



Organización de Aviación Civil Internacional
**Duodécima Reunión del Comité Directivo Ejecutivo
 del Grupo Regional de Seguridad Operacional
 de la Aviación – Panamérica
 (RASG-PA/ESC/12)**



Montego Bay, Jamaica, 14 to 15 March 2012

**Cuestión 3 del
Orden del Día:**

**Actualización/Estado de los Proyectos y Grupos de Trabajo del
RASG-PA**

**3.4 RASG-PA GSI/3.A Protección de la Información de Seguridad
Operacional**

**PROPUESTA DE ENMIENDA A LA LEGISLACIÓN AERONÁUTICA
PARA PROTEGER LAS FUENTES DE SEGURIDAD OPERACIONAL**

(Presentada por la Secretaría)

RESUMEN	
Esta nota de estudio presenta el historial y estado del proyecto GSI-3 del RASG-PA.	
• Plan Global de la OACI para la Seguridad Operacional (GSI-3) Notificación Eficiente de Errores e Incidentes • Hoja de Ruta para la Seguridad Operacional de la Aviación a Escala Global ISSG (Enfoque Área 3) Impedimentos para la Notificación de Errores e Incidentes • Borrador del Documento RASG-PA GSI-3: Propuesta de Enmienda a la Legislación Aeronáutica con el objeto de proteger las fuentes de seguridad operacional	
Objetivo Estratégico	<i>Esta nota de estudio se relaciona con el Objetivo estratégico A – Seguridad operacional</i>

1. Antecedentes

1.1 Como resultado del análisis de brecha (gap) finalizado en 2008 para la región Panamericana, el RASG-PA desarrolló un proyecto enfocado en el Plan Global de Seguridad Operacional de la Aviación, Iniciativa Global de Seguridad Operacional # 3 “**Notificación Eficiente de Errores e Incidentes**”. Este proyecto RASG-PA fue inicialmente nombrado GSI/3: “Información eficiente de flujo de peligro”, y fue establecido durante la primera reunión del RASG-PA en Puntarenas, Costa Rica, noviembre de 2008. Más adelante el proyecto fue nombrado RASG-PA GSI/3, “**Protección de la Información de Seguridad Operacional**”.

1.2 El programa de trabajo que fue desarrollado incluyó una identificación de las brechas legales, el desarrollo de un modelo de marco legislativo, y condujo a un taller para reguladores, la industria y otras instituciones dentro de los Estados que podrían apoyar la aprobación de cambios legislativos.

1.3 Las etapas iniciales de este proyecto fueron llevadas a cabo gracias al financiamiento que recibió RASG-PA de la Compañía Boeing, así como los apoyos en especie de COCESNA/ACSA, la Autoridad de Aviación Civil de Jamaica e IFALPA, quien proporcionó expertos legales para desarrollar un marco para el modelo legislativo.

1.4 Una de las estrategias del GSI/3 insta a los Estados a introducir cambios en los reglamentos de su legislación principal de aviación, con el objeto de apoyar una cultura justa promoviendo un sistema de notificación voluntaria y protegiendo la información recabada para mejorar la seguridad operacional.

1.5 El RASG-PA estuvo de acuerdo que elaborar un **Modelo de una Propuesta de Enmienda a la Legislación Nacional** sería una de las principales iniciativas del proyecto GSI/3, como una manera de apoyar a los Estados en la elaboración de sus propios cambios legislativos.

2. Propuesta de Enmienda a la Legislación Aeronáutica para la Protección de las Fuentes de Información de Seguridad Operacional

2.1 A principios de junio de 2009, los expertos legales proporcionados por COCESNA/ACSA, Jamaica e IFALPA iniciaron el borrador de un documento titulado “Propuesta de Enmienda a la Legislación Aeronáutica con el objeto de Proteger las Fuentes de Información de Seguridad Operacional” como parte del proyecto RASG-PA GSI/3.

2.2 En marzo de 2010, este borrador fue distribuido a los Estados para su revisión, y también se les solicitó proporcionar el estado de sus actividades como fue acordado durante la Reunión RASG-PA/02, en noviembre de 2009, realizada en Bogotá, Colombia:

2.3 Las respuestas fueron limitadas pero fue evidente que muchos Estados no habían progresado con relación al cumplimiento de la iniciativa GASP GSI/3.

2.4 En junio de 2010, como resultado de los comentarios del RASG-PA ESC y conclusiones de la Conferencia de Seguridad Operacional de Alto Nivel de la OACI (HLSC) la “Propuesta de Enmienda a la legislación aeronáutica” fue revisada para mejorar el documento y también para determinar si las diferencias entre la información y los datos habían sido consideradas en el documento inicial.

2.5 El documento revisado fue presentado durante la Reunión RASG-PA/03 en Punta Cana, República Dominicana, octubre 2010. La Reunión acordó que se requería tiempo adicional para comentarios adicionales de la parte interesada y fue acordado que los comentarios serían aceptados hasta enero de 2011.

2.6 Durante el periodo de comentarios varias partes interesadas advirtieron que la revisión tomaría mucho más tiempo que el inicialmente acordado por la complejidad de los asuntos involucrados. El ESC acordó extender el periodo hasta que las partes pudieran reunirse y discutir el proyecto con los representantes legales respectivos.

2.7 Durante la Reunión RASG-PA ESC/08, en Lima, Perú, marzo de 2011, el ESC fue informado por varios miembros del ESC que sus respectivos departamentos legales habían revisado el documento y no podían apoyarlo en su actual formato. Ellos apoyaron el concepto de la iniciativa pero, con el objeto de avanzar, propusieron una reunión adicional con los representantes de su departamento legal y los que bosquejaron el documento original con el objeto de crear un borrador que ellos pudieran respaldar.

2.8 El ESC apoyó esta propuesta y la Secretaría acordó coordinar la reunión entre Boeing, Airbus, los representantes de IATA y los que originaron el documento para revisar y modificar el informe como fuese necesario. Se acordó establecer una agenda clara, expectativas y un calendario para todas las partes respectivas antes de la reunión. La Secretaría del RASG-PA coordinaría una reunión entre los representantes de Boeing, Airbus e IATA y el proyecto GSI/3. Un experto legal para volver a redactar el marco de referencia legal del documento de orientación para los Estados y Boeing, Airbus y IATA proporcionaría comentarios específicos y propuestas de enmienda para el documento mencionado.

2.9 Durante la teleconferencia del ESC en julio de 2011 el representante de Boeing en el ESC informó al ESC que el abogado que estaba revisando el documento había tomado una licencia por cuestiones de salud, por lo que la futura revisión se retrasará hasta que no se asignara a un nuevo abogado.

2.10 Durante la reunión del RASG-PA ESC/11, octubre de 2011, el ESC solicitó el desarrollo de un calendario que indique cuándo estaría finalizada la revisión final, así como el borrador final que debería ser proporcionado antes de marzo 2012.

2.11 El 23 de febrero de 2012, los representantes legales de Airbus y Boeing se reunieron en la oficina NACC de la OACI, Ciudad de México, México con los expertos legales del proyecto GSI-3 del RASG-PA y los representantes del RASG-PA de la OACI. Los participantes se enlistan en el sumario de discusiones (**Apéndice A, sólo en inglés**). El propósito de la reunión fue discutir la **Propuesta de Enmienda para una Legislación Aeronáutica para la Protección de las Fuentes de Información de Seguridad Operacional**".

2.12 Airbus y Boeing proporcionaron comentarios (**Apéndice B, sólo en inglés**) unos días antes de la reunión los cuales destacaban sus áreas de preocupación y recomendaron mejorar el documento para que todas las partes interesadas apoyaran la versión final.

2.13 Al final de la reunión todas las partes estuvieron de acuerdo con los comentarios proporcionados, y acordaron trabajar en un calendario para revisar y dar una retroalimentación adicional para finalizar el documento.

2.14 Se acordó que todas las partes establecerían el 19 de junio de 2012 como fecha tentativa para terminar el documento y acordaron presentar la versión final durante la Reunión del RASG-PA ESC/13, en Bogotá, Colombia.

3. Siguiendo pasos

3.1 Los representantes legales de RASG-PA estimaron que tomaría un mínimo de dos semanas de trabajo, incluyendo varias teleconferencias con los representantes legales de Airbus y Boeing para finalizar la revisión del documento proyecto GSI-3. Esto no incluye el tiempo que necesitan para que los representantes legales de Airbus y Boeing den comentarios adicionales.

3.2 Los comentarios proporcionados por Airbus y Boeing fueron muy detallados y constructivos de acuerdo a sus cambios propuestos. Sin embargo, debido a la posible complejidad al revisar el documento, el líder del GSI-3 solicitó que la revisión sea finalizada por todas las partes que redactaron el documento original. El representante legal de RASG-PA de IFALPA se comprometió a trabajar en el proyecto pero, por el momento, no puede viajar fuera de México.

3.3 Las partes interesadas discutieron las actividades de la Protección de Información de Seguridad Operacional – Grupo de Tarea (SIP-TF) de la OACI, y sintieron que era muy importante que, debido al alcance del trabajo dentro del SIP-TF y su posible impacto en el proyecto GSI-3, el RASG-PA permanecería involucrado como miembro.

4. Acción sugerida

4.1 Se le solicita a la Duodécima Reunión del Comité Ejecutivo Directivo del Grupo Regional de Seguridad Operacional de la Aviación – Panamérica a:

- a) tomar nota y hacer comentarios sobre la información proporcionada en esta nota de estudio;
- b) apoyar la actividad mediante la aprobación de la adjudicación de fondos para la finalización del proyecto GSI-3; y
- c) aprobar la adjudicación de fondos para la representación del RASG-PA en el SIP TF de la OACI.

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APPENDIX/APÉNDICE A



International Civil Aviation Organization
Regional Aviation Safety Group – Pan America (RASG-PA)
GSI-3 Project Meeting
ICAO NACC Office
23 February 2012



Summary of Discussion

In Attendance:

Mrs. Loretta Martin, ICAO NACC Regional Director and RASG-PA Secretary; Mr. Oscar Quesada, ICAO SAM Deputy Director; Mr. Eduardo Chacin, ICAO NACC Safety Officer; Mr. Adolfo Zavala, ICAO NACC ATM Officer; Ms. Sagrario Padilla, COCESNA/ACSA; Mr. Fernando Perfecto, IFALPA; Ms. Marva Gordon, Jamaica CAA General Counsel; Airbus: Mr. Bill Bozin, Mr. Todd Ptak and Chris Odell; Boeing: Tom McLaughlin and Ms. Allison Kendrick.

Agenda Item 1: Opening

1.1 Mrs. Loretta Martin opened the meeting by thanking all participants for their continued involvement in the RASG-PA GSI/3 project. Mrs. Martin noted that the commitment of the stakeholders to meet in the ICAO NACC Office, Mexico City, Mexico, reflected the commitment to enhance and finalize the model law document that has been prepared through the RASG-PA GSI/3 project.

1.2 Mrs. Martin requested that to the extent possible, participants focus on clarifying and resolving the comments provided by Airbus and Boeing, and develop a timeframe to complete the project and present to the RASG-PA ESC during June 2012 meeting.

Agenda Item 2: Participant Introductions

2.1 The meeting participants introduced themselves and their current and future involvement in the project.

Agenda Item 3: Summary of Project – Status

3.1 The participants were given a summary of how the project was developed, background of the project members, objectives and current status. As mentioned by the RASG-PA Secretary, emphasis was focused on completing the project in the shortest possible timeframe.

Agenda Item 4: Stakeholder Input/Discussion

4.1 Previous to the meeting, Airbus and Boeing provided specific comments on several issues that needed to be clarified in the model law document, along with specific resolutions for each issue. The participants discussed the comments, which included the following points:

- a) Distinction between accident investigation covered by the ICAO Annex 13 and routine use of safety information covered by the model law.
- b) Definition of the information subject to the model law
- c) Definition of the entities covered by the model law
- d) Exceptions allowing disclosure of safety information
- e) Comments on specific model law provisions

4.2 During the discussion of the comments provided, the participants agreed that the language in the document should use and maintain the same ICAO language as used in ICAO annexes to protect safety information. There was also agreement that the document was a little too broad and needed to be re-worded in several areas to narrow the scope to clarify the intent and to protect existing Annex rules.

4.3 At the conclusion of the meeting the participants were in agreement that the issues and points raised could be clarified in the model law and a new version could be drafted incorporating the suggested revisions and clarifications.

Agenda Item 5: Project Next Steps – Timeline for Completion

5.1 The parties agreed to a tentative timeline to redraft the model law and have a new draft completed and ready to be presented during the ESC meeting in Bogota, Colombia, during the third annual aviation safety summit

Agenda Item 6: Other Matters

6.1 The parties agreed to continue to collaborate in order to develop a new enhanced version of the model law.

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**Written Comments of Boeing and Airbus for
RASG-PA GSI-3 Project Meeting on February 23-24, 2012**

Boeing and Airbus thank the ICAO Regional Aviation Safety Group – Pan America (“RASG-PA”) for the opportunity to provide input on the Report of the RASG-PA GSI/3.A Project, which includes a draft model law relating to the protection of safety information. We have identified four initial issues that need to be clarified in the model law. These issues are discussed below, as well as our recommended resolution of each. As we discuss the issues set forth below with you, Boeing, Airbus, or the RASG-PA may identify additional aspects of the law that require discussion, and we anticipate that the parties will work through such issues as they are identified.

1. Distinction Between Accident Investigations Covered by ICAO Annex 13 and Routine Use of Safety Information Covered by the Model Law

We support the current Annex 13 system relating to the disclosure of information collected or generated during the course of investigating accidents and serious incidents. This system is intended to allow investigators to collect the information necessary to identify the probable causes of an accident. We believe that accident investigators should be provided access to all information, whether safety information or otherwise, necessary to determine the probable causes of an accident. We would not support a model law that alters the current Annex 13 processes.

Although we understand that the intent of the authors of the model law was not to alter the existing Annex 13 rules, the model law could be read expansively to restrict the disclosure of safety information in accident or serious incident investigations. For instance, Article 11 of the model law could be read to relate to FDR data collected by Annex 13 investigators regarding an accident flight and to restrict its disclosure beyond the conditions set forth under Annex 13.

Therefore, we recommend that the model law explicitly exclude from its scope information collected in connection with accident and incident investigations conducted under ICAO Annex 13 or by States’ official investigation agencies (e.g., the United States National Transportation Safety Board).

2. Definition of the Information Subject to the Model Law

As currently written, the draft model law lacks clear definition of the information that is covered by the law and the information that is outside the scope of the law. Appropriately defining the material covered by the model law is a critical step in allowing us to understand and hopefully support the model law’s provisions. As a preliminary matter, the model law currently attempts to distinguish between information and data. (*See, e.g.*, p. 10, ¶ 5.3). This distinction is confusing and does not aid in clarifying what the model law is intended to accomplish. ICAO uses the term “safety information” in both Appendix E of Annex 13 and Resolution A 36-9. In these comments, we have used the ICAO terminology of safety information and we recommend that the model law do the same.

Also, it is important to define the types of safety information covered by the model law because, in our view, different types of information should be protected differently. This position is in accordance with ICAO guidance. Paragraph 3.2 of Appendix E of Annex 13 provides, “The

protection should be specific for each [safety data collection and processing system], based upon the nature of the safety information it contains.”

We recommend that the model law cover information from all forms of safety data collection and processing systems, including Safety Management Systems (“SMS”) and State Safety Programs (“SSP”), whether the information originates with operators, regulators, manufacturers, air traffic control agencies, or other actors in the aviation industry.

The current draft of the model law only seems to address safety information originating from operators and perhaps certain other entities, though this is inconsistent in the current text. Articles 5, 13, and 14 of the draft law all refer to operators. Article 5 also refers to “aeronautical service providers” participating in a SMS program accepted by the state, but the term is undefined in the model law. It is important to note that there are and will be sources of safety information beyond operators and their agents. For instance, manufacturers will implement similar reporting programs in the near future for design and manufacturing activities. Indeed, such reporting has already been made mandatory for European-based manufacturers. Safety information generated by other sources and other programs with similar objectives requires equal protection.

3. Definition of the Entities Covered by the Model Law

The RASG-PA should also clarify whether the model law restricts disclosure only by regulatory bodies (the “aeronautical authority” in the language of the model law) or by anyone with access to safety information. The current draft of the model law is inconsistent on this point. For example, Article 7 appears to apply to disclosures only by a regulatory body while Article 10 arguably prevents disclosure by any entity. This distinction is important. If the restrictions apply only to the regulatory body, then the confidentiality provisions could be evaded simply by directing subpoenas or other judicial demands for information to the entity that first reported the information or to other entities that received the information.

We support restrictions on disclosure by any entity, whether a regulator, an individual or organization reporting the safety information, or any third party who gains access to the information. The goal is to encourage open reporting of safety information. That goal is frustrated by inappropriate disclosure whether the disclosure is by regulators, operators, or others.

4. Exceptions Allowing Disclosure of Safety Information

The fourth basic issue to be addressed is the exceptions to be placed on the principle of confidentiality. In other words, when should safety information be disclosed?

a. Principles of Confidentiality and Protection of Safety Information

We are concerned that the basic principles of the draft model law appear inconsistent with fundamental ICAO principles as found in Resolution A 36-9 and Appendix E of Annex 13. “It is not the purpose of protecting safety information to interfere with the proper administration of justice.” Annex 13, Appendix E, ¶ 2.2. “National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety

information in order to improve aviation safety, and the need for the proper administration of justice.” *Id.* ¶ 2.3. ICAO contemplates the use of safety information in a variety of proceedings, provided that suitable safeguards are employed. *Id.* ¶ 3.5.

We recommend that the model law clearly state that it is intended to protect against the inappropriate use of safety information. As defined in Appendix E of Annex 13, inappropriate use is:

the use of safety information for purposes different from the purposes for which it was collected, namely, the use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public.

Id. ¶ 1.5.b. We recommend importing this definition into the model law.

Notably, ICAO defines inappropriate use only in the context of proceedings against “operational personnel,” or where safety information is publicly disclosed. *Id.* ¶ 1.5.b. ICAO’s guidance aims to prevent use of safety information against individuals, not against organizations. Also, ICAO guidance allows use of safety information in civil proceedings. *Id.* ¶ 3.5. Yet, the comparable language in the prefatory materials to the model law, § 4.20, does not include civil litigation in its list, and § 5.9 seems to indicate that safety information should not be used in any legal proceeding. Nothing in Appendix E to Annex 13 counsels against the use of safety information in, for instance, civil litigation allocating responsibility for an accident between an operator and a manufacturer provided that the safety information is shielded from public disclosure. We recommend that the model law track Annex 13’s provisions.

b. Exceptions Justifying Disclosure of Safety Information

ICAO currently allows disclosure under limited exceptions. ICAO permits disclosure where:

an appropriate authority considers that circumstances reasonably indicate that the occurrence may have been caused by conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or willful misconduct.

Id. ¶ 4.b.; *see also id.* ¶ 4.a. We support disclosure in these rare circumstances.

ICAO also allows disclosure of safety information where an appropriate authority determines that the release of the information is necessary for the proper administration of justice and that the need for release of the specific safety information at issue outweighs the broader need for confidentiality of safety information. *Id.* ¶ 4.c.

We also support disclosure in these instances, so long as appropriate procedures are in place to ensure review by judicial authorities and to prevent public disclosure. Relevant safety information should be available to courts and parties in civil litigation arising from an accident in limited circumstances and under controlled conditions protecting the information from public disclosure.

The model law's exceptions allowing disclosure of safety information do not track ICAO guidance. Importantly, there is no general exception in the model law allowing disclosure where the release of information is necessary for the proper administration of justice and the need for information outweighs the interest in confidentiality. We recommend including such an exception.

Moreover, the model law's exceptions are inconsistently applied. Beginning with Articles 7 and 10, it is unclear from the language of the model law whether these are three independent conditions (disclosure if a *or* b *or* c) or three dependent conditions (disclosure if a *and* b *and* c). Assuming that they are independent conditions, these articles appear to allow disclosure of information for use in any criminal proceeding, even for simple negligence, but do not allow disclosure in connection with any civil proceeding, even in cases involving willful misconduct.

The specific language of the exceptions also raises questions as to their interpretation. The first exceptions in these two articles are almost identical. Yet Article 7 refers to information that "might be necessary" for a criminal investigation while Article 10 refers to information that "could be needed." Assuming this is not a translation issue, the purpose and meaning of this difference are unclear. As to the second exceptions in these two articles, the language is difficult to understand. What is the distinction between "information" and "facts"? And, does this mean that "facts" contained in SMS reports can always be disclosed, regardless of the situation? Finally, these articles seem to allow the use of safety information in administrative proceedings relating to the cancellation, suspension, or rejection of licenses or certificates, but not other regulatory enforcement actions. The reason for this distinction is unclear.

Turning to Article 18, voluntarily reported information is treated differently than other types of safety information. For instance, the exception for criminal proceedings is removed and disclosure is now allowed in any instance of willful misconduct or simple negligence. The purpose of the different language is unclear. As a matter of public policy, voluntary reporting of safety information should be encouraged and protected. We recommend that voluntarily reported information be given equal protection, if not superior protection, to other forms of safety information.

Also, in Article 18, the issue of disclosure to Annex 13 investigations is broached for the first time. Assuming that this exception intends to allow accident investigators access to voluntarily reported information, why are accident investigators given access to only this information, but not to other types of safety information? We believe accident investigators should have access to all safety information relevant to determination of the probable causes of an accident.

We recommend that the exceptions in the model law allowing disclosure of safety information should more closely track the exceptions identified by ICAO in Appendix E to Annex 13. Specifically, we support prohibiting the use of safety information against individuals who report the information, subject to the ICAO exceptions. Otherwise, we recommend that (1) accident investigators be allowed access to all relevant safety information, (2) parties to civil litigation arising from accidents be given access to the same information made available to the official accident investigators, and (3) parties to civil litigation be allowed access to other safety information, subject to judicial safeguards, where the release of information is necessary for the proper administration of justice and where the need for disclosure outweighs the interest in

confidentiality. Other approaches could lead to incorrect probable cause determinations and unfair judicial allocations of fault for accidents. This could reduce aviation safety and interfere with the proper administration of justice.

As a final note, we recommend that the prefatory materials include an admonition to the member states that the model law's provisions should be thoughtfully adapted to that state's laws. For instance, the term "gross negligence" has different meanings and consequences in different states. We will be happy to provide examples of this issue when we meet to discuss the model law. But the key point is that the exceptions allowing disclosure should be tailored appropriately to each state's legal system.

5. Comments on Specific Model Law Provisions

In addition to the four fundamental issues discussed above, we are also concerned about several specific provisions of the draft model law. We focus for now on a few examples.

As one example, the scope of Article 21 is unclear. The language appears to imply that reporting individuals are prohibited from testifying regarding an incident that they report, even if the incident is discovered independently of the safety information. If this is the intended effect, it is unclear why this evidentiary bar furthers the broader goals of aviation safety and the proper administration of justice.

As another example, it is unclear whether Articles 13 through 15 allow the model law's provisions to be replaced by contractual agreements negotiated between regulators and operators, at least with respect to data captured by flight data recorders. We do not understand why allowing operators (or other entities) to negotiate different rules for the disclosure of FDR data is desirable.

A separate issue with respect to Articles 13 through 15 is whether these provisions supplant the rules for accident flight data recordings under Annex 13. As described above, we support the current Annex 13 processes and would not advocate replacing those rules with the model law's provisions. We also would not want these provisions to be interpreted in such a way as to bar an operator who has entered into this type of agreement from disclosing FDR data to the relevant airframe or component part manufacturer.

As a final example, the wording in Article 11 is vague, as it does not clarify whether the "action" or "procedure" therein is limited to disciplinary or regulatory enforcement hearings, or whether it includes all forms of civil and criminal proceedings.

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Again, Boeing and Airbus thank you for the opportunity to provide comments to the model law. We look forward to discussing these issues with the RASG-PA legal team.