and usage assists accident investigation authorities in working with affected parties, providing them with assurances. These assurances are vital for fostering trust and cooperation in the investigation process.

Lastly, records may establish precedents.[82] For instance, in jurisdictions where judicial authorities administer the balancing test, they are likely familiar with the concept of precedent. Competent authorities not accustomed to recording decisions to establish precedents may benefit from developing processes and guidelines. These should outline the circumstances in which precedents would be referenced.

2.6 Release of information

Standard 6.2 of ICAO Annex 13, concerning the preparation of a final report of any accident and incident investigation, may also be relevant to the question raised in this report. Standard 6.2 of ICAO Annex 13 limits any State from circulating, publishing, or giving access to a "draft report or any part thereof, or any documents obtained during an investigation."[83] Considering the objective of the accident investigation in Section 2.3 of this report, the scope of information is not to be shared under Standard 6.2. However, this is not without any condition. With the "express consent" of the State that conducts the investigation, it is possible to disclose records.

A question remains on the grammatical reading of Standard 6.2 of Annex 13. One may think that the grammatical interpretation may leave room to be a valid ground to argue against the disclosure of records in the mentioned Standard. Yet, if read more systematically in the context of Annex 13, Standard 6.2 intends to impose the responsibility for any State, but certainly "other than the State conducting the investigation," not to disclose records they are informed about. Hence, it is possible to conclude that Standard 6.2 does not have an impact on non-disclosure under Standard 5.12 or any other records that are mentioned in Standard 6.2 itself.

2.7 Impact of the international legal framework on records of the accident at *Bijlmermeer*

As the Netherlands is a Contracting State of the Chicago Convention (1944) and a Member State of ICAO, aircraft accidents occurring in the Netherlands should be investigated under Article 26 of the Chicago Convention (1944). Procedures recommended by ICAO are laid down in ICAO Annex 13, which also discusses the disclosure of accident and incident records in custody and control of the relevant investigation authority. In principle, following the objective of the technical investigation is fact-finding rather than apportioning blame as identified in Section 2.3 of this study, accident records remain under

[82] States are recommended to submit the records of decision to ICAO to be archived in a public database. *See,* ICAO, *Manual on Protection of Safety Information Part I - Protection of Accident and Incident Investigation Records (Doc 10053)* (1st edn, 2016) 3-14.

[83] ICAO, *Annex 13 Aviation Incident and Accident Investigation* (12th edn, ICAO 2020) Standard 6.2.

the custody or control of the accident investigation authorities independent from any governmental organisations in the Netherlands for the first 20 years after the closure of the accident investigation. Afterwards, as the records become transferred to the National Archives of the Netherlands, the records, in a strict sense, are no longer in the custody or control of the accident investigation authorities of the Netherlands. Hence, the impact of the balancing test may not be strictly relevant to the question of disclosure of the investigation records of the accident at *Bijlmermeer*.

Nevertheless, if still found to be subject to the balancing test, the implementation status of ICAO Annex 13 Standard 5.12 matters. If ICAO Annex 13 is implemented in the Netherlands and analysed that Standard 5.12 in the same Annex has a binding force for the matter concerning the accident at *Bijlmermeer*, the Netherlands may decide whether it releases certain types of accident records, excluding the cockpit voice recorders and airborne image recorders and their transcripts, for specific purposes. These purposes can include the right to access to the public documents or the administration of justice. The thorough guidance is explained in Section 2.5 of this study, based on the relevant technical manual of ICAO.

Emphasis should be placed on the fact that it is not the intention of ICAO to preserve accident records absolutely against all other interests of the public. However, ICAO does not provide any detailed and definitive guidance on how (competing) factors should be weighed except ones explained in Section 2.5.10.1 of this report. The decision-making remains entirely within the gift of the competent authority of the relevant State, not least considering the diverse legal and cultural backgrounds of the 193 ICAO Member States.

3 Balancing test in the regional legal framework

3.1 Regulation (EU) No 996/2010

3.1.1 Introduction

Regulation (EU) No 996/2010 is the core legislation that deals with the investigation and prevention of civil aviation accidents and incidents within the EU. The Regulation aims to ensure a high level of efficiency, expediency, and quality in civil aviation safety investigations throughout the EU. It establishes rules regarding the conduct of safety investigations, the role of authorities, cooperation between Member States, and the protection of sensitive information. The regulation emphasises the importance of preventing future accidents and incidents without assigning blame or liability, and it revokes Directive No 94/56/EC.

3.1.2 Scope of the application

The Regulation pertains to safety investigations regarding accidents and serious incidents under the following circumstances:

- If occurring within the territories of EU Member States; or
- Transpiring outside the territories of EU Member States but involving aircraft registered in a Member State or operated by an undertaking established in a Member State; and
- Enabling an EU Member State to appoint an accredited representative for participation in the investigation and
- Allowing an EU Member State with a special interest due to fatalities or serious injuries to its citizens to appoint an expert upon permission from the State conducting the investigation.

The Regulation excludes safety investigations involving aircraft engaged in military, customs, police, or similar services from its scope.

3.1.3 Just Culture element

Regulation (EU) No 996/2010 clearly supports the fostering of a Just Culture. The element of Just Culture is present in paragraph (24) of the Preamble, which states: "[t]he civil aviation system should equally promote a non-punitive environment facilitating the spontaneous reporting of occurrences and thereby advancing the principle of 'just culture'." This highlights the importance of creating an environment in which individuals feel safe to report safety-related occurrences without fear of reprisals or punitive measures, thereby fostering a culture of openness and learning from mistakes to improve aviation safety. This aligns with the definition of Just Culture provided in Section 1.1.2.2. of this report.

However, promoting Just Culture seems to be conditional. Paragraph (25) suggests that the use of information collected during the investigation should respect "constitutional principles and national law." Therefore, in States where constitutional principles and national regimes on transparency prevail in the preservation of accident records, it may be possible that accident records are restricted from access through the imposition of various conditions.

3.1.4 Sensitive safety information and non-disclosure

As outlined in Article 14 of the Regulation, a set of records is specified that must be safeguarded and utilised solely for safety investigation purposes, including:[84]

> (a) all statements taken from persons by the safety investigation authority in the course of the safety investigation;
> (b) records revealing the identity of persons who have given evidence in the context of the safety investigation;
> (c) information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals;
> (d) material subsequently produced during the course of the investigation such as notes, drafts, opinions written by the investigators, opinions expressed in the analysis of information, including flight recorder information;
> (e) information and evidence provided by investigators from other Member States or third countries in accordance with the international standards and recommended practices, where so requested by their safety investigation authority;
> (f) drafts of preliminary or final reports or interim statements;
> (g) cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units, ensuring also that information not relevant to the safety investigation, particularly information with a bearing on personal privacy, shall be appropriately protected, without prejudice to paragraph 3.

These items are considered as "sensitive safety information" where non-disclosure is granted in principle.

Stricter protection is applied to different types of records. Those include:[85]

(a) all communications between persons having been involved in the operation of the aircraft;
(b) written or electronic recordings and transcriptions of recordings from air traffic control units, including reports and results made for internal purposes;
(c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, where so requested by the safety investigation authority issuing the recommendation; and

[84] The list of sensitive safety information is directly quoted from Regulation 996 14(1).
[85] The list of sensitive safety information is directly quoted from Regulation 996, Article 14(2).

(d) occurrence reports filed under Directive 2003/42/EC. The non-disclosure protection under Regulation 996 is varied depending on the type of information.

Compared to the second list of sensitive safety information, Regulation (EU) No 996/2010 prohibits not only disclosure for purposes other than safety investigations but also any improvement of aviation safety. The second purpose seems closer to what ICAO defined as 'better-regulating safety.'[86] In certain cases, not even safety issues are a reason to release accident records to the public.

3.1.5 Balancing test element

With the existing protection, the administration of justice overrides. Despite the principles outlined in paragraphs 1 and 2 of Article 14, the judicial authority or the competent body designated by national law may determine that disclosing the investigation records mentioned in paragraphs 1 and 2 for lawful purposes outweighs any potential negative effects on current or future safety investigations, both domestically and internationally. EU Member States retain the discretion to restrict the situations in which such disclosure decisions can be made, ensuring compliance with EU legislation.

Within Regulation (EU) No 996/2010, there is no guiding element for EU Member States to conduct the balancing test that weighs the interests of disclosure of sensitive safety information.

3.2 Recent case on balancing test

3.2.1 Overview of the judgment

The Dutch Broadcast companies, RTL Nederland BV and RTL Nieuws BV (hereinafter together: 'RTL') submitted a request for a preliminary ruling in the context of proceedings between, on the one hand, RTL, and, on the other hand, the Minister of Infrastructure and Water Management of the Netherlands (IenW).[87] The appeal concerned a decision by the IenW rejecting a request from RTL for information about the destruction of an aircraft over eastern Ukraine on July 17, 2014.

In this request before the Court of Justice of the European Union (CJEU), the prime focus was the interpretation of Article 11 of the Charter of Fundamental Rights of the EU and Article 15(1) of Regulation 376. In addition, the CJEU includes Regulation (EU) No 2018/1139, Regulation (EU) No 996/2010, and the domestic legislation of the Netherlands, which is *Wet houdende algemene regeling met betrekking tot het luchtverkeer*, in the interpretation.

The judgment addresses the confidentiality of details relating to occurrences that endanger aviation safety, as outlined in Regulation 376 and its relationship with the right to freedom of expression and information under Article 11 of the Charter of Fundamental Rights of the EU.[88]

In summary, the CJEU's judgment emphasises the paramount importance of aviation safety and the need to protect information related to safety occurrences, balancing this goal with the fundamental rights of freedom of expression and information under certain conditions. The following section discusses key points of the judgment.

3.2.2 Scope of records

The CJEU examined that, in light of the general principle of interpretation of the EU law, the records referred to in Regulation 376 amending Regulation 996 are in any form all information collected

[86] *See*, Section 2.5.3.
[87] Arrest van het Hof (Tweede kamer) van 18 januari 2024, zaak C-451/22, betreffende een verzoek om een prejudiciële beslissing krachtens artikel 267 VWEU, ingediend door de Raad van State (Nederland) bij beslissing van 29 juni 2022, ingekomen bij het Hof op 7 juli 2022, in de procedure
[88] C-451/22, para 45.

through the reporting system.[89] The information may be in the custody and control of the accident investigation authority or by EASA in the European Central Repository.[90]

3.2.3 Confidentiality

The CJEU clarified that all information collected or held by national competent authorities, which the OVV in this case, concerning occurrences that could endanger aviation safety, is subject to strict confidentiality.[91] This includes accidents, serious incidents, or any event that poses a significant risk to aviation safety, ensuring that such information is used solely for improving aviation safety and is not available for attributing blame or liability.

3.2.4 Compatibility with freedom of expression and information

The CJEU examined whether this confidentiality regime is compatible with the freedom of expression and information, especially concerning requests for information by media undertakings.[92] The Court determined that while the confidentiality requirements do limit the right to freedom of expression and information, this limitation is justified.[93] It is provided for by law, respects the essence of the rights in question, and is proportionate to the objectives of maintaining and improving aviation safety, which is recognised as an objective of general interest by the EU.

3.2.5 Application to media requests[94]

Specifically, the Court addressed whether media undertakings could access information regarding aviation safety occurrences. It concluded that neither the public nor media undertakings have the right to access such information, upholding the confidentiality regime's applicability even when media undertakings request access for journalistic purposes.

3.3 Impact of the regional legal framework on the investigation records of the accident at *Bijlmermeer*

The impact of Regulation (EU) No 996/2010 is rather clear. With the legal force of the Regulation within the EU legal framework, the Regulation is directly applicable, and hence, Member States are obliged to conduct the balancing test under the baseline. Unlike ICAO Annex 13, Regulations in the EU are binding.

[89] C-451/22, para 50.
[90] C-451/22, para 51.
[91] C-451/22, para 55.
[92] C-451/22, para 65.
[93] C-451/22, para 84.
[94] C-451/22, para 85.

4 Balancing test in ICAO Member States

4.1 Introduction

Chapters 2 and 3 discussed the international and EU legal frameworks while focusing on accident investigations and the (non)disclosure of accident records information. However, these two chapters did not engage thoroughly with questions concerning the details of the balancing test. Therefore, Chapter 4 aims to analyse domestic legal frameworks and practices to provide answers to these questions. This is achieved through a review of select jurisdictions, noting that an Addendum to this study will be provided at a later date with updated information to the extent possible.

4.2 Australia

4.2.1 Relevant legal framework of Australia

In Australia, the accident investigation is governed by the Transport Safety Investigation Act 2003 (TSI Act).[95] Among others, the disclosure of accident records is determined under Part 6 on the protection of on-board recording (OBR) information and restricted information.[96]

4.2.2 Competent authority

The competent authority in Australia is the court, which refers to "any tribunal, authority, person or body that has power to require the production of documents or answering of questions."[97]

In addition, the coroner may also determine the records in the custody of the investigation authorities. The details are provided in Section 4.2.3.

4.2.3 Non-disclosure of accident records

4.2.3.1 Non-disclosure under the TSI Act

The disclosure of OBR information, which includes the accident records, is provided under Section 53 of Part 6. Subsection (4) of Section 53 provides that "[i]f the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure." This wording is similar to the relevant Standards in ICAO Annex 13. Unless there is a "good reason not to disclose," records would be disclosed.

Next to this balancing test, the court has specific power regarding the form of publication of OBR information, even if disclosure is permitted. For example, the court retains the authority to prohibit the publication or communication of OBR information, or any data derived from it to any individual. Alternatively, the court may allow publication or communication but under specific conditions and to designated individuals or entities as determined by the court.

In addition to the powers of the court to conduct the balancing test, coroners have a similar power to determine the disclosure of accident records. By the request of the coroner to access the records that are held by the accident investigation authority, the investigation authority must comply and provide the information. This is under the condition that the head of the investigation authority examines the potential disruption concerning any ongoing investigations.[98]

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[95] Transport Safety Investigation Act 2003 amended and in force on 10 March 2016 (No. 18, 2003)

[96] The OBR refers to the 'on-board recording' which should be understood as a wider concept than the cockpit voice recordings or airborne image recordings. *See*, Section 48 in Division 1 of Part 6.

[97] *See*, Part I Section 3 Definition in the TSI Act.

[98] Subsection (1) in Section 59, Division 1, Part 6 in the TSI Act.

Based on the provided information, the coroners can also determine whether or not to disclose the records after private examination.[99] There are two conditions attached to releasing the information:[100]

- The information in question is pertinent to the inquiry and cannot be obtained through alternative means; and
- The benefits of disclosing the information outweigh any adverse effects it may have on ongoing or future investigations, both domestically and internationally.

4.2.3.2 Non-disclosure under the Freedom of Information Act

The investigation authority of Australia generally accepts the request based on the domestic Freedom of Information Act ('FOI Act').[101] According to subsections 60(1), (2), and (3) of the TSI Act, individuals such as staff members, commissioners, and consultants, as well as those granted access under section 62, are prohibited from copying or disclosing this restricted information. Such secrecy provisions, as specified in section 38 of the relevant FOI Act of Australia, render access to this information exempt from release under subparagraph 38(1)(b)(i).

Furthermore, while the Australian Air Transport Safety Bureau (ATSB) transport safety reports are publicly available on the ATSB website, they are protected from being admitted as evidence in civil or criminal proceedings, except for coronial inquiries, as per section 27 of the TSI Act.

In summary, due to the confidentiality and legal protection afforded to certain information collected by the ATSB during its investigations, disclosure of this restricted information is not permitted under the FOI Act.

4.2.4 Relevant case law

There is no publicly available Australian case law concerning the non-disclosure of accident records.

4.3 New Zealand

4.3.1 Relevant legal framework of New Zealand

In New Zealand, the Transport Accident Investigation Commission Act 1990 (TAIC Act) governs transport accident and incident investigations.[102] The TAIC Act established the Transport Accident Investigation Commission (TAIC),[103] which is responsible for conducting independent investigations into transport accidents and incidents in New Zealand. The Act also regulates the disclosure and admissibility of investigation records.[104]

The TAIC Act provides the legal framework for the investigation of accidents involving aircraft, ships, and rail transport. Its primary objectives include determining the circumstances and causes of accidents, identifying safety issues, and making recommendations to enhance transport safety. Under this Act, the TAIC has the authority to investigate accidents, gather evidence, and issue reports with

[99] Subsection (2) in Section 59, Division 1, Part 6 in the TSI Act.
[100] Subsection (3) in Section 59, Division 1, Part 6 in the TSI Act.
[101] *See*, Australian Transport Safety Bureau, 'Freedom of Information' <https://www.atsb.gov.au/about_atsb/foi> accessed 31 January 2024.
[102] Transport Accident Investigation Commission Act 1990 of New Zealand (Public Act 1990 No 99, Version as at 5 April 2023) (TAIC Act)
[103] Title (a), TAIC Act
[104] Title (b), TAIC Act

findings and safety recommendations. The Commission operates independently from government agencies and regulatory bodies to ensure impartiality and transparency in its investigations.

Overall, the TAIC Act plays a crucial role in promoting transport safety in New Zealand by investigating accidents thoroughly and recommending measures to prevent similar incidents in the future.

4.3.2 Competent authority

The competent authority conducting the balancing test is the High Court of New Zealand.[105]

4.3.3 Non-disclosure[106]

4.3.3.1 Records based on the personal statement and Submissions

The following four records are protected under the TAIC Act:[107]

- Statement or submission made to the Commission in the course of an investigation; or
- Recording of an interview by a person engaged in an investigation by the Commission that is generated in the course of an investigation, or a transcript of such a recording; or
- Note or opinion of a person engaged in an investigation by the Commission that is generated in the course of an investigation; or
- Information relating to an investigation that the Commission provides in confidence to any other person (unless that information is a record specified in section 14C(2) of the TAIC Act)

In principle, these records are not permitted to be disclosed. However, if the TAIC provides its consent to the person who provides information to produce the mentioned records in the above list, the records may be disclosed.[108]

Moreover, the TAIC Act does not prohibit persons who made the submission to create the records mentioned above from sharing the information on their own submission with anyone who is not involved in the investigation.[109] Therefore, for these protected records, original sources may be available, although the TAIC does not grant the disclosure.[110]

4.3.3.2 Cockpit recordings

The TAIC Act outlines strict guidelines regarding the disclosure of cockpit voice and video recordings, the transcripts of the recordings, and documents or records containing information about identifiable natural persons.[111] The records may be disclosed under three circumstances:[112]

- With the written consent of the Commission, for the purpose of an investigation by the Commission into an accident or incident to which the record pertains;
- By order of the High Court under before and in civil proceedings; or
- When requests are made by persons who are recorded.[113]

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[105] Section 14C(1)(b), Part 3, TAIC Act.
[106] The TAIC Act provides for the admissibility of records at proceedings and the use of recording during the proceedings in a detailed manner next to disclosure. However, as such, it is outside the scope of this study; Section 4.3.3 of this research does not discuss the matter.
[107] Section 14B(2), Part 3, TAIC Act.
[108] Section 14B(1), Part 3, TAIC Act.
[109] Section 14B(3), Part 3, TAIC Act.
[110] Cf. Section 2.5.5. Even if the information is provided to a publisher or broadcast, this particular case is not considered as disclosure. *See*, Section 14(K)(C), Part 3, TAIC Act.
[111] Section 14C(2), Part 3, TAIC Act.
[112] Section 14C(1), Part 3, TAIC Act.
[113] Section 14Q, Part 3, TAIC Act.

In addition, just like the personal statement and submissions discussed in Section 4.3.3.1, persons who are recorded and transcribed thereon may provide information to external parties outside the accident investigation.[114]

4.3.3.3 Non-disclosure based on Freedom of Information

Under Section 14R of the TAIC Act,[115] records mentioned in Sections 4.3.3.1. and 4.3.3.2 are exempted from the Official Information Act 1982 of New Zealand on the grounds of the freedom of information.[116]

4.3.4 Relevant case law[117]

4.3.4.1 Director of Civil Aviation v Kirby

The main issue being discussed in the pre-trial application for the Judge Alone trial in the case of *Director of Civil Aviation v Kirby* is the admissibility of GoPro camera footage and audio recordings as evidence in the trial. The defence argues that the protections provided to pilots under the TAIC Act should extend to the footage captured by the cameras, while the prosecution contends that the recordings should be admissible as they do not fall under the definition of cockpit voice recordings or cockpit video recordings covered by TAIC Act. The interpretation of the TAIC Act and its application to the specific circumstances of the case is a key point of contention in the pre-trial application.

The defendant, Mr. Kirby, argues that the GoPro camera footage and audio recordings should not be allowed as evidence in the trial, claiming protections under the TAIC Act. He asserts that the TAIC Act's provisions regarding cockpit recordings should extend to the recordings made by the cameras. Conversely, the Crown argues for the admissibility of the footage and recordings, contending that they do not fall under the TAIC Act's definition of cockpit recordings. The Crown emphasises compliance with relevant sections of the Evidence Act and TAIC Act, stating that the evidence provides direct and reliable information about the events in question. Both sides base their arguments on the interpretation of the TAIC Act and its application to the case's circumstances, particularly regarding the admissibility of the GoPro recordings in the trial.

The Judge determined that the evidence from the GoPro cameras and audio recordings would be admissible in the trial. The decision was based on the interpretation of the TAIC Act and its provisions, which did not afford protection to the evidence in question in this specific case. The Judge considered the background and policy reasons behind the legislation, as well as the nature of cockpit voice recordings and cockpit video recordings covered by the TAIC Act. Additionally, the Judge found that there was no basis for claiming that the evidence was confidential to Mr. Kirby. Therefore, the application was granted, and there was an order admitting the evidence of the cockpit recordings for use in the trial.

4.3.4.2 Opinions of the New Zealand Privacy Commissioner

The edited transcript attached to the accident report contained excerpts from the cockpit voice recording (CVR). It specifically included conversations and communications between the pilots that related to piloting the aeroplane. The transcript did not include any information or conversations that were unrelated to the operation of the aircraft.

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[114] Section 14C(3), Part 3, TAIC Act.

[115] Section 14R, Part 3, TAIC Act

[116] Official Information Act 1982 of New Zealand (Public Act 1982 No 156, Version as at 1 May 2023)

[117] Section 4.3.3.3. analyzed that Freedom of Information is not a suitable ground to request disclosure; hence, no case law is discussing the matter. Nevertheless, two cases are presented in this section to see how judges conducted the balancing test.

The Transport Accident Investigation Commission (TAIC) justified the disclosure of the CVR transcript by stating that the transcript was considered part of its findings in connection with the investigation of the aeroplane crash. The TAIC obtained the CVR and made a transcript as part of its investigation process to determine the circumstances and causes of the accident. The Commission argued that the transcript was essential as it provided the evidential basis in support of their findings. Justice Panckhurst also supported this view by stating that in the context of an air accident investigation, reference to relevant facts is crucial for the findings to be intelligible and valuable. Therefore, the TAIC believed that the disclosure of the transcript in the accident report was allowed under information privacy principle 11(a) as it was directly related to the purposes for which the information was obtained.

In response to the union's complaint about the disclosure of the cockpit voice recording transcript by the TAIC, the Privacy Commissioner considered the purposes for which the TAIC obtained the CVR and its contents. After reviewing the case, the Privacy Commissioner accepted the TAIC's justification that the transcript was part of its findings and essential for the investigation process. The Commissioner concluded that the disclosure of the transcript in the accident report was allowed under information privacy principle 11(a) as it was directly related to the purposes for which the information was obtained. Therefore, the Commissioner determined that the complaint did not have substance, indicating that no further actions were taken against the TAIC regarding the disclosure of the cockpit voice recording transcript.

4.4 Republic of Ireland

4.4.1 Relevant legal framework of the Republic of Ireland

As a Member State of the EU, the legal framework of Regulation (EU) No 996/2020, as amended by Regulation (EU) No 376/2014, applies with direct legal effect to incident and accident records. Hence, this section omits the discussion on the legal framework in Ireland in this specific regard.[118]

4.4.2 Competent authority

In Ireland, the High Court conducts the balancing test.[119] The relevant minister, chief inspector, investigator in charge or anyone involved in the investigation shall not disclose any of the records that fall under the list, which Section 4.4.3 will discuss.

4.4.3 Non-disclosure

The Air Navigation Regulation in Ireland provides the records to be protected in a straightforward manner. The protected items before the balancing test are:[120]

- Statements taken from persons by the investigation authorities in the course of their investigation;
- Communications between persons involved in the operation of the aircraft;
- Medical or private information regarding persons involved in the occurrence;
- CVR recording or transcript from such recordings;
- Recordings and transcriptions of recordings from air traffic control units;
- FDR records or other data recordings or output from such recordings;
- Cockpit airborne image recordings and any part or transcripts from such recordings;
- Opinions expressed in the analysis of information, including CVR, FDR, and data recorder information; and

[118] The regulation can be found in S.I. No. 460/2009 - Air Navigation (Notification and Investigation of Accidents, Serious Incidents and Incidents) Regulations 2009 (Air Navigation Regulation)
[119] Section 20(1), Part 4, Air Navigation Regulation.
[120] Section 20(1), Part 4, Air Navigation Regulation.

- Names of persons involved in the accident or incident.

While the civil aviation authority functions as a Just Culture body in the legal framework of Regulations (EU) No 996/2010 and No 376/2014, the legal framework does not provide how the balancing test should be conducted.

4.4.4 Relevant case law

There is no publicly available case law concerning the non-disclosure of accident records in the Republic of Ireland.

4.5 United Kingdom

4.5.1 Relevant legal framework of the UK

After the UK left the EU, the previously in force Regulation (EU) No 996/2010 remained seamlessly applicable in the UK and, after adoption in national law, is subsequently referred to as the 'UK Accident Investigation Regulation'.

In addition to the legal framework, a practical agreement is in place. The UK's Aviation Accident Investigation Authority has entered into a Memorandum of Understanding (MoU) with The Crown Prosecution Service (CPS) and other accident investigation boards.[121] This MoU, while only reflecting a portion of it, aligns with Standard 5.10 of ICAO Annex 13, which mandates cooperation between the Air Accidents Investigations Branch (AAIB) and the CPS. Despite lacking formal legal force, this MoU is designed to establish effective operational collaborations. This MoU directly requires cooperation between the AAIB and CPS. Without any binding effect,[122] the mentioned MoU still aims to create "practical working arrangements."[123]

It is important to note that in the UK, it is the practice to institute a Coroner's Inquest in England, Wales and Northern Ireland, and in Scotland a Fatal Accident Inquiry to investigate and determine by way of public hearing(s) the circumstances of a sudden, unexplained or suspicious death. Such inquests aim to determine what happened rather than to determine responsibility; for the latter, the civil and criminal courts take jurisdiction. If an inquest finds that there has been an unlawful killing, this would be referred to the CPS. If the offender, for instance, an aircraft manufacturer, is not based in the UK, there may be little that can be done to pursue criminal proceedings; nonetheless, this may provide a sense of 'closure' for the victims' families. Following on from an inquest

4.5.2 Competent authority

In the UK, the competent authority to conduct the balancing test is the High Court.[124]

[121] Government of the UK, *Policy Paper - Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020.
[122] Government of the UK, *Policy Paper - Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 2.
[123] Government of the UK, *Policy Paper - Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020.
[124] *See*, Section 4.5.1. and Government of the UK, *Policy Paper - Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 2.

4.5.3 Non-disclosure

4.5.4 Relevant case law

4.5.4.1 Chief Constable of Sussex Police v Secretary of State for Transport and British Airline Pilots Association[125]

The High Court faced the complex task of balancing public interest and safety concerns following the tragic Shoreham air show crash in 2015. The court had to decide whether to disclose the pilot's statements and cockpit film footage, considering the potential impact on future accident investigations by the AAIB and the necessity for effective criminal investigation by the police.

For the pilot's statements, the court declined disclosure to prevent deterring future safety reporting, recognising these statements were made to enhance safety rather than for self-incrimination. This decision aimed to encourage open participation in technical investigations without fear of legal repercussions, directing the police to conduct their interviews independently.

Conversely, the court approved the release of the cockpit film footage, differentiating it from the pilot's statements. Despite arguments that disclosure might discourage the use of recording devices and affect AAIB's fact-finding abilities, the court found that the footage, installed for leisure and commercial reasons, could significantly aid the police investigation. This decision underlined the importance of the evidence's intended purpose over broader safety concerns.

In a later development, when the Coroner sought access to the same footage and additional materials for a re-investigation, the court applied a harm-benefit analysis. Emphasising the detrimental effect on future AAIB investigations and international cooperation, the court highlighted the need to protect sensitive materials to ensure ongoing trust and collaboration in aviation safety efforts. The court ultimately found no public interest in re-examining the AAIB's completed investigation without credible evidence of deficiencies, rejecting the Coroner's application.

These decisions illustrate the High Court's case-by-case approach to balancing the imperatives of safety, legal accountability, and public interest. The outcomes reflect a nuanced understanding of the distinct purposes behind collecting different types of evidence and the broader implications of disclosure on safety investigations and international aviation relations.

4.5.4.2 Sumburgh Helicopter Case[126]

This case centres on a routine flight transporting oil and gas workers to drilling platforms in the North Sea, which ditched in the North Sea approximately 1.7 nautical miles west of Sumburgh Airport in Shetland in Scotland. This accident resulted in four deaths, all of which were passengers: two from drowning as they were unable to escape from the helicopter while another escaped but drowned before reaching the surface and the fourth died from cardiac arrest from the stress. The captain and others survived and thus were able to contribute to the inquiry through their testimonies.

The Fatal Accident Inquiry found that the flight crew of the helicopter “failed to maintain the target approach airspeed and the stabilised approach criteria contained in the operator’s operations manual during the latter stages of the non-precision approach to Sumburgh Airport. This was due to

[125] Chief Constable of Sussex Police v Secretary of State for Transport (First Defendant) British Airline Pilots Association (Second Defendant) [2016] EWHC 2280 (QB)

[126] DETERMINATION UNDER THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC (SCOTLAND) ACT 2016 INTO THE DEATHS OF GEORGE THOMAS ALLISON, SARAH HELEN DARNLEY, GARY MCCROSSAN AND DUNCAN MUNRO, [2020] FAI 34, available at: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020fai34.pdf?sfvrsn=3b655add_0.

the flight crew not effectively monitoring the helicopter's flight instruments, thereby allowing the helicopter to enter a critically low energy state resulting in the loss of control of the aircraft."[127]

Given the circumstances, the CPS (in Scotland, the Crown and Police Scotland) very clearly wanted to access the CVR. However, the AAIB was prohibited from disclosing this evidence to anyone without a court order. The Lord Advocate was required to petition the court to order the Secretary of State for Transport to make the recorder available to the CPS. This application was opposed by the British Airline Pilots Association and both members of the flight crew. In his judgment, Lord Jones permitted the order subject to several conditions. While the AAIB did not oppose the petition, the Advocate General's Office submitted a letter that set out the concerns of the Secretary of State for Transport "about disclosure of the cockpit recorder, including the startling proposition that it is likely 'that, were recordings to be made public, pilots would develop a habit of erasing CVR record after incidents, to ensure that their words and comments do not become publicly known and so are not used by third parties seeking to apportion blame or liability."[128]

4.6 United States

4.6.1 Relevant legal framework of the US

The legal framework for investigating transportation accidents in the United States is anchored by two critical components: 49 U.S.C. §1153 and 49 C.F.R. §835.1, each serving distinct yet complementary roles in managing accident reports and the involvement of the National Transportation Safety Board (NTSB).

4.6.2 Competent authority

In the US, the balancing test in the context of ICAO Annex 13 is not implemented. However, under 49 U.S.C. §1154, Courts may examine the interests to determine the disclosure.

4.6.3 Non-disclosure

Accident investigation records are governed by 49 U.S.C. §1154. This key statute outlines the rules for discovering and utilising cockpit and surface vehicle image recordings and transcripts. This provision limits the ability to use discovery to access undisclosed images, undisclosed portions of transcripts, and all recordings from the cockpit or surface vehicle image recordings. As protected by statutes outside the FOI Act of the US, these remain "un-FOIAble."

However, the law permits courts to order the discovery of certain materials via an in-camera review if necessary to ensure a fair trial. The statute also includes provisions for handling materials discovered, such as imposing limitations on their use and distribution through protective orders. Importantly, it strictly forbids using any part of an NTSB accident or investigation report as evidence or in a civil lawsuit for damages related to the incidents covered in the report.

However, when it comes to the non-disclosure of accident records, safety is not always the prime interest in the court of the US. Federal Aviation Administration of the US, that is the civil aviation authority, provides the following:

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[127] Judiciary of Scotland, Fatal Accident Inquiry summary, *Sumburgh Helicopter*, https://judiciary.scot/home/sentences-judgments/fai-determination-summaries/2020/10/19/sumburgh-helicopter; *see also* SHERIFFDOM OF GRAMPIAN HIGHLANDS AND ISLANDS, Determination by Sheriff Principal Derek C W Pyle under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020fai34.pdf?sfvrsn=3b655add_0.

[128] Ibid. *See* para. 26 of the judgment: Frank Mulholland QC The Lord Advocate for an Order in terms of Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 [2015] CSOH 80.

"The full exchange of information is vital to effective accident investigation and prevention. The U.S. supports, in principle, measures that are intended to facilitate the development and sharing of information. The laws of the U.S. require the determination and public reporting of the facts, circumstances, and probable cause of every civil aviation accident. This requirement does not confine the public disclosure of such information to an accident investigation. However, the laws of the U.S. do provide some protection against public dissemination of certain information of a medical or private nature.

Also, U.S. law prohibits the disclosure of cockpit voice recordings to the public and limits the disclosure of cockpit voice recording transcript to that specific information which is deemed pertinent and relevant by the investigative authority. However, U.S. Courts can order the disclosure of the foregoing information for other than accident investigation purposes. The standard for determining access to this information does not consider the adverse domestic or international effects on investigations that might result from such access."[129]

Hence, depending on circumstances, interests such as the administration of justice or freedom of information may prevail in the interest of future safety investigations.

Such is also derived from the extended support for "transparency" of the US government. This is towards the citizens, but also to other governmental entities, "dealing with various interests, deserving access." At the same time, this transparency may align with safety, as available documents may also be used for safety improvement purposes. There is also a public docket system where factual records become accessible.[130]

An important point is made that reporters or anyone providing information is aware of this transparency of the US government and federal agencies.[131]

4.6.4 Relevant case law

4.6.4.1 Esquirer v. National Transportation Safety Board (2021)

The case involves Tony B. Jobe, Esquire, as the plaintiff-appellee and the NTSB as the defendant-appellant. It centres on the appeal from the United States District Court for the Eastern District of Louisiana (USDC No. 2:18-CV-10547), and the opinion was delivered by Circuit Judge Stuart Kyle Duncan, with Clement, Ho, and Duncan as Circuit Judges.

The case concerns a US Freedom of Information Act (FOIA) request related to the crash investigation of a sightseeing helicopter in Hawaii. The core legal question was whether communications between the NTSB and outside consultants (representatives from the aircraft's manufacturer or operator) must be disclosed under FOIA, specifically regarding the scope of FOIA's Exemption 5, which shields privileged intra-agency documents from disclosure. Other factual records, possibly not all, are available via the docket of the NTSB.

The district court ruled that the consultant corollary did not apply to documents the NTSB exchanged during its investigation with representatives from the helicopter's operator and manufacturers, citing the Supreme Court's decision in Department of the Interior v. Klamath Water Users Protection Association. The court argued that privileged communications with "self-interested" consultants like those in this case were not protected.

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[129] Administration FA, 'Aeronautical Information Publication - AIP ' (Effective 20 April 2023) <https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html> accessed 31 January 2023

[130] NTSB, 'NTSB Accident Docket Search' <https://www.ntsb.gov/investigations/SitePages/dms.aspx> accessed 29 February 2024.

[131] *See*, Section 2.5.10.1 of this report.

The appeals court reversed the district court's decision, concluding that the outside parties solicited by the NTSB qualify as "consultants" under Exemption 5's corollary. This reversal was based on the nature of NTSB investigations as non-adversarial fact-finding proceedings that do not assign liability and are controlled by the agency. The opinion emphasises that subjecting NTSB's communications with consultants to broad public disclosure would inhibit the agency's ability to receive candid technical input from those best positioned to provide it.

However, determining whether documents are intra-agency is just the first step in applying Exemption 5. The court remanded the case for the district court to determine whether the documents at issue are subject to a litigation privilege ordinarily available to a government agency, indicating that not all intra-agency documents are protected from disclosure, only those which are "normally privileged in the civil discovery context."

Circuit Judge James C. Ho dissented, arguing against the application of Exemption 5 to communications between the NTSB and the employees of the entity the NTSB is investigating. He emphasises the foundational principle of open government and FOIA's role in ensuring the public's right to know what the government is doing, advocating for a narrow construction of FOIA exemptions consistent with the Supreme Court's guidance.

4.6.4.2 Mueller v. US Dept. of Air Force (1999)[132]

This memorandum opinion, authored by District Judge Ellis, addresses a FOIA case wherein the plaintiff sought the disclosure of documents related to an Air Force investigation into allegations of prosecutorial misconduct by Major Martha Buxton during an inquiry into a tragic accident and subsequent legal actions.

The case began with a fatal crash of an F-15 aircraft in 1995, leading to charges of negligent homicide and dereliction of duty against Technical Sergeant Thomas Mueller, the plaintiff's late husband, and another mechanic. Following Mueller's suicide, allegations against Major Buxton for tampering with mail and making false statements during the investigation were investigated, leading to a lengthy report. Although disciplinary action was initially recommended against Buxton, she was ultimately exonerated.

The plaintiff's FOIA request for documents pertaining to Buxton's investigation was denied by the Air Force, citing privacy concerns and exemptions for law enforcement purposes exemptions under FOIA. Despite appeals, the denial was upheld, prompting the plaintiff to file a legal action seeking the documents' release.

The court's analysis focused on whether the privacy interests protected under FOIA exemptions, and the Privacy Act outweigh the public interest in disclosing the requested documents. The court noted that while the documents are contained within a Privacy Act system of records, their release would not significantly contribute to public understanding of government operations or misconduct, given their specific focus on an individual's personnel records and the particular investigation.

The court concluded that the privacy interests of Major Buxton, especially given her exoneration, significantly outweigh the public interest in disclosure. The potential harm to Buxton's reputation and the minimal public interest served by releasing the documents about a specific, isolated incident led to the determination that the documents are properly exempt from disclosure under FOIA exemptions for privacy and law enforcement records.

[132] Mueller v. US Dept. of Air Force, 63 F.Supp. 2d 738 (E.D. Va. 1999)

Therefore, the plaintiff's motion for summary judgment was denied, and the Air Force's motion for summary judgment was granted, upholding the non-disclosure of the requested documents based on the exemptions provided by FOIA and the Privacy Act.

4.6.4.3 In re Air Crash at Taipei[133]

The case concerns the crash of a Singapore Airlines flight in Taipei, Taiwan, on October 31, 2000. The plaintiffs filed a motion to compel Singapore Airlines to produce documents related to the crash, challenging objections based on Singapore's secrecy laws and the Convention on International Civil Aviation. The court held that Singapore's secrecy laws did not preclude the production of documents and that the Convention did not prevent the airline from disclosing the results of Taiwan's investigation of the crash. The motion was granted in part and denied in part.

The court examined the relevance and overbreadth of the document requests, as well as the applicability of the Singapore Official Secrets Act and the ICAO Annex 13 to the case. It concluded that the interests of the US and the plaintiffs in obtaining the information outweighed the adverse impact of disclosure on Singapore and future investigations. The court ruled on various requests for document production, granting some and denying others, and ordered Singapore Airlines to produce responsive documents and verifications as specified.[134]

Key points include the court's detailed analysis of the balance between respecting foreign secrecy laws and the need for disclosure in US litigation, as well as its consideration of the importance of the requested information for the plaintiffs' ability to prosecute their claims. The ruling highlights the complexities involved in international litigation, especially when foreign laws and international conventions potentially conflict with US legal proceedings.

4.7 Summary of findings in Chapter 4

The examination of how ICAO Member States handle the balancing test for disclosing accident records reveals a nuanced approach tailored to each jurisdiction's legal framework and practical considerations. Chapter 4 offers an in-depth analysis of domestic legal frameworks and practices in Australia, New Zealand, Ireland, the UK, and the US, providing insight into the varying methodologies and outcomes in these countries.

In Australia, the Transport Safety Investigation Act 2003 establishes a clear mechanism for protecting On-Board Recording (OBR) information, with courts and coroners playing pivotal roles in determining disclosure. The legislation allows for a balancing test that considers the public interest against potential adverse impacts on future investigations. Similarly, New Zealand's TAIC Act outlines strict guidelines for handling investigation records, with the High Court responsible for the balancing test. The Act emphasises the non-disclosure of sensitive information unless specific criteria are met, ensuring the integrity of investigations and the protection of involved parties.

The approach of the Republic of Ireland, under EU regulations and the Air Navigation Regulation, highlights a straightforward method for protecting certain records, with the High Court evaluating the need for disclosure against the backdrop of maintaining a Just Culture and safeguarding future investigations. However, Ireland has not established any balancing test mechanism and standards.

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[133] *In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374, 380 (C.D. Cal. 2002).

[134] The documents with the access granted are the cockpit voice recorders and unpublished portions of the transcript thereof. *See, In re Air Crash at Taipei, Taiwan on October 31, 2000*, 211 F.R.D. 374, 380 (C.D. Cal. 2002) para 381.

The UK, post-Brexit, continues to adhere to principles aligned with ICAO standards, emphasising cooperation between investigation authorities and legal bodies through Memoranda of Understanding. The High Court's decision in the Chief Constable of Sussex Police case illustrates a case-by-case approach to balancing safety, legal accountability, and public interest, with specific attention to the purpose behind evidence collection and its implications for safety investigations and international relations.

In contrast, the US legal framework, while supporting the principle of information exchange for accident investigation and prevention, allows for broader disclosure under certain conditions, as evidenced by case law. The courts may order disclosure that is not strictly confined to accident investigation purposes, taking into consideration the administration of justice and freedom of information.

This chapter underscores the delicate balance between protecting sensitive information to ensure the integrity of safety investigations and the public interest in transparency and justice. While methodologies and legal bases vary across jurisdictions, the common goal remains to safeguard the effectiveness of accident investigations, promote safety, and maintain public trust in the aviation industry.

5 Conclusion

5.1 Responses to the research questions

5.1.1 Just Culture

- **How should the concept of Just Culture be interpreted and applied according to ICAO Annex 13 and Regulation (EU) No 996/2010 as amended?**

Just Culture is fundamentally about balancing accountability and learning from the experience in aviation safety. According to ICAO Annex 13 and Regulation (EU) No 996/2010, it encourages an environment where professionals are able to report safety issues without fear of undue punishment, except in cases of gross negligence or wilful violations. This culture supports the open sharing of information critical to understanding and mitigating risks in aviation operations. The application of Just Culture within these frameworks is about ensuring that while safety is paramount, individuals are not unfairly penalised for honest mistakes that provide valuable learning opportunities.

The concept of Just Culture, as outlined in ICAO Annex 13 and Regulation (EU) No 996/2010, emphasises the importance of creating an environment within the aviation industry where professionals can report safety issues without fear of undue punishment. Just Culture aims to strike a balance between accountability and learning in aviation safety. It encourages an open and transparent reporting culture that is essential for understanding and mitigating risks in aviation operations.

According to ICAO Annex 13 and Regulation (EU) No 966/2010, Just Culture promotes an atmosphere where individuals are not treated unfairly for honest mistakes that provide valuable learning opportunities. It is that safety is paramount in the aviation sector, and it seeks to foster a culture where professionals feel comfortable reporting safety concerns without the fear of reprisals, sanctions, or retaliation.

In essence, the interpretation and application of Just Culture within the frameworks of ICAO Annex 13 and Regulation (EU) No 996/2010 revolve around ensuring that safety remains a top priority while also acknowledging that human errors are inevitable. By promoting a culture of openness and non-punitive reporting, Just Culture contributes to enhancing safety standards and fostering continuous improvement within the aviation industry.

- **How does Just Culture impact Dutch legislation and regulations?**

Just Culture has a significant impact on Dutch legislation and regulations within the aviation sector. In the context of Dutch law, Just Culture should be already integrated into the legal framework to promote a non-punitive environment that encourages the reporting of safety-related incidents and issues due to the binding force of Regulation (EU) No 996/2010. In this, the Dutch legislation and regulations align with the principles of Just Culture to create an environment where individuals feel safe to report safety concerns without the fear of facing punitive measures.

Within this framework, Just Culture should be interpreted as a culture that does not punish front-line operators or individuals for actions, omissions, or decisions that are commensurate with their experience and training. This means that unless there is evidence of gross negligence, violations, or destructive acts, individuals are not responsible for their actions in the context of safety-related incidents.

Furthermore, Dutch legislation and regulations support the principles of transparency and accountability, which are essential components of Just Culture. By fostering a culture of openness and learning from mistakes, Dutch laws aim to improve aviation safety standards and practices. The integration of Just Culture into Dutch legislation underscores the country's commitment to promoting a safety culture that promotes learning, improvement, and the prevention of future incidents through the sharing of safety-related information.

Overall, Just Culture has a positive impact on Dutch legislation and regulations by promoting a proactive approach to safety management, encouraging reporting, and creating a supportive environment for safety-related communication and collaboration within the aviation industry.

5.1.2 ICAO Annex 13

- **What criteria are used to determine which documents must remain confidential according to Article 5.12 of ICAO Annex 13 to the Chicago Convention / Regulation (EU) No 966/2010, and how are these criteria applied in aviation accident and incident investigations?**

Article 5.12 of ICAO Annex 13 to the Chicago Convention and Regulation (EU) No 966/2010 outlines criteria for determining which documents must remain confidential in aviation accident and incident investigations. These criteria are crucial for balancing the need for transparency with the protection of sensitive information to ensure the integrity of safety investigations. The application of these criteria plays a vital role in safeguarding sensitive data while facilitating the sharing of relevant information for safety improvement purposes.

The criteria used to determine confidentiality of documents typically include:

- **Sensitive Safety Information**: records containing sensitive safety information, such as statements from individuals involved in the investigation, personal health information, or opinions expressed during the analysis phase, are often considered confidential to protect the privacy and integrity of individuals and the investigation process.
- **Legal Considerations**: national laws and constitutional principles may dictate the confidentiality of certain documents to ensure compliance with legal requirements and protect the rights of individuals involved in the investigation.
- **Safety Investigation Purposes**: documents that are essential for safety investigation purposes, including flight recorder data, cockpit voice recordings, and other sensitive materials, are often safeguarded to maintain the integrity of the investigation and prevent misuse of information.

- **Non-Disclosure of Certain Information**: certain information, such as the identity of individuals involved in accidents or incidents, may be withheld from public disclosure to respect privacy rights and prevent unwarranted exposure of individuals involved.

These criteria are applied in aviation accident and incident investigations to strike a balance between transparency and confidentiality. By identifying and safeguarding sensitive information while ensuring the necessary disclosure of relevant data for safety improvement, aviation authorities can uphold the principles of Just Culture, promote safety reporting, and enhance safety management practices within the industry.

Overall, the criteria outlined in Article 5.12 of ICAO Annex 13 and Regulation (EU) No 996/2010 serve as guidelines for determining the confidentiality of documents in aviation accident investigations, emphasising the importance of protecting sensitive information while promoting transparency and accountability in safety-related matters.

However, the list of records provided by ICAO Annex 13 differs from Regulation (EU) No 996/2010. Along with their respective emphases on stricter protection for certain types of records, they highlight both the commonalities and differences in how sensitive information is categorised and protected in the context of aviation safety investigations.

- *Commonalities:*
    - Cockpit Voice and Image Recordings: Both Annex 13 and Regulation (EU) No 996/2010 emphasise the sensitivity of cockpit voice and image recordings and their transcripts, acknowledging their critical importance to investigations and the need to protect personal privacy.
    - Statements and Communications: Statements taken from persons involved in the investigation and communications between those involved in the operation of the aircraft are considered sensitive in both Annex 13 and Regulation (EU) No 996/2010, underscoring the importance of protecting the identities and information of those involved.
    - Medical or Private Information: The protection of medical or personal information about individuals involved in the incident or accident is a common concern, highlighting the need for confidentiality and respect for privacy.
    - Analysis and Opinions: Notes, drafts, and opinions, especially those related to flight recorder information, are deemed sensitive, reflecting the need to safeguard the investigative process and the conclusions drawn from it.
    - Draft Reports: Drafts of preliminary, final reports, or interim statements are recognised as sensitive in both Annex 13 and Regulation (EU) No 996/2010, indicating the importance of ensuring the accuracy and integrity of investigative findings before they are made public.
- *Differences:*
    - Specificity in Protection Levels: Regulation (EU) No 996/2010 explicitly outlines stricter protection measures for certain types of records, such as all communications involved in the operation of the aircraft and internal air traffic control recordings, which are not explicitly differentiated in Annex 13.
    - International Cooperation: Regulation (EU) No 996/2010 mentions the sensitivity of information and evidence provided by investigators from other Member States or countries, highlighting the importance of international standards and practices in protecting sensitive safety information, a point not explicitly covered in Annex 13.

- Covering Letters and Occurrence Reports: Regulation (EU) No 996/2010 uniquely identifies the sensitivity of covering letters for safety recommendations and occurrence reports filed under specific directives, indicating a broader scope of protected documents than Annex 13, which focuses more on investigation-generated content.

In summary, while both ICAO Annex 13 and Regulation (EU) No 996/2010 highlight the sensitivity of various types of information gathered during safety investigations and the need for their protection, Regulation (EU) No 996/2010 provides a more detailed outline of protections, including specific references to regulations and a broader scope of documents and communications that warrant stricter confidentiality measures.

- **What is the relationship between Standards 5.12 and 6.2 of ICAO Annex 13?**

Standard 5.12 delineates restrictions on the disclosure of specific records by the State responsible for investigating an accident or incident. It identifies records such as cockpit voice recordings, airborne image recordings, transcripts thereof, and other records under the control of the accident investigation authority, stipulating that these should not be disseminated for purposes other than the investigation itself. However, exceptions are permitted if the competent authority, in line with national laws, determines that disclosing or utilising these records outweighs the potential adverse impacts on ongoing or future investigations.

In contrast, Standard 6.2 centres on the handling of draft reports and documents acquired during accident or incident investigations. It mandates that States refrain from circulating, publishing, or granting access to draft reports or any investigation-related documents without explicit consent from the State that conducted the investigation. An exception to this rule exists if said reports or documents have already been made public or released by the investigating State.

While Standard 6.2 primarily addresses the circulation and publication of draft reports and investigation documents, it indirectly influences the dissemination of specific accident records covered under Standard 5.12. By requiring consent from the investigating State before circulating investigation-related documents, Standard 6.2 suggests a level of control by the investigating State over the release of information.

In practical terms, if a State conducting an accident investigation chooses not to consent to disseminating certain accident records covered under Standard 5.12, it could use the framework provided by Standard 6.2 to withhold draft reports or investigation-related documents containing these records. By doing so, the investigating State can maintain control over the release of sensitive information, including cockpit voice recordings or medical data, while adhering to the guidelines outlined in both standards. In addition, it is possible for the investigating State to withhold the disclosure of records within its own jurisdiction, citing Standard 6.2. The Standard implies that the investigating State has the authority to decide whether or not to release the records, regardless of any restrictions outlined in Standard 5.12. Therefore, if the investigating State chooses to withhold the records based on Standard 6.2, it would not be possible to obtain access to those records as the investigating State has not consented.

- **What is the (legal) meaning and application of Just Culture to the importance of public access?**

Just Culture, in a legal context, refers to a safety culture within the aviation industry that encourages open and transparent reporting of safety-related incidents and issues without fear of punitive measures, except in cases of gross negligence or willful violations. The concept of Just Culture

emphasises the importance of creating an environment where individuals feel safe to report safety concerns, errors, or incidents, with the primary goal of improving safety standards and preventing future accidents.

When it comes to the importance of public access, Just Culture plays a crucial role in balancing transparency with the protection of sensitive information, but from the perspective of international civil aviation. While promoting a culture of openness and accountability, Just Culture also recognises the need to safeguard certain confidential information to maintain the integrity of safety investigations and protect the privacy rights of individuals involved.

In the context of public access to information related to aviation accidents and incidents, Just Culture ensures that relevant safety information is shared with the public to enhance safety awareness, promote learning from past incidents, and drive continuous improvement in safety practices. However, Just Culture also acknowledges the necessity of withholding certain sensitive safety information to prevent misuse, protect privacy, and maintain the effectiveness of safety investigations.

Therefore, the legal meaning and application of Just Culture to the importance of public access involve striking a delicate balance between transparency and confidentiality. By upholding the principles of Just Culture, aviation authorities can promote a culture of openness and learning while respecting the need for confidentiality in certain circumstances to ensure the effectiveness and integrity of safety investigations. This approach ultimately contributes to enhancing aviation safety standards and fostering a culture of continuous improvement within the industry.

5.1.3 Balancing test

- ***Do Member States of ICAO conduct the balancing test?***

The States studied in this report conduct the balancing test. While it is unclear if all ICAO Member States conduct the balancing test, they are encouraged to conduct a balancing test to determine the disclosure of accident and incident investigation records. The balancing test involves weighing the competing interests of transparency and public access against the need to protect sensitive information and maintain the integrity of safety investigations. By conducting this test, Member States can ensure that relevant safety information is shared appropriately while safeguarding confidential data and respecting privacy rights.

The balancing test is essential for upholding the principles of Just Culture and promoting transparency within the aviation industry. It allows Member States to assess the potential impact of disclosing certain information on safety investigations, legal considerations, privacy rights, and public interest. By considering these factors, Member States can make informed decisions regarding the disclosure of accident records and strike a balance between transparency and confidentiality.

While conducting the balancing test is not mandatory under ICAO Annex 13 due to the legal force of SARPs, it is considered a best practice for ensuring the responsible and effective management of safety-related information. By evaluating the competing interests at play and applying the principles of Just Culture, Member States can navigate the complexities of disclosing accident records in a manner that promotes safety, transparency, and accountability within the aviation sector.

Overall, the balancing test serves as a valuable tool for the Member States of ICAO to make informed decisions regarding the disclosure of accident and incident investigation records, taking into account the various considerations involved in balancing transparency with the protection of sensitive information.

- **How do the various ICAO Member States apply the balancing test to possibly make certain types of documents that must remain confidential public?**

In Chapter 4 of this report, various States, including Australia, New Zealand, Ireland, the UK, and the US, are discussed in terms of how they conduct the balancing test for disclosing accident records. Observations on the practices can be summarised as follows:

- Non-disclosure Policies:
    - Legal Framework: All countries studied in this report have established legal frameworks governing accident investigations, which outline procedures for handling and disclosing accident records.
    - Competent Authority: Each country designates a competent authority responsible for determining the disclosure of accident records. This authority may vary, including courts, specialised investigative bodies, or coroners.
- Balancing Test
    - In Australia, the Republic of Ireland, and the United Kingdom, a balancing test is conducted to weigh public interest against potential adverse impacts on investigations. In the United States, courts under relevant statutes have the authority to determine disclosure based on interests without explicitly conducting a balancing test as in the other States.
- Protection of Sensitive Information
    - Provisions are in place in all countries to protect sensitive information, including statements, communications, and recordings related to accidents. Specific criteria and conditions for disclosure are outlined in each country's legal framework, ensuring that sensitive information is safeguarded appropriately.
- Regulatory Framework
    - The regulatory frameworks governing accident investigations differ among countries, ranging from standalone acts (e.g., TSI Act, TAIC Act) to EU regulations (e.g., Regulation (EU) No 996/2020) and specific statutes and regulations (e.g., 49 U.S.C. §1154, 49 C.F.R. §835.1).
- FOIA Exemptions (United States Specific)
    - In the United States, exemptions under the Freedom of Information Act (FOIA) and protective orders regulate the disclosure of accident records, considering factors such as privacy, law enforcement, and litigation privileges.

Overall, while there are differences in the specific legal frameworks and competent authorities among Australia, New Zealand, the Republic of Ireland, the United Kingdom, and the United States, all countries share a common goal of protecting sensitive information and ensuring fair investigations through established non-disclosure policies. These policies aim to strike a balance between transparency, accountability, and the need to preserve the integrity of accident investigations.

5.2 Final remarks

Recognised by ICAO, safety is surrounded by the paradigms of transparency and administration of justice, if not more. Especially in the disclosure and use of records collected during the *technical* investigation of accidents and incidents, the interaction and weighting of these three paradigms are evidenced more explicitly. The specific questions in this report focus more on the balance between safety and transparency.

The prime sources of this report are ICAO Annex 13 and Regulation (EU) No 996/2010. They clearly support safety. The basis of such support is embedded in Standard 5.12 in ICAO Annex 13. Regulation (EU) No 996/2010 incorporated Standard 5.12 in Article 14. Yet, the room for balancing interests is also found in both sources. The desk research shows that besides the main interest to protect and enhance safety, in the case of Annex 13, ICAO recognises that the protection is subject to domestic legislation and policy, which seemingly is then not absolute but conditional. In the case of Regulation (EU) No 996/2010, the protection is more robust due to the binding nature of EU Regulations. The report contains an analysis of these aspects through Chapters 2, 3, and 4.

Next to the desk research, this report is based on interviews. While State practices may vary depending on the judicial and domestic culture, two points appeared consistently among interviewees. Firstly, there is a dilemma about how to balance interests, as transparency is also a significant value next to safety. Secondly, unless there is a good reason not to disclose, records should be disclosed carefully, examining and respecting the purpose and intention of the appearance of non-disclosure within ICAO Annex 13. In other words, interviewees recognised the challenges and dilemmas among paradigms.

To conclude, certain parts in ICAO Annex 13, which are the basis of Regulation (EU) No 996/2010, remained vague and open. Especially in the second point mentioned above, the technical expert(s) interviewed pointed out that it is not necessary to restrict access to all records if they are not listed under Annex 13. Also, if the records the relevant accident investigation authorities possess or hold in custody are not original but only copied versions, the copied records in custody should be protected as other sources are available. This emphasises the importance of absolutely protecting the role of accident investigation authorities, which are technical fact-finding. Unless necessary, records should be protected. However, it does also not mean non-disclosure is absolutely supported, as records shall be available for safety purposes. As mentioned, there are also safeguards to mitigate potential negative impacts if determined to be disclosed. All in all, the reason for non-disclosure is to enhance safety by learning from experiences but not absolute prohibition from accessing.

Due to the circumstances concerning the records in question in this report, a question was raised about the time frame of the non-disclosure protection. Neither the ICAO nor the EU specifies the time frame of the non-disclosure protection from the international civil aviation safety perspective. Regarding this point, interviewees either had no opinion or varied opinions. A point raised is that although the point is absent from ICAO Annex 13, certain records listed under Standard 5.12 should probably remain unlimitedly non-disclosed, seeing the purpose of the initial establishment of the Standard. As this point falls outside the scope of this research, the report does not further contain nor analyse this specific point.

Another important point is the difference between disclosure and admissibility as evidence. Both transparency and administration of justice can be the reason for the disclosure of certain records after the balancing test. However, once disclosure is determined the matter of whether the disclosed records are provided conditionally and with limitations for information purposes or widely disclosed to be considered as evidence at a court is still questionable. ICAO and EU do not discuss this aspect. At the national level, some jurisdictions do regulate both aspects, but others do not, as studied in this research project. As the admissibility as evidence before the court is already a long-standing question for disclosed records such as final reports. However, as this point also falls outside the scope of this research, the report does not contain further discussion on, nor analysis of, this specific point.

6 Appendix: Scope of Standard 5.12 in ICAO Annex 13

Record Type	Sensitivity Level	Summary
CVRs/AIRs and transcripts	Highly sensitive	Perceived as an invasion of privacy, critical to investigations, and essential for operational personnel's trust. They may not be subject to the balancing test.[135]
Statements	Highly sensitive	Disclosed with the expectation of confidentiality, it is important for the provider to be willing to share information.
All communications between persons involved in the operation of an aircraft	Highly sensitive	Safety may be compromised if personnel fear their communications could be used adversely.
Medical and private information	Sensitive	Protected due to privacy rights and the need for confidentiality in accessing services.
ATC communications — where publicly broadcasted	Not protected	Publicly available and should be obtained from other sources rather than the investigation authority.
ATC — intrafacility	Highly sensitive	Similar to CVRs/AIRs, they are considered invasive and require protection to maintain trust.
Opinions and analysis generated by the accident investigation authority	Protected against misuse in proceedings to apportion blame or liability	Intended to remain separate from blame or liability proceedings to ensure cooperation and objective analysis.
All information recorded in FDRs and ADRS	Not protected in Annex 13 investigations, but sensitive in daily operations	Sensitive in daily operations, protected under specific provisions for their use.
Information exchanged among States or institutions during investigations	Sensitive, with the potential for damaging relations or reputations	Sensitive due to the potential impact on state relations and the protection of individuals and organisations.
Information provided by stakeholders involved in the investigation	Sensitive, may damage reputations and commercial confidence	It may impact reputations and financial standing, which are protected under laws like IP rights.
Information obtained using statutory powers of compulsion by the accident investigator	Highly sensitive, obtained coercively	Sensitive due to coercive means of obtaining and potential rights conflicts.
Draft Final Report	Highly sensitive, misleading if disclosed prematurely	Misleading if disclosed prematurely, changes possible after consultation.

[135] ICAO, *APAC-AIG/1 : ICAO Safety Information Protection Task Force* (2013), 2.

Final Report	Publicly available, but specific use restricted to preserve investigation integrity	Aimed at accident prevention, its misuse in legal proceedings is discouraged to maintain investigation integrity.