

# FDM Conference for Business Jet Operators

Legal aspects of FDM / FOQA data collection,  
retention and use

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# Introduction

- Flight Operations Quality Assurance (FOQA)
- Operational Flight Data Monitoring (FDM)
- capturing, analyzing and/or visualizing the data generated by an aircraft moving through the air from one point to another
- goal is to improve the organization's overall safety, increase maintenance effectiveness and reduce operational costs
- ICAO Annex 6 mandate, all airlines/operators are required under regional legislation to implement Flight Data Monitoring (FDM) programs

# Objectives of an Operators FDM System – UK CAA CAP 739

1. Identify areas of operational risk and quantify current safety margins.
2. Identify and quantify changing operational risks by highlighting when non-standard, unusual or unsafe circumstances occur.
3. To use the FDM information on the frequency of occurrence, combined with an estimation of the level of severity, to assess the risks and to determine which may become unacceptable if the discovered trend continues
4. To put in place appropriate risk mitigation techniques to provide remedial action once an unacceptable risk, either actually present or predicted by trending, has been identified
5. Confirm the effectiveness of any remedial action by continued monitoring

# Liability versus safety

- What is good practice?
- Robust safety management systems as a defence and prosecution tool (Helios)
- Where is your data and who is managing and processing it?
- Prolific use of online real time data enhanced by FDM
- Data retention policies – Data Protection Act

# Why is it important to preserve electronic evidence?

Preservation of evidence is important for:

- Co-operation with any accident investigation
- Defending the company
- Supporting company's claim or defence in dispute or litigation
- Resolve dispute before litigation with key evidence
- Supporting your Insurers' claim against third parties

A large amount of the key evidence will be in electronic form and **advance planning** is important to make sure it can be retained and retrieved.

## Different approaches to evidence

- There may be a number of possible jurisdictions for claims
- Approach of courts to evidence varies
- Preserve evidence to maximise admissibility in international litigation

## Different evidential systems

- Two types of evidential systems in civil systems:
  - Parties can submit their best evidence to support their case: often approach in civil law systems
  - Parties and lawyers must carry out a search to ascertain documents relevant to the case whether the documents support or damage that party's case: England, many Commonwealth countries and US: we call this process '**disclosure**' or '**discovery**' in the US.

## What's different about disclosure?

- Focus is on the nature and extent of the search for documents
- A document is any means of recording information: paper, electronic, audio, photographs.
- Senior person (often General Counsel) obliged to provide a witness statement giving full details of documents and the searches carried out.

## Important points to remember:

- Parties must disclose documents even if they damage their own case.
- Parties must disclose documents even if they are confidential
- Documents containing legal advice can be privileged from inspection i.e. they can be kept private from the other parties.

# Disclosure of electronic information

- Special rules and procedures set out for electronic evidence.
- English courts introduce a questionnaire which requires parties to give information and technical details about
  - Computer systems
  - Back-up systems
  - Retention and archiving of data

# Why is it relevant – the legal consequences

- Civil and criminal liability
- Corporate manslaughter
- Criminalisation trend of air accidents
- Directive 2003/42/C – occurrence reporting in civil aviation
- Just culture – no punity
- Confidentiality
- Labour law issues



# Who is exposed and how?



- Key personnel
- Directors, officers and key management
- Accountable managers
- Insurance coverage – adequate cover
- Shareholders and owners
- Directors responsibility and duty of care
- Regulatory compliance
- Vreeland v Ferrer

# Legal protections and risk management

- Corporate Structure
  - Use of the special purpose vehicle – “ring fencing” liability
  - Management and reporting structure
  - Directors responsibility and duty of care
- Contractual protections
  - Warranties and indemnities
  - Limitation of liability
  - Choice of jurisdiction/choice of law
  - Dispute resolution
- Practical steps

# Practical Steps 1: Consider what evidence may be required

- Testing/certification documents
- Production records
- Raw material supply
- Emails – internal and external investigators
- Receipts and invoices

## Practical Steps 2: Involve your IT provider

- Need to work with IT to understand the company's IT systems and where you would locate evidence.
- Find out about archiving, retention policies.
- Make sure IT understand how any outsourced IT providers retain data

## Practical Steps 3: Think about how data would be retrieved

- Disclosure: often utilise services of specialist forensic data collection specialists.
- Centralise data as far as possible to minimise amount of places it would need to be collected from.
- Trace custody of PC's, laptops and PDAs
- Access: employment law, privacy issues
- May be positive process for the company's day to day business improving data management
- Cost saving quick data retrieval

## Practical Steps 4: Training

- Make staff aware that documents may be disclosable: **a judge may read this one day.**
- Avoid creating unnecessary documents following accident: speculation as to possible cause of accident or implications
- If it is necessary to create documents discuss with legal department and include internal lawyer and your **external lawyers** on any emails.

## Post-accident or incident

- Procedures in place to quarantine data
- Notify relevant staff
- Reminder to staff re document creation
- Involving external lawyers maximises opportunities to claim privilege
- Speak to internal lawyers before sensitive matters are recorded

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