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Body: National High Court: **Administrative Chamber**

Headquarters: **Madrid**

Section:**8**

Date:**08/11/2018**

**AppealNo.:8/2017**

Resolution No.:

Procedure: **Fundamental rights**

Rapporteur: **ANA ISABEL GOMEZ GARCIA**

Type of Resolution: **Judgment**

**THE NATIONAL HIGH COURT**

***The Administrative Chamber***

**SECTION EIGHTH**

**Resource No:**0000008/2017

**Type of action:** FUNDAMENTAL RIGHTS

**No. General Register:** 05825/2017

**Applicant:** VICTIMS ASSOCIATION OF FLIGHT NUM001

**Legal representative:** Mr. Ludovico MORENO MARTÍN

**Defendant:** MINISTRY OF PUBLIC WORKS

**State Attorney.**

**Rapporteur IIMA. Mrs. ANA ISABEL GÓMEZ**

**GARCÍA**

**Judgement nº**

**Iimo. Mr. President:**

Mr. FERNANDO LUIS RUIZ Piñeiro

**Ilmos. Judges**

Mr. ERNESTO MANGAS GONZÁLEZ

Mrs. MERCEDES PEDRAZ CALVO

Mr. JOSÉ ALBERTO FERNÁNDEZ RODERA

Mrs. ANA ISABEL GÓMEZ GARCÍA

Madrid, eighteen November, two thousand eighteen.

**Having regard to** the present administrative complaint **No. 8/17**, brought before this Chamber of Administrative Disputes of the National High Court by the legal representative **Ludovico Moreno Martín**, on behalf and representation of the **VICTIMS ASSOCIATION OF THE FLIGHT NUM001**, followed by the procedure for the protection of the **fundamental rights** of the person, on the basis of the inactivity and refusal of the Ministry of Public Works in properly handling the application of that Association, made under the Law 9/1968 of 5 April, amended by Law 48/1968 of 7 October, on Official Secrets, as well as of the Decree 242/1969 of 20 February, for the disclosure of the entire file on the Technical Report A-032/2008, prepared following the "accident to the McDonell Douglas DC-9-82, MD-82 aircraft, NUM000, operated by the company Spanair, at Madrid-Barajas airport, on the 20th of August 2008", by the Commission for the Investigation of Civil Aviation Accidents and Incidents (CIAIAC).

It has been rapporteur Ilma. **Ana ISABEL GÓMEZ GARCÍA**, Judge of the Section.

## FACT FINDINGS

**FIRST:** This administrative appeal is brought by the VICTIMS ASSOCIATION OF THE FLIGHT NUM001 against the inactivity and tacit refusal of the Ministry of Public Works and Transportation to deal adequately with the application of said Association, formulated under Law 9/1968, of 5 April, as amended by Law 48/1968 of 7 October, on Official Secrets, as well as of Decree 242/1969, of 20 February, for the disclosure of the totality of the file relating to the Technical Report A- 032/2008, developed following the "accident to the McDonell Douglas DC-9-82, MD-82 aircraft, registration NUM000 ,operated by Spanair at Madrid-Barajas airport on 20 August 2008" by the Civil Aviation Accident and Incident Investigation Commission (CIAIAC).

**SECOND:** After the appeal, the administrative file was claimed and all this was transferred to the applicant in order to formalise the application. He set out the facts, invoked the grounds of law and finally pleaded that, after the relevant legal proceedings, *"the judgment be handed down considering the claims of this part and:*

- 1) Provide that the Ministry of Public Works and Transportation has violated the fundamental right to information, established in article 20 of the Spanish Constitution, by refusing to properly handle the request for disclosure, made by the Victims Association of the Flight NUM001.
- 2) *Agrees to the disclosure and delivery to the Victims Association of the Flight NUM001 of*

*all the particular allegations made by the parties that contributed to the CIAIAC investigation of the accident of flight NUM001, together with all the technical documentation provided by them, from 20 August 2008 onwards. Including, expressly and as a matter of priority, all information and documentation, in any medium and format in which it is found, e-mails or digital files, provided by the NTSB (National Transportation Safety Board), the FAA (Federal Aviation Administration), Boeing, Pratt & Whitney, the General Administration for Civil Aviation, and the European and Spanish State Aviation Safety Agencies.*

3) *Or, subsidiarily to the preceding paragraph, order the Ministry of Public Works and Transportation to submit the request for disclosure to the Council of Ministers to take a decision on it.”*

**THIRD:** Formalised the application, it was transferred to the State's Attorney to reply, who set out the facts and grounds of law and requested that the judgment declares the claim inadmissible, or alternatively, dismisses it, and order the opposing party to pay the costs.

**FOURTH:** The Public Prosecutor ' s Office replied to the appeal, deeming it appropriate:

1. Declaring the lack of competence to hear the appeal.
2. Subsidiarily, declaring inadmissible the appeal.
3. Subsidiarily and in this proceeding, although at the time it may have led to the initial dismissal of the appeal, to dismiss the appeal on the grounds that the alleged offences concern ordinary legislation.
4. Dismiss the appeal on the grounds that there has not been a violation of fundamental rights complained of.

**FIFTH:** By Order dated 25 May 2018, the Chamber decided to declare its competence to hear the present appeal, without prejudice to the outcome of the proceedings.

**SIXTH:** It has been made the proposal of evidence, it was examined the evidence admitted and the proceeding was brought to an end, being indicated for a vote and judgment on 24 October of the current year in which the deliberation began, which continued on 31 October, in which it was voted and decided.

## **GROUND OF LAW**

**FIRST:** In summary, the statement of claim states that on 10 May 2017, the Association submitted to the Registry of the Ministry of Development a formal request for the declassification as "reserved matter" of the entire file on the Technical Report A-032/2008, drawn up following the "accident McDonell Douglas DC-9-82, MD-82, registration NUM000, operated by Spanair, in Madrid-Barajas airport, on 20 August 2008", by the Civil Aviation

Accident and Incident Investigation Commission (CIAIAC), under Law 9/1968 of 5 April, amended by Law 48/1978, of 7 October on official secrets, and Decree 242/1969 of 20 February; and that, following this Chamber case law 16/11/2005. However, without initiating administrative proceedings to resolve the application and without issuing any specific decision, admitting or denying the processing of the application, the Undersecretariat of the Ministry of Development sent a letter to the President of the Association in which it declined that the Ministry of Development should submit the request to the Council of Ministers, considering that the fact that the information held by the CIAIAC was reserved under a European Regulation (Regulation 996/2010) was left outside the scope of the Spanish law. In the opinion of the party concerned, such a criterion presupposes that, if there is any matter classified in the possession of the Spanish Administration whose reservation has been provided for by a European Regulation, it could never be disclosure for our citizens' knowledge, since there is no European body responsible for disclosing the reserved matters according to European law.

The appellant Association understands that the information requested is indeed reserved according to rules with rank of Law; at the time of the incident on 20 August 2008 at Barajas Airport, it was reserved under article 16 of Law 21/2003 of 7 July on Air Safety, even after the entry into force of Law 1/2011. And this, while taking into account that this rule coexists with the European Regulation, as stated in the second paragraph of the said Article 18 of the Law, in the wording given by Law 1/2011: "The duty of reserve with regard to information obtained in the technical investigation of accidents or incidents in civil aviation will be governed by the provisions of regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010".

In the Foundations of Law, it argues that the disclosure of the totality of the information that served to draw up the report A-032/2008, published in its final version on 3 August 2011 by CIAIAC, does not cause any harm to the public cause, nor to the National security, nor to the fundamental interests of the Nation or the national community. On the other hand, the assessment of this application will fulfil the first of the Association's founding purposes, declared to be of public utility. That the accident responded to a chain of tragic mistakes, negligence and tragic failures, which **Spanair** company's employees committed, resulting in the death of 154 people and serious injuries to 18 others. However, the CIAIAC was unable to produce a complete and objective report on the causes of the tragedy, since it was legislatively limited to relate only to the circumstances in which the accident occurred, its probable causes and its consequences, having been vetoed to analyse possible responsibilities, the victims being abandoned. therefore, on the one hand, the criminal investigation, which did not materialise, when the case was closed by the Provincial Court of

appeal of Madrid, was enormously demanding and restrictive in its adherence to the principles of minimum intervention, legality, and culpability, and, on the other hand, the CIAIAC investigation was limited by legal imperative to an aseptic report, without possibility of in-depth analysis of the chain of errors of the tragedy, vetoing the purging of responsibilities that would be appropriate in the circumstances. For this reason, the file must no longer remain inaccessible to the victims.

While recognising the need for the ASSOCIATION to have access to such information held by the CIAIAC is in conflict with Article of Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010, it is claimed that, in order to reconcile the protection of national security, on the one hand, and the right to information of those affected by the tragedy, on the other hand, Article 7 of Law 9/1968 attributes the Council of Ministers the power to carry out in each case the relevant judgment to determine which of the legal assets involved should prevail.

It is added that the right of access to public information is a means or instrument for exercising other fundamental rights, such as the right to participate in public affairs (Article 23 EC), the right to freely communicate and receive truthful information (Article 20.1.d EC), and even the right to effective judicial protection (Article 24(1) EC). That the relationship between the fundamental right to information (Article 20(1)(d EC) and the right of access to archives and records (Article 105.b EC) makes the latter an autonomous fundamental right integrated within the former. That constitutional case law has stated on the right recognised in article 20.1 (d) of the Spanish Constitution, which is not a right to benefit, but a right of freedom common to all citizens and which is first enjoyed by the community and then each of its members. With regard to Article 105(b) of the Constitution, it recognises access of any person, even if he or she does not have the status of a person concerned in relation to the which seeks to obtain information.

**SECOND:** The State Attorney opposes the claim, alleging:

— That the appeal is inadmissible because there is no challengeable act to terminate the administrative procedure (art. 69(c) LJCA).

Understands that the Administration has, for the time being, neither granted nor denied the request for disclosure questioned, having limited itself to indicating which body is competent in this regard; that the challenged act, according to the letter of application and the initial claim, it is the official communication of the Undersecretariat of Promotion of 25/05/2017 indicating that the competent body is the CAIAC, in accordance with Article 14.1 of Law 40/2015, as well as the tacit rejection of the appeal deducted; that such a communication is not an act terminating the administrative procedure and therefore there is no subject matter of the

procedure; that the procedure is paralysed by the action of the appellant himself, who has been notified of the Internal Note of the CAIAC plenary session of 23/06/2017 questioning the uses for which the information seeks and has not responded to it.

- Alternatively, inadmissibility on the grounds of lack of competence of the National High Court to hear the appeal.

The State Attorney considers that, should it be understood that the action under appeal is the official communication of the Undersecretary, such an act would be issued considering the generic competence of the Under-Secretaries for the ordinary representation of the Ministry, currently enshrined in article 63 of Law 40/2015; in such a case the original contested act would come from the Assistant Secretary, and has not been left ineffective by any senior or management body of the Department.

- Alternatively, on the merits of the case, that the action of the Administration has been fully lawful and has not infringed the fundamental right of Article 20(1)(d) EC.

It is stated that the only thing in the file is that the Under-Secretary for Development, through the official communication of 25.5.2017, has understood that the request made should not be submitted to Act No. 9/1968 on official secrets as there is special legislation on the subject. It has referred the proceedings to the competent body, CAIAC, who in turn has questioned the association about the documents requested the reason for carrying out the corresponding weighting; without it being known that the association has complied with this request for specification. That, since there is special legislation regulating this matter, general law 9/1968 does not apply, but the special law that establishes specific bodies, with specific competences, for specific purposes and therefore regulates a special regime of access to its documents, Regulation (EU) 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. The CAIAC is the independent authority in Spain because this is established by Law 21/2003, of 7 July, on Air Safety (LSA), and according to its specific regulations, they are not obliged, or even legitimated, automatically, generically and without prior weighting, to allow access to documents.

The action of the Administration has not been able to violate the fundamental right to obtain information because it has not granted or refused the application, it has merely indicated the competent body, which in turn, considering its applicable legal regime, has merely questioned to the applicant association about the use they intend to make of the information they requested. In any event, even if the application had been refused on the ground that the intended assignment was not admissible, the fundamental right of Article 20(1)(d) EC would

not have been infringed. The TC considered the specific scope of this right for administrative bodies (STC 160/2014 of 6 October, which covers the previous 104/2014 of 23 June and 130/2014 of 21 July), but in the area of institutional advertising carried out by public administrations; what the Constitutional Court has never protected is that access to the archives and records of administrations is absolute. Furthermore, Article 105(b) EC does not fall within the framework of fundamental rights.

**THIRD:** The Prosecutor argues in his brief:

- That this Chamber is not competent to hear the appeal, since this is an explicit act by the Undersecretariat of the Ministry of Public Works, administrative appealed and that has not been rectified by the Minister or Secretary of State, but it must be understood that the appeal has allegedly been dismissed for the effect of administrative silence. The jurisdiction, in accordance with article 10.1.m), is vested in the Administrative Chamber of the High Court of Justice of Madrid.
- In the alternative, that the cause of inadmissibility provided for in Article 69.c) of the LJCA, in relation to Article 25 and following of the same, concurs, since we are dealing with a procedural act which does not decide on the merits of the case, or determines the impossibility of continuing the proceedings, or renders defenceless.
- Alternatively, the procedure provided for in Article 114 of the LRJCA should be limited, as this article states, on the basis of the freedoms and rights provided for in Article 53(2) EC, and therefore only those claims which seek to "restore or preserve the rights or freedoms on the basis of which the action has been brought" have room to be applied. That, contrary to the statement made by the appellant, there is no question here of the violation of a fundamental right, the right to information recognised by Article 20 EC, even if it so says, since that right has not been denied. What is questioned is the way in which the Administration, Ministry of Public Works, has dealt with the request for documents related with the NUM001 flight.
- At this stage, it is not possible at all to understand violated the right to information recognised in Article 20(1)(d).

**FOURTH:** We shall begin by responding to the questions raised about the lack of competence of this Chamber and the grounds for inadmissibility of the appeal.

The first question has already been settled by this court in Order dated 25 May this year, declaring the jurisdiction of the Chamber, since what is appealed – at least formally – is "the

inactivity of the Minister of Public Works in response to the request made by the applicant for the disclosure of certain documents". This is the action that the applicant identifies as appealed, and the claims set out in the application's pleading determine *prima facie* the jurisdiction of this Chamber, in accordance with the provisions of Article 11(1)(a) LJCA, without prejudice to the fact that the examination of the merits may lead to the appeal being considered inappropriate.

As to the grounds for inadmissibility of the appeal, in fact, if we consider that the official communication of the Assistant Secretary for Development of 25/05/2017, indicating that the competent body is the CAIAC, in accordance with Article 14.1 of Law 40/2015, as well as the tacit rejection of the appeal against it, we should accept the ground for inadmissibility, in accordance with article 69(c) of the LJCA. However, consistent with the above, and in view of the fact that the request for the disclosure of the above-mentioned documents was submitted to the Ministry of Public Works for proper processing and referral to the Council of Ministers, pursuant to Law 9/1968, the procedural obstacle, which the State Attorney and the Prosecutor rightly raises, is so closely related to what really constitutes the core of the litigation, that it, actually, has a dual, procedural and substantive aspect. For this reason, the court considers that the proper observance of the right to effective judicial protection and the principle of "pro actione" require a non-rigorist criterion in this case, facilitating the examination of the dispute in its various aspects. Especially when the appeal is brought under the special procedure for the protection of the fundamental rights of the individual, as regulated in Articles 114 et seq. of the LJCA, and one of the grounds for opposing the appeal invoked by the Prosecutor is precisely the inadequacy of this procedure.

**FIFTH:** In order to determine whether or not the special procedure to which the plaintiff is entitled is appropriate, we must take into account the following factual background in the administrative file, in relation to the claim deduced by the interested party in the administrative proceeding and the allegations deducted in court:

- On May 10, 2017, it was entered in the register of the Ministry of Public Works the request of the Association addressed to the "Minister for Public Works to resolve the Council of Ministers of the Kingdom of Spain", under the provisions of Law 9/1968 of 5 April, as amended by Law 48/1978 of 7 October, on Official Secrets, as well as in Decree 242/1969 of 20 February.

The request was made for the immediate disclosure of the entire dossier relating to Technical Report A-032/2008 as a "restricted subject matter", drawn up following the "accident of McDonell Douglas DC~9~82, MD-82, registration number NUM000, operated by Spanair, at

Madrid-Barajas airport, on 20 August 2008" by the Commission of Inquiry into Civil Aviation Accidents and Incidents (CIAIAC).

- On 25 May 2017, the Undersecretary of the Ministry addressed the President of the Association informing her that "information on the technical investigation of a plane crash is not declared "secret" by any rule of law, nor "classified" by an act of the Council of Ministers or the Board of Chiefs of Staff and, therefore, it is not covered by Act No. 9/1968 on Official Secrets. It is the European Regulation 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, which provides that, for the sole purpose of protecting air safety, information relating to the technical investigation of an accident is considered "reserved" information. This protection is therefore due to reasons beyond the security and defence of the State. The CIAIAC, which carried out the technical investigation of this accident, is organically attached to the Undersecretariat for Development, although it cannot receive any type of instruction in its activities by this Ministry, given its functional independence regime. Therefore, and given that the protection of the information referred to in your letter is the responsibility of the CIAIAC, I am forwarding your request to that Commission so that it can be duly analysed".

- After consultation with the State Attorney, it was issued Report in which it is concluded that *"the conclusions reached by the Office of the Undersecretariat for Development to the Association must be considered in accordance with the law"*.

- On 30 June 2017, the above-mentioned Association appealed against *"the refusal to properly process the application of the VICTIMS ASSOCIATION OF FLIGHT NUM001, made under the Law 9/1968, of 5 April, as amended by Law 48/1978 (...)"*, *despite expressly recognising that Ms. Undersecretariat's communication does not meet the requirements of any administrative decision, nor does it imply the initiation or formal conclusion of any administrative procedure. They insisted that the correct processing of his application entails the submission of the application to the Council of Ministers; he denounced the improper transfer to CIAIAC.*

- The Secretary of CIAIAC, in connection with the request of the Association, made the following observations:

'That the regime for the protection of safety information used in civil aviation accidents is provided for in Law 21/2003 of 7 July on Air Safety; 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 Annex 13 to the Convention on International Civil Aviation. The latter in its current version, eleventh edition, July 2016, effective from November 10, 2016. In accordance with the rules laid down in Article 5.12 of

the last of the above-mentioned rules, it is necessary to take into account that: "The State conducting the investigation of an accident or incident shall not make the following records (see below) available for purposes other than accidents and incidents investigation of, unless the competent authority designated by that State determines, in accordance with national laws and subject to Appendix 2 and 5.12.5, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:

- a) *Cockpit voice recordings and airborne image recordings and any transcripts from such recordings; and*
- b) *Records in custody or control of the accident investigation authority being:*
  - 1) *all statements taken from persons by the accident investigation authority in the course of their investigation;*
  - 2) *all communications between persons having been involved in the operation of the aircraft;*
  - 3) *medical or private information regarding persons involved in the accident or incident;*
  - 4) *recordings and transcripts of recording from air traffic control units;*
  - 5) *analyses and opinions about information, including information flight data recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and*
  - 6) *the draft Final Report of an accident or incident investigation."*

According to article 19 LSA, the above-mentioned information may only be communicated or transferred to third parties "*when requested by the judicial bodies or the Public Prosecutor's Office for the investigation and prosecution of crimes*", and that in the case of the accident that occurred on 20 August 2008 to the NUM000 aircraft operated by **Spanair**, there is no criminal judicial procedure pending, so that the principle of res judicata that governs our legal system must be brought to bear.

- In addition, and with respect to the request referring to the information provided by the NTSB, ICAO standards require that "*States shall ensure that requests for records in the custody or control of the accident investigation authority are directed to the original source of the information, where available*" (5.12.4 Annex 13).

Finally, in connection with the request for disclosure of the complete dossier, consideration should be given to the provisions of Regulation 4.2 of Appendix 2 to Annex 13, according to which, "*when administering the balancing test, the competent authority shall take into considerations factors such as: (...) (b) the requester's intended use of that records (...)*", so this Commission would need to know about such use prior to any assessment.'

- On 4 July 2017, the Chief of the Technical Cabinet of the Assistant Secretary addressed the President of the Association, transmitting the comments adopted by the plenary of the CIAIC in connection with the request for the disclosure of information from the investigation file of the accident of **Spanair flight** NUM001. At the same time, he informed her that the actions related to this request should be addressed directly to the above-mentioned Commission, since the latter, attached to the Ministry through the Under-Secretary, it has a system of functional autonomy.

In short, the applicant Association, even though it understood that the undersecretariat's communication was not a decision, filed an appeal against it, the alleged rejection of which is appealed in this jurisdictional procedure, giving it the consideration of inactivity by the Ministry of Public Works.

**SIXTH:** If the action were brought in these terms, we would not be faced with the inactivity of the defendant administration but with the alleged rejection, through administrative silence, of the appeal against the "refusal of the Ministry of Public Works" to process the appellant's application - submission to the Council of Ministers.

In any case, even if we understood, as a mere hypothesis, that there has been inactivity on the part of the Ministry of Public Works, and it is clear why that Ministry did not submit the request to the Council of Ministers, transferring it to the CIAIAC - understanding that Law 9/1968 was not applicable to the case, on official secrets, as amended by Law 48/1968, and Decree 242/1969, which implements the provisions of Law 9/1968, since there is specific implementing legislation-, it seems clear that the alleged acts or inactivity challenged here are subject to ordinary law in this appeal. Indeed, there is no statement, either favourable or unfavourable on the merits of the claim deduced by the Promoting Association- disclosure and delivery to the Victims Association of Flight NUM001 of all the particular allegations made by the parties that contributed to the CIAIAC investigation of the accident of flight NUM001 , together with all the technical documentation provided by them, from 20 August 2008 onwards.

The Defendant Administration, finding that it was not the competence of the Ministry to proceed with the application of the Association, complied with the provisions of article 14.1 of Law No. 40/2015, on the Legal Regime of the Public Sector: '*An administrative body deemed incompetent for the resolution of a case shall refer the proceedings directly to the body it considers competent, and shall notify the persons concerned thereof.*'

He forwarded the request to CIAIAC and communicated it to the Association concerned.

Therefore, the procedure of judicial protection of freedoms and rights, provided for in Article 53.2 of the Spanish Constitution, regulated by Articles 114 and following of the LJCA, is not

appropriate to the case.

The above-mentioned constitutional provision establishes:

*“Any citizen may seek the protection of the freedoms and rights recognised in article 14 and the first section of Chapter II before the ordinary courts by a procedure based on the principles of preference and summariness and, where appropriate, through an application for amparo before the Constitutional Court. This last resort shall apply to conscientious objection recognised in article 30.”*

Even if the option for this procedure is based on the alleged violation of Article 20(1)(d) EC, the fact is that what is combated and disputed is the failure to process the petition as an application for disclosure under Act No. 9/1968 of Official Secrets, on the understanding that the documents to which the actor intends to have access are not considered official secrets and are not included within the scope of that law, depriving the competence of the Ministry of Development for the intended procedure.

In view of the above, it is clear that the action, in the terms in which it is brought, and under the procedure laid down in Articles 114 and in accordance with the ECLA, cannot be considered.

It should also be added that Article 20(1) EC recognises and protects rights:

“(…)

*d) to freely communicate or receive truthful information by any means of dissemination.*  
(...)"

The appellant is invoking the fundamental right to information, established in article 20 of the Spanish Constitution, as violated by the Ministry of Public Works by refusing to process the request for disclosure made by the Victims Association of Flight NUM001, in the manner that the Association intends. Articulating the argument based on his right to access certain information documented in an investigation file followed by CIAIAC.

However, the right to ‘freely receive truthful information by any means of dissemination’, covered by Article 20(1)(d) EC, refers to facts and news of general scope and is substantially different from the right to access data in public registers, as referred to in Article 105 EC, which provides that it shall be regulated by law: *“(b) Access of citizens to administrative archives and records, except in respect of the security and defence of the State, the investigation of crimes and the privacy of persons.*

In this sense, in STS 19/05/2003 it is stated that "the right to verify the veracity of information is a right derived from Article 20.1.d), but that it is essential to connect it in the case under

examination with the right established by Article 105.b), which concerns access by citizens to archives and administrative records, which is exactly what was requested by the appellant (...) The interpretation of the rules of the legal system, including those of the Constitution, cannot be verified in isolation, considering that each precept constitutes its own unit, which is not related to the others applicable to the case. In the event of this trial, in strict exercise of the right to have access to the archives and administrative records, it is not possible to deny the connection of Article 20(1)(d) with Article 105(b). The latter rule, as rightly the court's ruling states, is a right of legal configuration ("the law shall regulate"), which requires the need to make use of the provisions which have laid down the requirements for their exercise"

**SEVENTH:** In the present case, the exercise of this –not fundamental– right of access by citizens to administrative archives and records is configured by a specific regulation, since this is a request for access to the file relating to the Technical Report drawn up by the Commission of Inquiry into Civil Aviation Accidents and Incidents (CIAIAC) on an air accident.

The applicant requests the disclosure of the file under Law 9/1968 of 5 April, as amended by Law 48/1968 of 7 October on Official Secrets and Decree 242/1969.

However, the first article, second paragraph, of the *Law states that "The matters thus declared by law shall be secret, without prior classification."* The second article states that "For the purposes of this Law, matters, acts, documents, information, data and objects whose knowledge by unauthorised persons may damage or jeopardise the security and defence of the State may be declared "classified matters". For its part, the third article provides that "Classified matters" shall be qualified in the categories of secret and reserved in view of the degree of protection they require".

In accordance with the provisions of the fourth article, the qualification referred to in the preceding article shall be exclusively for the Council of Ministers and the Board of Chiefs of Staff in the field of their competence. And, according to article seventh, the cancellation of any of the qualifications provided for in article of this Law "*shall be provided by the authority that made the respective declaration*".

It is clear that the documents the appellant claims to be declassified have not been declared secret by law, nor have they been declared a matter classified as "secret or reserved" by the Council of Ministers or by the Board of Chiefs of Staff; therefore, none of these authorities are responsible for their disclosure.

In contrast to the regulations contained in this Law and in Decree 242/1969, Law 21/2003 of 7 July 2003 on Air Safety, as amended by Law 1/2011, in Article 13 assigns to the Commission for the Investigation of Civil Aviation Accidents and Incidents the function of technical investigation of accidents and serious incidents of civil aviation, with full functional

independence from the aviation authorities, airports and of those responsible for air traffic and any others whose interests may be affected by conflict with the mission entrusted to it.

Article 15 of the Law provides that the technical investigation of civil aviation accidents and incidents shall be governed by 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 rules. Article 16 (as drafted by Law 1/2011) is also referred to in Regulation (EU) No 996/2010 regarding the publicity of CIAIAC reports and recommendations.

For its part, article 18, in similar terms as article 16 in the original wording, provides:

*“1. The data, records, recordings, declarations, communications, indicators and reports provided under the State Operational Safety Programme for Civil Aviation by suppliers of aeronautical services and products to the public sector agencies, bodies, entities and entities referred to in Article 11.3, first paragraph, are reserved and may only be used for the purposes specified therein.*

*The duty of reserve in relation to information obtained from the technical investigation of accidents or incidents in civil aviation shall be governed by Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010.*

*In any event, the information referred to in the preceding paragraphs is collected for the sole purpose of strengthening operational safety and preventing future accidents and incidents, and not for the purpose of determining faults or responsibilities.*

*(...)"*

Therefore, the information contained in the Technical Report on the dossier for the investigation of the air accident of 20 August 2008 is reserved –ex lege– and its specific regulation is contained in the abovementioned European Regulation on the investigation and prevention of accidents and incidents in civil aviation. Laid down in Article 14 under the heading ‘*Protection of sensitive safety information*’:

*1. The following records shall not be made available or used for purposes other than safety investigation:*

*(a) all statements taken from persons by the safety investigation authority in the course of the safety investigation;*

*(b) records revealing the identity of persons who have given evidence in the context of the safety investigation; L 295/44 Official Journal of the European Union 12.11.2010 EN*

- (c) information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals;
- (d) material subsequently produced during the course of the investigation such as notes, drafts, opinions written by the investigators, opinions expressed in the analysis of information, including flight recorder information;
- (e) information and evidence provided by investigators from other Member States or third countries in accordance with the international standards and recommended practices, where so requested by their safety investigation authority;
- (f) drafts of preliminary or final reports or interim statements;
- (g) cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units, ensuring also that information not relevant to the safety investigation, particularly information with a bearing on personal privacy, shall be appropriately protected, without prejudice to paragraph 3.

2. The following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:

- (a) all communications between persons having been involved in the operation of the aircraft;
- (b) written or electronic recordings and transcriptions of recordings from air traffic control units, including reports and results made for internal purposes;
- (c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, where so requested by the safety investigation authority issuing the recommendation;
- (d) occurrence reports filed under Directive 2003/42/EC.

Flight data recorder recordings shall not be made available or used for purposes other than those of the safety investigation, airworthiness or maintenance purposes, except when such records are de-identified or disclosed under secure procedures.

3. Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Member States may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union. The communication of records referred to in paragraphs 1 and 2 to another Member State for purposes other than safety investigation and, in addition as regards paragraph 2, for

*purposes other than those aiming at the improvement of aviation safety may be granted insofar as the national law of the communicating Member State permits. Processing or disclosure of records received through such communication by the authorities of the receiving Member State shall be permitted solely after prior consultation of the communicating Member State and subject to the national law of the receiving Member State.*

*4. Only the data strictly necessary for the purposes referred to in paragraph 3 may be disclosed.”*

Finally, to recall that RD 389/1998 of 13 March, which regulates the investigation of civil aviation accidents and incidents, in the wording in force since August 2013, Article 7 of the Code provides:

*“1. The Commission for the Investigation of Civil Aviation Accidents and Incidents is a collegiate body attached to the Undersecretariat of the Ministry of Development, which has competence for the technical investigation of civil aviation accidents and incidents.*

*2. The Commission enjoys full functional independence from the aeronautical, airport, air traffic and any other authorities whose interests may conflict with the mission entrusted to it. It performs the following functions:*

*a) Conducts investigations and technical reports on all major civil aviation accidents and incidents, determines their causes and makes recommendations to take the necessary measures to prevent them.*

*b) It undertakes the necessary steps to complete the technical investigation and draws up reports on serious accidents and incidents, in accordance with the provisions of this Royal Decree and the Convention on International Civil Aviation of 7 December 1944 and its annex 13.*

*c) Conducts the technical investigation of civil aviation incidents not covered by paragraph (a) of this subparagraph, where lessons can be obtained for the safety of civil aviation and prepares technical reports thereon.’*

The competence of this body to respond, where appropriate, to the request of the applicant Association is unquestionable.

**EIGHTH:** In the light of the provisions of Art. 139.1 LJCA, the applicant Association is ordered to pay the costs.

**Having regard** to the above-mentioned legal provisions and other provisions of general and

relevant application,

## **JUDGMENT**

That **we dismiss** the administrative appeal filed by the legal representative **Ludovico Moreno Martín**, on behalf and representation of the VICTIMS ASSOCIATION OF FLIGHT NUM001, followed by the procedure for the protection of the fundamental rights of the person, against "the inactivity and tacit refusal of the Ministry of Public Works to properly process the application of the said Association, formulated under Law 9/1968, of 5 April, as amended by Law 48/1968 of 7 October on Official Secrets, and Decree 242/1969 of 20 February for the disclosure of the entire file on Technical Report A- 032/2008, drawn up following the "accident involving the McDonell Douglas DC-9-82, MD-82 aircraft, registration NUM000 , operated by the company Spanair, at Madrid-Barajas airport, on 20 August 2008", by the Commission for the Investigation of Accidents and Incidents of Civil Aviation (CIAIAC)".

With conviction in costs to the appellant.

This judgment is subject to appeal, which must be prepared before this Chamber within 30 days of the date following the date of its **notification**; the document for the preparation of the appeal must demonstrate compliance with the requirements set out in article 89.2 of the Law on Jurisdiction, justifying the objective cassational interest it presents.

(Translated with [www.DeepL.com/Translator](http://www.DeepL.com/Translator) (free version) and review by Ph D. Irene Nadal)