

High Court Judgement on Sussex Police request for AAIB to release their evidence connected with the Shoreham accident

A closer examination of the government announcement at <https://www.gov.uk/government/news/shoreham-high-court-judgement> (Ref 1) suggests this was a sensible well-reasoned decision. Although the judgment was actually delivered by Mr Justice Singh it will carry even more weight because the other judge was the Lord Chief Justice. The approved judgment has not yet been published but it is highly unlikely to differ in any material respect, if at all, from this version: www.bailii.org/ew/cases/EWHC/QB/2016/2280.html (Ref 2).

It is helpful that the Court dealt with another case which raised related issues:

At the inquest into the Agusta Westland AW139 crash (Lord Ballyedmond/ Edward Haughey and three others), the Senior Coroner for Norfolk ordered that the CVFDR data be disclosed to her – or, at least a transcript of what was said in the final moments (although she did not have the powers to make this order). When the Chief Inspector AAIB refused to comply, she fined him 2 x £1000.

The AAIB sought judicial review of the order and fines and the High Court not only quashed the order and fines but went further:

Unless there is credible evidence that the AAIB's investigation is incomplete, flawed, or deficient, coroners should simply accept the AAIB's conclusions, should not re-open the matter and should regard the cause of the accident as outside the scope of the inquest. ... There is "no public interest in the coroner going over the same ground as the AAIB".

The following are extracts from the Court's comments concerning Shoreham as in Ref 2:

Introduction

3. The Secretary of State submits that the disclosure of the material sought in this case would have a significant and adverse domestic and international impact on future safety investigations, something which the Court is required to weigh on one side of the balance.

The different categories of material sought

40. In my view, the categories of material which the Chief Constable now seeks can be divided into three broad categories for the purposes of analysis. First there are the statements made in response to interviews or discussions by the pilot, Andrew Hill. The second category comprises contemporaneous evidence from the flight itself which is not the product of any human action. In the present case the only material which falls into that category is the film footage of the flight which was made by cameras which had been installed on the aeroplane in question on a voluntary basis. The third category of material is not contemporaneous but comprises material which has been produced by various other people subsequently. For example there have been experiments conducted and tests done on various aspects of the accident. I will deal with the particular materials of which disclosure is sought when I return to this third category in due course.

The first category: statements made by Andrew Hill

41. In my view it is almost inconceivable that statements made to the AAIB could properly be the subject of an order for disclosure when the appropriate balancing exercise is done by this Court. This is for two main reasons.

42. First, there would be a serious and obvious "chilling effect" which would tend to deter people from answering questions by the AAIB with the candour which is necessary when accidents of this sort have to be investigated by it. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which may help to prevent similar accidents. As is clear from the text cited earlier from Annex 13 to the Chicago Convention, the EU Regulation and the 1996 Regulations, this would be contrary to one of the fundamental purposes of the regime in this area, which is carefully designed to encourage candour in the investigation of air accidents in order to learn lessons and prevent accidents in the future.

43. Secondly, it would be unfair to require such disclosure. This is because the powers of the AAIB, unlike the ordinary police, are such as to permit the compulsion of answers to questions: see Regulation 9 of the 1996 Regulations. Further, so far as I could discern from the hearing before this Court, there is no clear practice, to say the least, of giving a caution to the person interviewed. This is hardly surprising, since the purpose of such an interview is to obtain the fullest possible information in an accident investigation. This contrasts markedly with the purpose of a police interview, which is to elicit evidence which may be capable of being used at a subsequent criminal trial.

The second category of material: film footage

48. It is important to stress that the film footage in this case is unlike the cockpit voice and flight data recording which normally has to be created as a matter of legal duty by those operating aircraft. There was no such duty in the present context. For that important reason this case is distinguishable from that of the Lord Advocate case, which was considered by Lord Jones.

49. Furthermore, in my judgment, what is significant in the present case is that the cameras concerned were installed not only on a voluntary basis but for leisure and private commercial reasons. Indeed, on the evidence before this Court, it would appear that the intention was to use the film footage obtained during the air show in this way as part of a broadcast. I am, therefore, not persuaded that pilots would be deterred in the future from installing such equipment on a voluntary basis, since they would do so for their own private, and potentially commercial, reasons.

50 In the circumstances of the present case, I am satisfied that the balance falls in favour of disclosure rather than against it. The film footage has significant potential value for the police investigation in this case, since it is a contemporaneous recording of what happened during the flight itself.

Conclusion

55. For the reasons I have given I would refuse the Chief Constable's application for disclosure in this case except in relation to the film footage from within the aircraft.

56. It was agreed between the parties that, if this court decided to order disclosure of any material, it should be subject to the following conditions:

(1) The material set out in the Schedule attached herewith ("the material") is to be disclosed to the Chief Constable of Sussex for the purposes of his criminal investigation into the circumstances surrounding the crash of the Hawker Hunter T7, G-BXFI piloted by Mr Andrew Hill;

(2) The Chief Constable of Sussex will retain overall responsibility for the material until its return to the AAIB;

(3) The material that is disclosed to the Chief Constable of Sussex shall not be further disclosed by him save that he may disclose the material to:

(i) Any experts instructed by the Police in the furtherance of their investigation

(ii) The Crown Prosecution Service for the purposes of advising him and pursuing a prosecution if that is the decision of the CPS and any Solicitor or Counsel engaged by them to act as their agents or representatives or any expert instructed by them

(iii) Mr Andrew Hill and any other Defendant prosecuted as a result of the investigation into the crash of the Hawker Hunter T7, G-BXFI and any Solicitor or Counsel engaged by them for the purposes of ensuring that he receives the required procedural safeguards by way of disclosure that are provided for in the case of an investigation and prosecution of a crime pursuant to the Criminal Procedures and Investigatory Powers Act 1996

(4) The results of any analysis and any subsequent opinion as a result of the expert consideration referred to in 3(i) above shall be treated on the same confidential as the rest of the material.

(5) The material in the Schedule shall be returned to the AAIB at the conclusion of any criminal proceedings.

PROPOSED AIR PILOT POSITION ON RELATED MATTERS:

"The Honourable Company of Air Pilots concurs fully with para 5.12 of Annex 13 to the 9th Edition of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 which states:

"Non-disclosure of records

5.12 The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

- a) all statements taken from persons by the investigation authorities in the course of their investigation;
- b) all communications between persons having been involved in the operation of the aircraft;
- c) medical or private information regarding persons involved in the accident or incident;
- d) cockpit voice recordings and transcripts from such recordings; and
- e) opinions expressed in the analysis of information, including flight recorder information.

5.12.1 These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed. **Note.- Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to the investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.** [Emphasis added]

Any State considering the exercise of its option at para 5.12 for disclosure of such information should understand that such disclosure could permanently damage the safety of global aviation safety far beyond its borders."