

PROPOSAL FOR THE AMENDMENT OF DOCUMENT SA-CATS 12 ISSUED UNDER THE CIVIL AVIATION REGULATIONS, 2011

PROPOSER

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PROPOSER'S INTEREST

The proposer has been established in terms of the Civil Aviation Act, 2009 (Act No. 13 of 2009), to control and regulate civil aviation in South Africa and to oversee the functioning and development of the civil aviation industry, and, in particular, to control, regulate and promote civil aviation safety and security.

GENERAL EXPLANATORY NOTE

Words in **[bold and solid square bracket]** indicate deletions from the existing regulations.

Words underlined with a solid line indicate insertions to the existing regulations.

Proposal for the amendment of Document SA-CATS 12

1. It is hereby proposed to amend Document SA-CATS 12 by:
 - (a) the substitution for technical standard 12.04.6 of the following technical standard:

12.04.6 PROTECTION OF ACCIDENT AND INCIDENT INVESTIGATION RECORDS

1. INTRODUCTION

1.1.1 The disclosure or use of records listed in regulation 2.04.6, in criminal, civil, administrative, or disciplinary proceedings, or their public disclosure, may have adverse consequences for persons or organisations involved in accidents and incidents, likely causing them or others to be reluctant to cooperate with accident investigation authorities in the future. The determination on disclosure or use required by regulation 12.04.6 is designed to take account of these matters.

1.1.2 In accordance with regulation 12.04.6, the provisions specified in this technical standard are intended to assist the competent authority in making the determination as required by regulation 12.04.6.

2. GENERAL

2.1 The Executive responsible for aircraft accident and incident investigation shall accord the protections in regulation 12.04.6 and this technical standard to the entire recording of the cockpit voice recorder and airborne image recorder, and any transcripts from such recordings. These protections shall apply from the time an accident or incident occurs and continue after the publication of the Final Report.

2.2 The Executive responsible for aircraft accident and incident investigation shall accord the protections in regulation 12.04.6 and this technical standard to the other records listed in regulation 12.04.6(1)(b). These protections shall apply from the time they come into the custody or control of the accident investigation authority and continue after the publication of the Final Report.

Non-disclosure of audio or image recordings to the public

2.3 The Executive responsible for aircraft accident and incident investigation shall take action to achieve the non-disclosure of audio content of cockpit voice recordings as well as image and audio content of airborne image recordings to the public, as provided by regulation 12.04.6(8), such as:

- (a) prevention of disclosure through the adoption of national laws, regulations, and policies; or
- (b) adoption of authoritative safeguards such as protective orders, closed proceedings or in-camera review; or
- (c) prevention of disclosure of recordings through technical means, such as encrypting or overwriting, before returning the cockpit voice recorders or airborne image recorders to the owners.

2.4 The Executive responsible for aircraft accident and incident investigation notes that ambient workplace recordings, such as cockpit voice recordings and airborne image recordings, required by SARPs contained in Part 12 of the regulations may be perceived as constituting an invasion of the privacy of operational personnel if disclosed or used for purposes other than those for which the recordings were made.

3. COMPETENT AUTHORITY

3.1 In accordance with regulation 12.04.6, the Executive responsible for aircraft accident and incident investigation shall designate a competent authority appropriate to the task of administering the balancing test.

4. ADMINISTRATION OF THE BALANCING TEST

4.1 Where the request is for a record to be disclosed or used in a criminal, civil, administrative, or disciplinary proceeding, the competent authority shall be satisfied that a material fact in question in the proceedings cannot be determined without that record, before administering the balancing test. A material fact in question is a legal term used to refer to a fact that is significant or essential to the matter at hand, that one party alleges and that the other controverts, and is to be determined by the competent authority administering the balancing test.

4.2 When administering the balancing test, competent authority shall take into consideration factors such as:

- (a) the purpose for which the record was created or generated;
- (b) the requester's intended use of that record;
- (c) whether the rights or interests of a person or organisation will be adversely affected by the disclosure or use of that record;
- (d) whether the person or organisation to whom that record relates has consented to make that record available;
- (e) whether suitable safeguards are in place to limit the further disclosure or use of that record;
- (f) whether that record has been or can be de-identified, summarized or aggregated;
- (g) whether there is an urgent need to access that record to prevent a serious risk to health or life;
- (h) whether that record is of a sensitive or restrictive nature; and
- (i) 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, willful misconduct, or done with criminal intent.

4.3 The Executive responsible for aircraft accident and incident investigation shall ensure that the administration of the balancing test is done once for a certain category of records and that the result is incorporated into national laws and regulations.

4.4 The competent authority may need to administer a balancing test for determining whether to permit the disclosure of a record and a separate balancing test for determining whether to permit the use of a record.

4.5 Guidance material on the balancing test can be found in the AIID Guidance Manual, Part 4 — Protection of Accident and Incident Investigation Records.

5. RECORDS OF THE DECISIONS

5.1 The competent authority shall record the reasons for its determination when administering the balancing test. The reasons should be made available and referred to as necessary for subsequent decisions.

5.2 The Executive responsible for aircraft accident and incident investigation shall submit the decisions recorded by the competent authority to the ICAO in English to be archived in a public database.

6. FINAL REPORT

6.1 In order to limit the use of the Final Report for purposes other than the prevention of accidents and incidents, the Executive responsible for aircraft accident and incident investigation shall:

- (a) instituting a separate investigation for those other purposes;
- (b) differentiating between the parts of the Final Report to allow the use of factual information contained therein while preventing the use of analysis, conclusions and safety recommendations for apportioning blame or liability; and
- (c) preventing the use of the Final Report as evidence in proceedings to apportion blame or liability.

6.2 In accordance with regulation 12.05.1A(6), Final Reports are publicly available in the interest of accident prevention and are not subject to protection under regulation 12.04.6. However, the use of portions of the Final Report, in particular the analysis, conclusions, and safety recommendations, as evidence before a

Court in view of assigning blame or determining liability is against the purposes for which the investigation was undertaken.

7. ACCIDENT AND INCIDENT INVESTIGATION PERSONNEL

7.1 In the interest of safety and in accordance with regulation 12.03.1, the Executive responsible for aircraft accident and incident investigation shall consider that accident investigation personnel are not compellable to give an opinion on matters of blame or liability in civil, criminal, administrative or disciplinary proceedings”.

(b) the substitution for technical standard 12.04.7 of the following technical standard:

“12.02.7 DETERMINATION OF AIRCRAFT DAMAGE

1. If an engine separates from an aircraft, the event is categorised as an accident even if damage is confined to the engine.
2. A loss of engine cowls (fan or core) or reverser components which does not result in further damage to the aircraft is not considered an accident.
3. Occurrences where compressor or turbine blades or other engine internal components are ejected through the engine tail-pipe are not considered accidents.
4. A collapsed or missing radome is not considered an accident unless there is related substantial damage in other structures or systems.
5. Occurrences of missing flaps, slats and other lift augmenting devices, winglets, etc., that are permitted for dispatch under the configuration deviation list (CDL) are not considered accidents.

6. Retraction of a landing gear leg or wheels-up landing, resulting in skin abrasion only, when an aircraft can be safely dispatched after minor repairs or patching, and subsequently undergoes more extensive work to effect a permanent repair, would not be classified as an accident.
7. If the structural damage is such that the aircraft depressurizes, or cannot be pressurized, the occurrence is categorized as an accident.
8. The removal of components for inspection following an occurrence, such as the precautionary removal of an undercarriage leg following a low-speed runway excursion, while involving considerable work, is not considered an accident unless significant damage is found.
9. Occurrences that involve an emergency evacuation are not counted as accidents unless someone receives serious injuries or the aircraft has sustained significant damage.

Note 1.— *Regarding aircraft damage which adversely affects the structural strength, performance or flight characteristics, the aircraft may have landed safely, but cannot be safely dispatched to a further sector without repair.*

Note 2.— *If an aircraft can be safely dispatched after minor repairs and subsequently undergoes more extensive work to effect a permanent repair, then the occurrence would not be classified as an accident. Likewise, if an aircraft can be dispatched under the CDL with the affected component removed, missing or inoperative, the repair would not be considered a major repair and consequently, the occurrence would not be considered an accident.*

Note 3.— *The cost of repairs, or estimated loss, such as provided by insurance companies may indicate the damage sustained but should not be used as the sole guide as to whether the damage is sufficient to count the occurrence as an accident. Likewise, an aircraft may be considered a “hull loss” because it is uneconomic to repair, without it having incurred sufficient damage to be classified as an accident”.*

MOTIVATION

This proposal emanates from the ICAO finding 6.029, Annex 13 Standard 5.12 and Appendix 2 which provides for the protection of accident and incident investigation records and Attachment E which provides for the guidance for the determination of aircraft damage.