



Docket Number FAA-2002-13236

October 7, 2002

Docket Management System
U.S. Department of Transportation
Room Plaza 401
400 Seventh St. SW
Washington, DC 20590-0001

To the Dockets Office;

Thank you for the opportunity to respond to this Notice of Proposed Order. The Aviation Policy Institute respectfully submits the following comments.

Our comments turn generally on two ideas. The first is an issue having to do with the legislative basis for this action, and the other has to do with policy issues surrounding the data which is the subject of the Notice. As regards the legal basis for this action, it is the Aviation Policy Institute's position that the FAA's proposal is not properly within the scope of 49 USC 40123.

The FAA proposes the issuance of an order under 14 CFR Part 193, as provided for under 49 USC 40123. The effect of this order would be the designation of information provided to the agency from an ASAP as protected from public disclosure. However, the FAA's proposal is not properly within the scope of that section of the United States Code.

In its Notice of Proposed Order, the FAA represents that:

...A significant impediment to the sharing of ASAP information with the FAA is the aviation industry's concern over public disclosure of the information, and, if disclosed, the potential for it to be used for other than the safety enhancement purposes for which the ASAP was created. As a result, **certificate holders have not permitted ASAP reports and related information to leave the certificate holder's premises, and** except for ASAP information made available for review by the FAA ERC representative at the certificate holder's place of business, **no ASAP information is presently submitted to the FAA.** This information is considered to be confidential by the participating certificate holders and their

employees who are involved in the program. (FR Vol. 67, No. 172, September 5, 2002, page 56775. Emphasis added.)

In short, it is the FAA's contention that the current nonexistence of the kind of protection proposed by this Order creates a chilling effect on certificate holders, and as a result, no certificate holder is currently transmitting ASAP information to the FAA. Note, however, that in establishing the objectives of ASAP, the FAA's Advisory Circular 120-66A—the document which provides the guidance for establishing ASAPs—explains that:

[ASAP's] focus is to encourage voluntary reporting of safety issues and events that come to the attention of **employees of certain certificate holders**. . . . To **encourage an employee to voluntarily report safety issues** even though they may involve an alleged violation of Title 14 of the Code of Federal Regulations (14 CFR), enforcement-related incentives have been designed into the program. . . . These programs **provide a vehicle whereby employees of certain air carriers and certain repair station certificate holders** can identify and report safety issues to management and the FAA for resolution generally without fear the FAA will use those reports to take enforcement action against them. (FAA Advisory Circular 120-66A, March 17, 2000, Page 1. Emphasis added.)

This is to say, that, under ASAP, the voluntary submitter of the information is not the certificate holder. Rather, the employee of the certificate holder is the submitter under ASAP, and the protections afforded by 49 USC 40123¹ and 14 CFR Part 193 run to the employee submitting information under the Program. The idea here is to avoid inhibiting the employee that has a desire to report under ASAP, not to protect the certificate holder. In addition to the FAA's contention that ASAP reports are being submitted to certificate holders but not passed on to the FAA, a query of the ASRS makes it clear that many employees are voluntarily submitting reports under ASAP.² Although the certificate holders may obstruct the flow of these reports to the FAA, such obstruction is not the same thing as inhibiting the voluntary submission of the reports in the first place. To put this another way, the safety-related information which the certificate holder refuses to share with the FAA has already been "submitted" under ASAP as soon as it is provided by the certificate holder's employee. The employee has made his or her submission under, and due to the existence of, ASAP. This is in contrast to a setting in which the certificate holder itself is the reporting party. For instance, in Flight Operations Quality Assurance (FOQA), participating air carriers collect data from flight data recorders and

¹ 49 USC 40123 provides, in pertinent part, that, "Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that – **(1)** the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and **(2)** withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities."

² While the majority of ASRS queries for "ASAP" and "Air Carrier" return records in which "ASAP" is used as an acronym for "As Soon As Possible," there are a fair number of records in which the reporter uses "ASAP" to refer to his or her filing under the AC 120-66A Program, and many of these references are from reports which are quite recent. Judging from the phrasing of the report, it appears that, in these cases, the reporter filed solely under ASAP, and, under the MOU governing the Program, that ASAP filing was transmitted to the ASRS.

perform trend analyses, providing these data to the FAA. While the actual harvesting of data is obviously done by employees of the certificate holder, the reporting is done at the direction of the certificate holder, not the employee. The employee is not voluntarily providing information having to do with an event which the employee witnessed or in which he or she personally participated. Therefore, we do not argue that it is *never* proper to protect safety related information under 49 USC 40123 in the manner suggested by this proposal. Rather, we argue that, in this case, the employee is the reporter and the one who should benefit from the protections afforded by ASAP. A certificate holder which is, itself, afforded protection for a report submitted by an employee will have received a benefit to which it is not entitled. Such a certificate holder has hijacked the process and is using its physical control over a properly submitted ASAP report to extort compliance from the FAA. Should the FAA submit to the demands of the certificate holders, its action will all but foreclose the flow of this incredibly useful information into the aviation community and endanger the viability of other aviation safety-related resources..

Employees of certificate holders voluntarily report information under ASAP and ASRS for two broad reasons: 1) to limit their exposure to legal or certificate action, and 2) because they are professionals and want to share what they've learned. It is disingenuous to claim that this proposed action seeks to remove the roadblocks which stand in the way of this reporting. On the contrary, the Notice of Proposed Order addressing ASAP information makes clear the fact that voluntary reporting is being conducted every day by the men and women from whom ASAP was designed to elicit reports. It is the certificate holder, not the reporter, that is responsible for the FAA's inability to analyze the reports. The failure of certificate holders to provide the reported information to the FAA is simply wrong, and the acquiescence of the FAA in extending protection to those certificate holders in return for the information shows only complicity. The certificate holders supporting this action seek to enhance public trust of commercial aviation by hiding the industry's errors from that public, but the damage that will be caused by this course of action will far outweigh the benefit enjoyed by the industry in the short term.

Another commenter has pointed out that in some cases, the reporting under ASAP makes its way to ASRS and becomes available to the public, and given that fact, protecting ASAP information will have no effect. The commenter suggests that the FAA's proposal, therefore, has no utility. While we tend to agree, we believe that the response of the FAA will not be to abandon the effort to separate these data from the public domain. Rather, our greatest fear is that, as an adjunct to "protecting" ASAP data, the FAA will stop the flow of ASAP information into the ASRS database. This would be a tragedy. Although employees of certificate holders are free to file under both the ASAP and ASRS programs, the likelihood of such dual filings, especially given the certificate holders' distaste for the dissemination of this kind of information, is exceedingly rare. The end result would be an ASRS public database made up of general aviation reports and reporting by non-ASAP certificate holders. Non-ASAP certificate holders would find themselves overrepresented and have no choice but to flock to ASAP, resulting in a situation in which current air carrier safety reports would no longer be available to anyone but the certificate holders and the FAA. This represents a giant step backward. Safety information needs to be shared, and the aviation community needs to be able to

have access to useful data. We are not talking about data reductions from a flight data recorder here. We are talking about an event which was important enough to an aviation professional to move him or her to share it with others. We cannot afford to begin traveling down this slippery slope.

The FAA intends to protect seven different types of information found in the ASAP report:

1. The content of an employee's ASAP report.
2. The identity of the certificate holder associated with an ASAP report.
3. The name of an employee submitting an ASAP report(s).
4. The findings from other than FAA sources of an ERC investigation concerning an ASAP report.
5. Evidence and other information gathered during an ERC investigation by other than FAA sources.
6. Statistical analysis and trend information provided by the certificate holder based on events reported under a particular certificate holder's ASAP.
7. A database of reports and events over time from a particular certificate holder's ASAP.

While we would take issue with the protection of a number of non-identifying ASAP characteristics, we would object most strenuously to number one—protecting the content of an employee's ASAP report. We believe that the FAA has failed to articulate a convincing case for protecting the entire content of an employee's ASAP report, when “sanitization” is all that is called for to afford the protection which the FAA claims is required. In short, why withhold the entire content of the ASAP report when simply withholding the identity of the employee and the certificate holder would eliminate the problems described by the FAA?

It is axiomatic that the FAA may, and by all means should, encourage voluntary reporting by agreeing to waive enforcement action in appropriate cases³. It is within the FAA's power to do so, and we encourage the FAA to continue to facilitate reporting through use and expansion of the ASRS model. Further, we fully support the de-identification or sanitization of ASAP reports, again, on the ASRS model. If effective de-identification requires the work of an outside contractor to ensure that no connection between the report and the reporter remains, then an outside contractor should be engaged. We agree that no information identifying the certificate holder or reporting party should remain associated with the data. However, we do not, and cannot agree that withholding sanitized data from the public is an alternative. These data must exist in a database to which the public has access. Again, queries against the database and, for that matter, FOIA requests, must never yield information concerning reporter or certificate holder. We firmly believe that the value of this information is in the detail surrounding the event, and while knowing which certificate holder was involved may shed additional light on any given information, such knowledge is not so vital that its absence would render the rest of the information useless. Therefore, we agree that a tradeoff which considers the disincentives felt by potential reporters weighed against the value of the information that may be provided to the aviation community is inevitable. However, we remain convinced that the balance may be struck by eliminating reference to individuals and organizations.

³ Non-criminal, unintentional, etc.

Clearly the FAA has options which have far less impact on those in the aviation community with an interest in safety data. The FAA's rationale for a decision to "protect" all ASAP data must, therefore, be questioned. We respectfully submit that the FAA has allowed itself to be inappropriately guided by aviation industry pressure—pressure which comes, not from a desire to improve safety, but rather, a desire to reduce the profile of safety issues. Obviously, certificate holders must deal directly with issues such as aircraft accidents. However, accidents are so rare that they tend not to show a pattern or trend of a particular behavior leading to a particular result. However, databases like ASRS, AIDS, NMACS do offer trend information, and, to the extent that information in one of these collections can be identified with a specific carrier, these databases will also come under attack.

Others commenting on this issue have labeled the FAA "paternalistic" for, among other things, putting forth the idea that all analysis that *needs* to be done with aviation safety information *can* be done by the FAA working with certificate holders. The argument that safety information should be disseminated only to the FAA and certificate holder has been made before, and usually by the certificate holders themselves. For instance, in its comments to FAA-1999-6001, "Protection of Voluntarily Submitted Information," America West Airlines makes this argument, albeit with a premise which approaches the issue from another angle. The America West comment states that the airline is "...concerned about the possible release to the public of sensitive airline operational data that could be both misunderstood and misused by those not having the technical background necessary to properly interpret it." If the FAA is truly responding to this concern when it proposes "protecting" sanitized ASAP information, there is clearly no hope for the continued availability of ASRS, AIDS, or NMACS data. What's more, if this is the honest expression their concern, the FAA and certificate holders seriously underestimate the depth of interest and expertise in these data which exists outside of their own organizations.

We disagree with the assertion that the FAA is being paternalistic in its approach to the ASAP issue, because we believe that the concern over "misunderstanding" is a red herring. If the FAA harbors concern over data being "misunderstood," then why populate its own National Aviation Safety Data Analysis Center with hundreds of thousands of reports which can be accessed by a public clearly lacking the "technical background necessary to properly interpret" the data?⁴ From the amount of work which the FAA has put into making data available to the public, it seems clear that there has been a trend toward open, community discussion of these data at FAA—a situation at odds with the very idea of paternalism. To institute greater restrictions upon those data now, especially without careful explanation of the reasons that these data should be restricted, smacks less of paternalism (and the idea that the FAA is imposing strict rules for our own good) and more of an effort to mitigate public relations problems on behalf of air carriers. This is to say that, although an event such as an armed pilot accidentally discharging his

⁴ It is interesting to note that the FAA's NASDAC ASRS access page mentions that :” [a]bout 400,000 incident reports have been submitted and no reporter's identity has ever been revealed by the ASRS.” The import should be clear.

weapon on the flight deck would make headlines, such an event would hopefully be quite rare and, therefore, manageable. However, ASAP reports which document a large number of firearms incidents that do *not* result in a discharge would certainly prove less manageable to the carrier. In other words, one pilot accidentally firing a gun just once aboard an aircraft poses an incredible danger, but can be dealt with in public in a constructive manner by the FAA and the carrier. But a hundred or more ASAP reports of situations that were stopped just before accidental discharge of a weapon would point to systemic issues that would raise a firestorm of controversy. The prospect of this kind of tempest is daunting, but not reason enough to keep these data from the public.

ICAO Annex 13, Section 8.9, says that “States should promote the establishment of safety information sharing networks among all users of the aviation system and should facilitate the free exchange of information on actual and potential safety deficiencies.”⁵ Reports under ASAP and ASRS are user reports, and simply must, in good conscience, be made available to all users of the system. The United States has been a leader in this regard, but by shifting focus to the protection of the air carriers’ business and image, the FAA shifts focus away from system safety, and begins to destroy its own reputation as well as the good work of aviation safety. We urge the FAA not to travel this road.

Sincerely,

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⁵ “Exchange of Safety Information,” Aircraft Accident and Incident Investigation, Annex 13 to the Convention on International Civil Aviation, International Civil Aviation Organization, International Standards and Recommended Practices, Ninth Edition, July 2001