"Protection of Accident and Incident Investigation Records and competent authority to decide on the right to access and to apply the "*balancing test*" within Spanish law[1]"

Commentary on the National High Court (Administrative Chamber) ruling
Judgment of 8 November 2018
Appeal no: 8/2017
Judge Rapporteur: Ms Ana Isabel Gómez García

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I. BACKGROUND TO THE JUDGMENT.

The VICTIMS ASSOCIATION OF FLIGHT (hereinafter "the Association") submitted a request to the Ministry of Public Works (hereinafter MPW, the Ministry) for the disclosure as "reserved matter" of the entire file relating to Technical Report A-032/2008, prepared following the "accident to the McDonell Douglas DC-9-82, MD-82 aircraft, operated by Spanair, at Madrid Barajas Airport, on 20 August 2008" (hereinafter "the accident"), by the Commission for the Investigation of Civil Aviation Accidents and Incidents[2] (hereinafter "CIAIAC").

This request was answered by the Undersecretary of the Ministry, who addressed the President of the Association and informed her, basically, that the information on the technical investigation of an air accident is not considered "reserved" in the sense of Law 9/1968, on Official Secrets (hereinafter OSL). The legal regime of such information is given by European Regulation 996/2010 of the European Parliament and of the Council of 20 October 2010 (hereinafter Reg. 996/2010). Therefore, the Association's request was transferred to the CIAIAC, so that it could be properly analysed.

This response was appeal by the Association to the higher administrative body

[1] This commentary is published in the original Spanish version at NADAL GÓMEZ, I., (2019) "Régimen de protección de la información contenida en un expediente de investigación técnica de un accidente aéreo y autoridad competente para decidir sobre su difusión», In *Revista de Derecho del Transporte, 23 392-403.*
[2] The CIAIAC is the official body in charge of the technical investigation of an air accident or incident according to ICAO Annex 13 in Spain.

For its part, the CIAIAC responded to the request made by the MPW, on the understanding, firstly, that it is indeed the competent authority to decide on the disclosure of information relating to the technical investigation of an accident; and, secondly, that in this particular case, the disclosure of the information requested was not appropriate, for the reasons that will see below.

This response was communicated by the Chief of the Technical Cabinet of the Undersecretary of the Ministry to the President of the Association. She was also informed that requests concerning the disclosure of the accident investigation records should be addressed to the CIAIAC directly.

The Association appealed this official communication, that was not answered by the Administration.

Against the inactivity and tacit refusal of the MPW to the request of the Association, the latter filed an appeal trough the procedure for the protection of fundamental rights, before the Administrative Chamber of the High National Court.

The judgment under analysis resolves the aforementioned administrative appeal.

II. THE JUDGMENT UNDER APPEAL AND THE GROUNDS OF THE APPEAL

The decision of the National Court of 8 November 2018 rules an appeal against the inactivity and refusal of the MPW to properly process the request made by the Association, to declassify the entire file on the technical report elaborate by the CIAIAC during the investigation of the accident of the MD-82 aircraft, operated by Spanair at Madrid-Barajas airport on 20 August 2008.

In its application, the Association claims the following:

In its opinion, the information requested constitutes reserved matter according to the legal regulations in force at the time of the accident; specifically, Article 16 of Law 21/2003, of 7 July, on Air Safety (hereinafter ASL), even after the entry into force of Law 1/2011, which reformed it. In his opinion, its reserved nature is maintained, even when this precept has to coexist with Reg. 996/2010, according to the wording of art.18 given by the aforementioned Law 1/2011.

The appellant argues that, in contrast to the decision of the Ministry to consider that the applicable regime for disclosure was the special regime established by Regulation 996/2010, such a criterion would make it impossible to disclosure any material whose reservation was provided for by European regulations, since there is no European body responsible for deciding on disclosure in accordance with European regulations.

It is understood that the disclosure of all the information that served to prepare the report A-032/2008 does not cause any damage to the public cause, nor to the security of the State, nor to the fundamental interests of the Nation or the national community; on the contrary, it serves to comply with the first of the Association's purposes, which has been declared of public utility. According to the applicant, the rights to know and to be held accountable have not been satisfied either by the criminal proceeding followed after the accident, owing to the application of the principles of criminal law (minimum intervention, legality and culpability), or by the outcome of the report issued by the CIAIAC, since that report is expressly barred from determining guilt and liability.

The appellant understands that, in effect, Article 14 of Regulation 996/2010 prohibits direct access to the information requested, but that the need to protect the security of the State on the one hand and to guarantee the right to information of those affected on the other must be taken into consideration; and that it must be the Council of Ministers that assesses both rights and determines which of them must prevail.

Finally, the Association elaborates on the right to know of those affected and its constitutional basis. To that end, it puts it into relation, as a necessary and prior requirement for effective compliance with constitutional rights such as the right to participate in public affairs (art. 23 Spanish Constitution (hereinafter SC)), the right to communicate and receive truthful information freely (art. 20.1 d SC) and the right to effective judicial protection (ar.24 1 SC). For the petitioner, the right of access to archives and records in Art. 105(b) SC constitutes an autonomous right, integrated into the fundamental right to information in Art. 20(1)(d).

Accordingly, the Association claimed the following:

- The MPW has violated the fundamental right to information, contained in Article 20 of the SC, by refusing to properly process the Association's request for disclosure.
- All the particular allegations made by the parties that contributed to the CIAIAC investigation, together with all the technical documentation provided by them, be disclosure and delivered to the Association from August 20, 2008 onwards, including expressly and, as a priority, all the information and documentation, in any medium and format, including e-mails and/or digital, that was provided by the NTSB, FAA, Boeing, Pratt &Whitney, DGAC, EASA and AESA.
- In the alternative to the above paragraph, an order should be given to the MPW to submit the request for declassification to the Council of Ministers for a decision.

In response to the application, the State’s Attorney informed, opposing the application on the grounds that:

The inadmissibility of the appeal in the absence of an act which could be challenged and which would put an end to the administrative procedure. The State's Attorney considers that the origin of the appeal is the official communication of the Under-Secretary of Public Works of 25 May 2017 and the tacit rejection of the appeal against that letter; and that that letter is not an act which puts an end to the administrative process.

In the alternative, the appeal would be inadmissible for lack of jurisdiction of the National High Court, since the original act challenged came from the Under-Secretary and has not been overturned by any superior or managerial body of the department.

In the alternative to the foregoing, and already on the merits of the case, the fundamental right under Article 20(1)(d) SC has not been infringed and the Administration's conduct has been fully in accordance with the law. The State's Attorney considers that, on the basis that the information requested is not a State secret but it is subject to a special regime of confidentiality, the interested parties have been directed to the competent authority (the CIAIAC) to decide on disclosure. This authority has in turn asked the Association for the purpose or intended use of the information, before deciding whether to share it. The Association has not answered this request. Furthermore, the Attorney argues that the right to know in art. 20.1.d) SC is not absolute one and that art. 105 b) SC is not part of the fundamental rights.

For his part, the Public Prosecutor, in his written response to the appeal, reiterated the lack of competence of the National High Court, pointing out as the competent body the Administrative Chamber of the High Court of Madrid, for the same reasons as stated by the State's Attorney.

In the alternative, it argues that the ground of inadmissibility also put forward by the State's Attorney is present, since the challenged act is only a procedural step. It does not decide on the merits, does not prevent the proceedings from continuing and does not lead to a lack of defence. Finally, and also in the alternative, it considers that the procedural channel followed is not appropriate, since the administration has not denied it the right to information under Article 20(1)(d) SC, as the appellant claims. The real object of the appeal is the treatment given by the administration to the request for documents relating to the technical investigation of the crash.

III. THE GROUNDS FOR THE JUDGMENT

After setting out the background to the judgment in the first to third grounds, the Court addresses the issues raised in the appeal on the fourth ground.

It thus recalls, first, its ruling of 25 May 2018, in which it recognised that the Chamber had jurisdiction to hear the proceeding. In the Court's view, what the applicant claims is the lack of activity on the part of the MPW in response to the request made for the disclosure of certain records. Therefore, the Court's jurisdiction to hear the appellant's case must be upheld.

As regards the grounds of inadmissibility, the Chamber's position is to consider as the subject of the appeal the inactivity of the MPW in response to the request for disclosure. Therefore, it does not take into consideration a purely formal criterion as to whether the appeal is against an administrative act and whether the procedure before the CIAIAC is still open. The Court invokes, in accordance with the principle of effective judicial protection and "pro actione", that

the true purpose of the appeal is to find out whether such inactivity actually violated an appellant's fundamental right. For that purpose, it needs to enter into the substance of the appeal.

The fifth ground concerns the relevance of the procedure followed by the appellant before the Court, which is that of the protection of fundamental rights. On this point, the Court reproduces each of the steps taken from the entry of the Association's application before the MPW to the appeal against the communication from its Deputy Secretary. It also reproduces here expressly the response given by the Secretary of CIAIAC to the request transferred to him by the Ministry.

The sixth ground states that the object of the appeal is not the inactivity of the defendant Administration, but the presumed rejection by administrative silence of the appeal against the "refusal of the MPW" to process the appellant's request, which was a referral to the Council of Ministers for disclosure. The Court suggests as a hypothesis, in an "obiter dicta", that the alleged inactivity of the Ministry had taken place. But, even in this case, on the understanding that the matter whose disclosure was requested did not fall within the scope of application of the OLS, the alleged acts or inactivity would be subject to a trial of ordinary legality. Therefore, they do not imply an infringement of a fundamental right.

In fact, there is no administrative ruling, or substantive decision on whether the declassification and disclosure of the materials of the technical investigation carried out by the CIAIAC from 20 August 2008 onwards is appropriate or not. Only a decision on the manner in which this request was to be dealt with, which led to its referral to this Investigation Body.

Hence, the procedure for judicial protection provided for in Article 53.2 EC and regulated by Articles 114 and following of the LJCA is not appropriate.

Furthermore, in the last paragraphs of this reasoning, the Court analyses the content of Article 20(1)(d) SC and whether it could be extended to the case at hand. In this sense the Court points out that "the right to "freely receive truthful information by any means of dissemination", which is protected by Article 20(1)(d) SC, refers to facts and news of general scope, and is substantially different from the right to access data held in public registers, provided for in Article 105 SC. The latter establishes that shall be regulated by ordinary law: the "(b) Access by citizens to administrative archives and records, except in matters affecting the security and defence of the State, the investigation of criminal offences and the privacy of individuals".

The National High Court ends this argument with a quote from the Supreme Court decision on 19/05/2003, which concludes that Article 105 b) of the SC "is a right of legal configuration ("the law shall regulate"), which implies the need to resort to the provisions that have established the requirements for its exercise.

The seventh ground focuses on the rules governing access to the specific information required by the applicant. Thus, after analysing the corresponding articles of the ASL and of Decree 242/1969, the Court concludes that "It is clear that the documents whose disclosure the appellant seeks have not been declared secret by law, nor have they been declared matters

classified as "reserved secrets" by the Council of Ministers or by the Joint Chiefs of Staff, and therefore it is not for any of those authorities to disclosure them".

In view of the non-applicability of these rules, it refers to Law 21/2003, of 7 July, on Air Safety, as amended by Law 1/2011, and more specifically to Articles 13, 15 and 18 thereof. These precepts indicate, in the first place, the CIAIAC as the competent authority for the technical investigation of accidents and serious incidents in civil aviation, with functional independence from any other authority. For its part, Article 15 refers to 'Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC and its implementing and application rules. Likewise, Article 16 (in the wording given by Law 1/2011) is referred to Regulation (EU) No 996/2010 as regards publicity for the reports and recommendations of the CIAIAC". Art. 18 ASL is partially reproduced below, insofar as it refers to the aforementioned European Regulation, and more specifically article 14, which is also reproduced in its entirety.

Finally, it incorporates the literal wording of article 7 of RD 389/1998, which regulates the investigation of civil aviation accidents and incidents, in its current wording from August 2013, and which refers to the nature and functions of the CIAIAC.

With all this, the Court concludes that the competent body to deal with the request of the applicant, the Association, is not the MPW, but the CIAIAC. Accordingly, the appeal is dismissed and the applicant is ordered to pay the costs.

IV. COMMENTARY

This ruling will be analysed from three angles:

- First: the procedural aspect, which deals with the administrative procedure followed and the appeal lodged.
- Second: that concerns the nature of the information gathered in the course of a technical investigation into an air accident and its legal protection, and the right of access to that records.
- Third: that determines the body competent to decide on the records disclosure.

1. Procedural aspects

The first group of questions examined by the Court are those relating to its jurisdiction, the admissibility of the action and the procedure to be followed. The starting point for its decision was considering that there has not really been any inactivity on the part of the Ministry, but rather a tacit rejection of the appeal lodged by the Association before the official letter sent by the Deputy Secretary of the MPW.

It should be noted that the Court will look more at what is being asked for, than how it is being asked for. Therefore, it will not stop at the alleged inadequacy of the procedure followed, but at the substance of the application, even though this may affect the process followed.

In this line and with respect to the first of the questions, the Court will make use of Article 11.1 a) of the Law Regulating Contentious-Administrative Jurisdiction, which in general confers jurisdiction on the National High Court in sole instance against acts of the Ministers and Secretaries of State, in the terms expressed in its own ruling of 25 May 2018.

With regard to the possible causes of inadmissibility for not being a decision on the merits and for not having put an end to the administrative procedure, the Court refers to the case law established by the Supreme and the Constitutional Court itself, on the scope of the right to effective judicial protection, in its area of "pro actione" principle. This case law has been expressed in numerous judgements of the Constitutional Court, precisely related to the administrative jurisdiction. The recent CCJ No. 23/2018 of 5 March states that: "The doctrine transcribed has been substantially reiterated, in relation to Article 56.1 of the current LJCA, in SCJ 75/2008, of 23 June, JG 4; 25/2010 and 29/2010, of 27 April, JJGG 2 and 3, respectively, and 155/2012, of 26 July, JG 3. Specifically, the grounds indicated in the last-mentioned ruling recall that it is not compatible with the right of access to jurisdiction, as an aspect of the right recognised in Article 24. 1 SC, "that the procedural rules should be interpreted rigorously, excessively formalistically or disproportionately in relation to the aims which they preserve and the interests which are sacrificed when it comes to access to jurisdiction, but that does not mean, as this Court has pointed out, that they necessarily require the selection of the interpretation most favourable to admission from among all the possible ones".

Once it has been decided that the appeal is admissible in this way, it is analysed whether the procedure to be followed is appropriate, a question which, although of a procedural nature, as the Court points out, will have a significant impact on the grounds, insofar as it determines the constitutional scope of the right to access to existing information on the technical investigation of air accidents.

2. Legal regime of air accident technical investigation records and right to access them

As mentioned above, the question of the procedure to be followed is closely linked to the legal regime of safety data and information protection, when it relates to air accident or incident investigation records and the right of access to them. It is therefore so closely linked to a question of substance, that its answer requires an analysis of that legal regime.

It should be recalled that on this issue, the State's Attorney argued that the fundamental right of Article 20(1)(d) SC could not be considered to have been infringed in so far, as no access has been refused or granted. The Ministry has merely indicated which body is competent to decide on such access. For its part, the CIAIAC has asked the applicants about the use of such records, in accordance with the regime of confidentiality applicable to them. In any event, the refusal to grant access to the information does not, according to the State's Attorney, infringe

the constitutional law invoked. The case-law on this right does not cover absolute access to archives and records. Furthermore, Article 105(b) is not a fundamental right and therefore, if it had been violated, it would not serve as a basis for the procedure followed.

The Public Prosecutor's Office expressed itself in similar terms.

The conclusion reached by the National High Court in this case is that, in reality, no one has refused Association access to the information requested, and therefore no appeal can be made on the basis of the refusal to exercise an alleged right. The only thing that can be done is to appeal the processing of the request by the body that receives it, the MPW.

From this perspective, it is clear that the procedure followed is not the appropriate one, but, despite this, and taking into account the principle of "pro actione" referred to above, the Court goes on to decide what is actually the object of the appeal; that is, whether the regime applied by the Ministry to the request made by the petitioner is the appropriate one.

But before entering into this point, which it will do in the seventh legal ground, the Court stops to analyse if the content of art.20 1 d) SC could include the right to access to the information documented in an investigation file followed by the CIAIAC according to ICAO Annex 13. This would be a further argument, as it concludes that access to such information would in any case be included in Art. 105 b) SC, which is a right of legal configuration and whose violation would not give access to the procedure for the protection of fundamental rights.

Although this is not the "ratio decidendi" in this question, it is interesting to comment on the Court's reflections in this regard. Thus, the existence of a "right to know", as this right is known in common law countries, is something that is set out in different legal systems, with different binding force and scope of application. International and European regulations take into account the possible existence of this right, establishing criteria for its application with regard to the information to be protected.

In general, these criteria are set out in Annex 19 to the ICAO Convention on the Management of Safety Information and the documentation complementing that Annex. It should be remembered that information relating to the technical investigation of air accidents is one of safety information types which, in all matters not expressly provided for in the specific regulations, must be governed by the provisions of the general rule. Hence, the relationship between information protection and the “right to know” has its inspiring principles in Annex 19 and, in particular, its Appendix 3 and Doc 9859 containing the Safety Management Manual.

Thus, according to Appendix 3 to Annex 19, paragraph 4.1, States which have laws relating to the “right to know” in order to allow public access to information held by the State, shall create exceptions to this right of access. This ensures the continued availability of data and safety information that has been provided voluntarily. Therefore, this right is not absolute and it is the responsibility of the State to delimit its scope taking into account the necessary protection of safety information.

More precisely, regulations at international level on this matter are Annex 13 to the ICAO Convention, with its Appendix 2, and ICAO Doc 10053 "Manual on protection of safety information", in its Part I, dedicated to the protection of records coming from the investigation of accidents and incidents. Specifically, standard 5.12 of Annex 13 specifically urges the State not to make available or use air accident information for purposes other than investigation, unless the competent authority determines that the benefits of its disclosure or use outweigh the harm it will cause. This assessment, which is essential to decide on the disclosure of the information, is what has been called the "balancing test".

At European level, Regulation 996/2010, follows these criteria and takes into account the existence of difference regulations on the “right to know” within the European Union. Therefore, it does not establish an absolute prohibition on the disclosure of the record listed in paragraphs 1 and 2 of Article 14.

It can be said, that this decision of the High National Court is of great importance. It is, because, it delimits the scope of the “right to know” in the Spanish legal frame, in relation to this specific matter. According to the decision, Article 20.1 d) SC “refers to facts and news of a general scope, and is substantially different from the right to access data held in public registers, contemplated in Article 105 b) of the SC”. The conclusion is that access to all records collected by the CIAIAC from various sources and generated with the investigation of an air accident is not based on a fundamental right, but on a right of legal configuration, as is the 105 b), and must be subject to the applicable rules for access to archives and administrative records.

The question then is to determine such a regime. And in this sense, although this judgment has its limitations and cannot be expected to draw the full extent of the complex regime of an air accident investigation information, it does establish some very interesting points.

In particular, the first thing to note is that the protection provided to such records is not that of the OSL, since they do not fall within the objective scope of this piece of law. These records are not declared secret by law, nor have they been declared "secret or reserved" by the Council of Ministers or the Joint Chiefs of Staff. Therefore, the procedure to access to them will not be the one laid down in the OSL for the disclosure of this material.

The second thing is that, despite not being an official secret, the information in the file of an air accident investigation is reserved “ex lege” and the regime to be followed in order to have access to it will be that mainly provided for in Regulation 996/2010 and the ASL, in what said Regulation does not establish. In this sense, Article 14.3 Reg. 996/2010 is the precept that applies and refers to an authority making a judgment on the benefits and damages that the disclosure and use of this information may cause.

Therefore, the decisive factor is to determine now which authority should be the one to carry out this decision, according to our national law.

3. Competent authority for applying the “balancing test”

The Court concludes its sentence by stating, without any doubt, that the competent authority to carry out the balancing test in this case is the CIAIAC. This decision is based on the regime of art. 14 of Reg. 996/2010, mentioned above, and on art.7 of RD 389/1998, of 13 March, which regulates the investigation of civil aviation accidents and incidents, in the wording in force since 2013.

In my opinion, there is nothing to object to this Court’s conclusion, since only the CIAIAC have the background and the knowledge to decide on this matter, and only it can carry out the value judgment required by the Regulation in a proper way.

In this respect, it should be noted that ICAO Doc 10053 "Manual on protection of safety information", in its Part I dedicated to the protection of records coming from the investigation of accidents and incidents, gives a series of guidelines on the authority in charge of carrying out the balancing test and the criteria to be followed. In particular, Section 3 of Chapter 3 of this document includes a specific section devoted to the designation of the competent authority.

Two main ideas and several recommendations emerge from this section. The first idea is that it should be the internal regulation of each country that determines the competent authority to carry out the balancing test. Therefore, it will be necessary to comply with the national regulations on this matter. As stated in this document, this authority does not have to be the same in all cases, but several can be designated depending on the destination of the information. It may be an administrative or judicial body or the accident investigation authority itself.

The second idea concerns the criteria to be taken into account by the legislator when designating such an authority. In this sense, the main criterion indicated is that the chosen authority is the best possible one to take into account the different factors that must be weighed in the "balancing test". (Cf. 3.3.14 "in fine"), have sufficient experience in dealing with the different interests at stake, or have relevant experts available so that the public has confidence in its ability to make decisions (Cf. 3.3.15). It is therefore an important task for the legislator to provide the authority concerned with the Statute and the means to carry out its task in a solvent and prestigious manner.

Finally, among the recommendations of this document, it is important that the authority designated by the State has clear procedures and rules by which its decisions are followed, and furthermore that this designation is kept constant, so that the authority acquires experience and greater competence in the exercise of the "balancing test".

In Spanish law, the permitted uses of safety information are those set out in Article 19.1 of the Air Safety Law, while Article 19.2 refers directly to European regulations for the use of information contained in technical accident investigation files, which leads us to the European Reg. 996/2010, already cited. This Regulation, as we have seen, refers again to the national authorities the designation of the competent authority to carry out the balance test in its art.14.3.

So, to a certain extent, a circle is produced that is resolved by the High National Court with the designation of the CIAIAC as the competent authority to decide about the request made by the Association, which is perfectly admissible with the current regulations.

4. The CIAIAC response

Although it has no direct influence on the High National Court decision, it is interesting to comment briefly on the content of the response that the CIAIAC Secretary gave to the Association's request and which was transmitted to her by the MPW.

In this sense, the CIAIAC precisely bases its response on the international regulations to which we have been referring. In particular, it refers to standard 5.12.5 of Annex 13, which lists the records that must be protected, and the need to carry out a "balancing test" before proceeding to disclose.

But before such a test can be carried out, i.e. before the Commission is obliged to carry out the balancing test, we must be faced with one of the legal situations in which protected information may be disclosed. That is to say, that at least it is possible to consider *a priori* whether the information could be disclosed if the test were to be passed. And this is where the Commission finds the main problems, which are transferred to the Association.

Firstly, the Association's request does not fall within the cases provided for in Article 19.1 of the ASL, mentioned above. In particular, there is no open criminal procedure that, under the letter a), gives rise to the possibility of transmitting the information. In effect, the request does not come from a judicial body or the Public Prosecutor's Office, cases which are provided for in the ASL to consider the possibility of transferring information. Therefore, this possibility cannot even be considered. It is also not necessary to resort to the existence of *res judicata*, as the Secretary of the CIAIAC does, to justify not carrying out the balancing test. Such *res judicata* effect would, in any event, be binding on a judicial body if one of the interested parties were to request the opening of criminal proceedings on the same facts in respect of which there was already an acquittal.

Apart from this, any other use would involves knowing the purpose the information is intended to be used for so that the balance test could be carried out with sufficient elements of judgment. It is impossible to determine whether the benefits of the disclosure will outweigh the harm it may cause, when the intended use is not known. The Commission, therefore, makes clear that the knowledge of these purposes is required before making any judgement.

The second consideration, which also avoids the balancing test itself, is the application of another of the criteria set out in Annex 13, concerning documentation requested which has only been compiled by the investigating authority and therefore may be available from the original source. This criterion has also been maintained in the MoU between the concerned authorities (the General Council of the Judiciary, the Public Prosecutor's Office, the Ministry of Justice,

the Ministry of the Interior, the Ministry of Public Works and the CIAIAC)[3]. It establishes the protocol to be followed on information exchange, and more specifically on third party information held by the CIAIAC, in compliance with Article 12. 3, paragraph 4, of Reg. 996/2010. This criterion applies to the request for information provided by the NTSB in the framework of the investigation, referring the interested parties to the original sources.

V. Final conclusions and unsolved questions

It is the first resolution to give a legal framework on the protection of accident and incident investigation records and to the right of access to it. In this sense, it is worth highlighting the classification of the information contained in the file as "reserved matter" and whose right of access is specifically regulated by the European Reg. 996/2010 and by the ASL.

Likewise, it is significant to determine which is the competent authority in our system to carry out the balancing test, required by section 3 of article 14 Reg. 996/2010. The designation of the CIAIAC as the entity authorised to carry out such a test in a case like this one is not only in accordance with current law but is also appropriate and convenient. It meets the criteria that ICAO Doc 10053 recommends to States when designating this authority.

It remains to be seen whether this designation will apply to all cases where records held by the CIAIAC is required. The precedent established by the criminal investigation carried out at the time of the accident to which this judgement refers is not conclusive, since in some points the CIAIAC was responsible for deciding which materials were communicated, in the sense of paragraph II of Art. 19.1 a), ASL. It is also the CIAIAC that must bear the persons subject to the principle of confidentiality to testify in the criminal proceedings, conforming to the provisions of Art. 18.4 ASL. But the MoU to which we have referred, seems to point to the Court on charge of the criminal proceeding to decide in cases of dispute, leaving to the Public Prosecutor's Office the function of appealing against judicial decisions that it considers to contravene specific aeronautical regulations.

But, in any case, outside the judicial proceedings and when the records are used to improve air safety and in which the Spanish Air Safety Agency the competent to carry out the balancing test, it will be the CIAIAC that will be in charge of carrying it out.

Translated with www.DeepL.com/Translator (free version). Supervised by the author.

[3] It can be consulted at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Convenios/Convenios-vigentes/Acuerdo-marco-de-colaboracion-entre-el-Consejo-General-del-Poder-Judicial--la-Fiscalia-General-del-Estado--el-Ministerio-de-Justicia--el-Ministerio-del-Interior--el-Ministerio-de-Fomento-y-la-Comision-de-Investigacion-de-Accidentes-e-Incidentes-de-Aviacion-Civil--por-el-que-se-establece-el-protocolo-a-seguir-en-cumplimiento-del-articulo-12-3-del-Reglamento--UE--n--996-2010-del-Parlamento-Europeo-y-del-Consejo--de-20-de-octubre-de-2010--sobre-investigacion-y-prevencion-de-accidentes-e-incidentes-en-la-aviacion-civil